LEGAL PERSPECTIVES ON EU-US JHA COOPERATION: THE EVOLUTION AND DEEPENING OF TRANSATLANTIC COOPERATION

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Overview

1. Well over a decade after the September 2001 (9/11) terrorist attacks, there are many EU-US Justice and Home Affairs (JHA) Agreements in force and under development. Transatlantic JHA cooperation has had a vibrant agenda in this period, in particular in the area of law enforcement. It is arguably one of the most active fields of EU-US cooperation and, as a result, the focus of consideration here. They have variable degrees of success or failure and comprise public and private spheres, variable actors and

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activities. JHA law-making continues to evolve, through widening and deepening and indeed autonomously now sets a global agenda to some extent. While the relationship between the EU and US is conventionally viewed as a 'law-light' and 'institutionally-light' scientific entity and historically, (Pollack, 2005), JHA cooperation is in some senses quite law dependent albeit still sharing many of the characteristics of other areas of transatlantic cooperation.

2. This chapter explores this deepening and widening agenda beginning with the development of Extradition and Mutual Legal Assistance from a legal perspective. Such agreements demonstrate a high level of cooperation and settled effective practice. There are further indications of deeper bilateral sometimes outside of the strictly legal parameters of the relationship e.g. as to the death penalty. This deepening agenda generally appears to have facilitated further and broader forms of cooperation, for example, in cybercrime with specifically global ambitions.

3. In recent times, the ambitions of EU-US JHA have expanded and increasingly attempt to have global approach albeit in many different forms. For example, Passenger Name Records (PNR) and cybercrime cooperation appear to have spurred further global cooperation. The idea of an EU global approach to EU-US JHA and its contextual or broader understanding is sketched here as a result. EU-US Justice and Home Affairs in the post 9/11 period has been subject to broad critique for its scant attention to questions of fundamental rights, their lack of transparency or their problematic governance.The effects of the Snowden, revelations concerning the US National Security Agency (NSA) remains now the most significant challenge ahead, with respect to the appropriate place of human rights and in data privacy in all new areas of regulation, cooperation and law-making.

4. This chapter thus describes the evolution and status quo of many cooperation and integration mechanisms in a variety of areas of JHA. It begins with an overview of the deepening and widening of EU-US JHA (Section 1). It examines the evolution from Extradition and MLA to contemporary cooperation in PNR and the significance of the shifts. Thereafter, there is an analysis of the unfolding of the global approach of EU-US justice and home affairs (Section 2), looking at the areas of PNR and Cybercrime and security, and then the chapter reflects upon a right-centric approach to EU-US JHA (Section 3), followed by concluding reflections.

This chapter begins next to consider the key features of the first transatlantic cooperation mechanisms in criminal law post- 9/11 in the prominent subject areas of cooperation, Extradition and Mutual Legal Assistance.

Deepening and Widening Cooperation

First major criminal law enforcement cooperation

5. The analysis here might logically begin with an attempt to outline widening then deepening cooperation but this is not necessarily the exact narrative applicable. In June 2003, the EU and US signed two treaties on extradition and mutual legal assistance so as to simplify the extradition process and promote better prosecutorial cooperation, as part of efforts to improve transatlantic security cooperation after the 9/11 atrocities. The Agreements were historic as they were the first law enforcement agreements conducted between the EU and US and the first cooperation agreements to be negotiated by the Council in criminal matters (Mitsilegas 2003; Peers, 2011 751). Their negotiation surpassed the debate on whether the EU had legal personality at this time to so act. As a result, many suggested that the Agreement appeared as a step towards the EU being a global player in the area of criminal law or at least a precedent of the EU speaking with one voice in criminal matters, globally (Mitsilegas, 2003, 533). The secrecy of the negotiation of the agreements and their limited review by parliaments in both jurisdictions gave rise to concerns about the democratic character of the agreements (Mitsilegas in Fahey and Curtin, 2014; Mitseligas 2009). Similarly, the omission of human rights protections from the scope of the agreements provoked concerns, as did the prospect of joint investigation teams working together, not least the place of personal data within the scope of the agreements (Peers, 2011, 751). Nevertheless, in practice their evaluation appears to have been viewed positively with respect to the ability of the EU to speak with one voice (Mitseligas, 2003, 516).

6. As regards implementation, there were also some variations in the form of the bilateral instruments across the Member States. A majority of Member States opted for an instrument containing an annex clearly stating the changes made by the EU-US Agreements, but there are considerable variations in a minority of States. The Member States are bound to the provisions of each EU-US Agreement as a matter of law and also have separate but parallel international obligations with the US under the bilateral instruments. At the time of writing, there were in excess of 50 agreements in place between the EU and US on extradition and mutual legal assistance. This cooperation has notably won significant joint praise for its effectiveness by both and EU and US in recent times (Council, 2013).

This leads to a more specific analysis of extradition.

Deepening: the EU-US Extradition Agreement

7. The EU-US Extradition Agreement was the centrepiece of the first EU-US Summit held since the Iraqi war, in the aftermath of failed US attempts to extradite an accused flight instructor of the 9/11 hijackers on the grounds of proof of the US claim. The Extradition Agreement is viewed as having significantly widened the list of extradition offences and thereby deepened EU-US cooperation in a key area. It introduced provisions *inter alia* simplifying the transmission of documents, furnishing additional information, the

temporary surrender of persons already in custody, competing requests for extradition, simplifying procedures where the fugitive consented to extradition, the treatment of sensitive information, the transit of fugitives and the exclusion of death penalty fugitives. The definition of the grounds for extradition extraditable offence therein is credited with modernising its definition through applying a dual criminality analysis. Where there is already a dual-criminality approach in the existing bilateral extradition treaty with a Member State, the EU-US Agreement's provisions do not apply, given that it is perceived as preferable to continue to apply existing and well-functioning provisions. Nevertheless, it is a notable development of the nature of EU-US cooperation as a joint cooperation effort.

A more specific analysis of mutual legal assistance arrangements follow then next.

EU-US Mutual Legal Assistance Agreement

8. The EU-US Mutual Legal Assistance (MLA) Agreement has its origins in several provisions in the EU Mutual Assistance Convention of 2000 and its Protocol of 2001 and is another cooperation mechanism of note (Denza, 2003). The MLA Agreement was designed as an assistance mechanism between law enforcement authorities and does not confer rights on private parties e.g. defendants. The EU-US Mutual Legal Assistance Agreement amended bilateral treaties where it existed as regards the supply of banking information, joint investigative teams, video conferencing of witnesses/ experts, expedited transmission of requests, the extension of mutual assistance rules to administrative authorities, the protection of personal data and request confidentiality provisions. Article 4 in particular was significant for placing the parties under an obligation to search for the existence of bank accounts and financial transactions unrelated to specific bank accounts and also including provisions on banking secrecy. It was significant for including within its scope evidence sharing for criminal investigations and prosecutions, streamlining of extradition arrangements, central points of contact between US and EU judicial authorities and the sharing of sensitive data, such as related to bank accounts and terrorist financing. The MLA has been criticised for its provisions on fundamental rights grounds and these concerns are significant but possibly also difficult to discern further for reasons of transparency and accountability, discussed here further below (See Mitseligas, 2003; 2009).It receives less attention in recent times in light of the turn to specific rather than generalised forms of cooperation agreements for the transfer of data..

This leads to a consideration of the notion of changing cooperation next.

EU-US Death Penalty Cooperation: 'Soft Power' Cooperation?

9. Another legal provision of note but with significant less legal significance in theory unlike in practice is death penalty cooperation. While there is a long-standing opposition by the EU to capital punishment and all EU Member States are party to the ECHR Protocol 13 on the abolition of the death penalty (Fahey, 2014), during the negotiation of the EU-US Extradition and Mutual Assistance Agreements, the death penalty proved a specific

challenge for negotiations so as to accommodate EU-US variations, i.e. the EU prohibition on the death within its legal mores. As a result, the Agreement contains a clause permitting the requested State to make non-application of the death penalty a condition of extradition. The US as a general rule agrees to the condition that the death penalty is not imposed upon EU citizens. Nevertheless, what is of note is that the European External Action Service (EEAS) delegation in Washington DC has a specific official charged with furthering the EU's campaign against the death penalty for over a decade at the time of writing- thus preceding and postdating the Treaty of Lisbon with its innovations in legal personality and fundamental rights (Fahey, 2014, 374-376) The EU has recently made many *amicus curiae* submissions before the US Supreme Court in death penalty cases arguing against its application in high profile cases. It did so in several cases, even those with no application to the EU , thereby showing its efforts to engage in soft power diplomacy in such a prominent setting (Fahey, 2014, 374-376). The clause was a significant development in cooperation terms, even if not a strict legal obligation. Instead, its broader institutionalised development in Washington DC demonstrates the forms of strategic legal development that are possible, at the highest possible level of the legal system and in some senses a very entrenched and deepened form of engagement with a close partner.

This leads to a discussion of the most significant EU-US JHA cooperation in recent times as to data transfer.

PNR and SWIFT- A One-Sided Deepening?

10. Two of the most prominent forms of Agreements entered into by the EU with US in the post 9/11 period, designed to communicate air passenger data and to target the financing of terrorism are the EU-US Passenger Name Records (EU-US PNR) Agreements and EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreements (2004; 2007; 2012; 2010). These Agreements, even in later evolutions, have generated much controversy on account of their limitations on redress and their uneven application of US law to EU citizens, not enabling the latter to fully realise their rights to redress and review. The formulation of the character of rights, remedies and redress is distinctively replicated in both agreements in a broad time frame, extending well after a decade post 9/11. As a result, they are perceived to form very prominent examples of the limits of deeper attempts at mutual recognition of justice in transatlantic relations (Fahey, 2013).

11. One may argue that this cooperation involved an era of deepening cooperation but with certain imbalances of significance. The legal goals of these Agreements, especially TFTP, have been explicitly orientated towards US objectives on EU territory, suggesting some dispersal of authority. The Agreements seem to contain many non-standard accountability mechanisms in the form of 'New Accountability' mechanisms, a fuller discussion of which is outside the scope of the current account. Suffice to say that for example, the 'Eminent Person' review or EU overseer reviews constitutes the use of distinctive actors that have operated against the interests of citizens. On the one hand, EU-US Joint Reviews of these Agreements has used many information sources, with the EU and US acting horizontally as peers. However, challenging 'oversight' in EU-US PNR

appears to entail that an EU citizen is seriously hampered in seeking judicial review through complex layers of oversight at least, until very recently and became a significant issue for the EP (De Goede, 2012; Curtin, 2014; Fahey, 2013; Ripoll-Servent and Mac Kenzie; Argomaniz, 2009). The most recent EU-US PNR Agreement is explicitly drafted on the basis that no new rights are created there. EU citizens have been also historically excluded from alleging privacy violations under US law, despite provisions in the EU-US PNR Agreement on onwards transfer of data. Similarly, the TFTP subjects rights to broad State-oriented exceptions. It notably masks the EU oversight of the Agreement for reasons that are not explicit or transparent (Fahey, 2013). There are considerable legal challenges as a result in assessing the effectiveness of security agreements shrouded by secrecy, discussed below.

This account next moves to consider the second theme of this account, the global approach to EU-US JHA.

EU-US JHA and a 'global' approach to legal integration between legal orders

Overview

12. The phenomenon of the global approach of EU law is a complex and uncertain one, with many meanings and possible understandings across policy fields (Fahey, forthcoming). It may indicate relative forms of taking and receiving and push and pull of law. A distinct feature of certain EU-US JHA measures has been their global reach and effects, their common purpose in advancing the global regulatory environment and their generally efforts at regulatory push. This account limits itself to consideration of two diverse forms of global approaches to the JHA with significant EU-US dimensions:- one a very literal and explicit global endeavour of the EU and US acting bilaterally and the other also a literal and explicit effort to engage in a global approach to law-making but instead emanating from the EU as a consequence of its law-making with the US in this.

The Global Approach and EU Passenger Name Records (PNR)

13. After the decision of the CJEU to strike down the EU-US PNR Agreement in 2004, the EP began to press the Commission for a global strategy on external PNR with the US, Canada and Australia which emphasised better redress and effective legal safeguards and the Commission's 'Global approach' is an important starting point in understanding the development of PNR (Fahey, 2016; Commission, 2010). Whether the EU-US Agreements have actually generated a global approach is a difficult question. More accurately, perhaps it might be more correct to say that they have ignited here a series of bilateral agreements with substantial imprints of the initial and evolving EU-US Agreements such that the transatlantic arrangements form a significant part there. Thereafter, negotiation of a revised EU-US PNR Agreement with the US followed suit and a 'Second Generation' Agreement was agreed upon in 2011 (PNR, 2011). It has been described by the European Commission as an 'improved' agreement, enhancing data protection mechanisms therein, limiting the use of data, purporting to fight crime more effectively, placing obligations on the US to share data with the EU and setting out a detailed description for the circumstances for when PNR can be used (CJEU, 2015). Not

without controversy, the EU has been developing its own internal EU PNR system and various atrocities in the EU have driven the development of an EU PNR Directive (Fahey, 2016). Several Member States, particularly the UK have meanwhile been developing their own PNR systems, albeit with considerable variations. Significant similarities are to be found in all subsequent EU third party agreements on a wide variety of clauses and provisions, as to rights, review and redress (Monar, 2015; Fahey, 2013). However, little is yet known as to the judicial view to be taken on the global approach to PNR, however viewed or formulated. An Agreement reached with Canada in 2014 has been referred by the EP to the Court of Justice on the basis of its possible non-compliance with the Data Retention Directive decision, substantially similar to the EU-US PNR Agreement (Opinion 1/15). Other Third Countries such as Mexico, South Korea, and the United Arab Emirates all now urgently seek a PNR Agreement with the EU (Fahey, 2016). This form of global approach arises from EU-US cooperation rather than can be explained as a transatlantic global approach. Still it is notable the extent to which EU-US Agreements have influenced the content to subsequent arrangements. A very different form of global approach arising from EU-US JHA Cooperation might be in the form of EU-US Cybercrime and security cooperation, considered next.

The Global Approach and EU-US Cybercrime and Cybersecurity Cooperation

14. The latest transatlantic cooperation in JHA is in cybercrime and cybersecurity, in the form of the EU-US Working Group on Cybercrime and Cybersecurity group (WGCC), was established after the EU-US Summit in November 2010 (WGCC Concept Paper, 2011). However, the origins of this cooperation date back a decade earlier to the Joint EC-US Task Force on Critical Infrastructure Protection (Commission 2000). Also around this time, the Council of Europe Cybercrime Convention was adopted, which now forms a central legal element of EU-US cooperation. The EU-US cooperation goals have been predominantly in four areas: the expansion of cyber incident management response capabilities jointly and globally, through a cooperation programme culminating in a joint-EU-US cyber-incident exercise by the end of 2011, to broadly engage the private sector using public-private partnerships, sharing good practices with industry and to launch a programme of joint awareness raising activities, to remove child pornography from the internet and to advance the international ratification of the Council of Europe Convention by the EU and Council of Europe Member States and to encourage non-European countries to become parties. This came as no surprise given the commitment of EU-US Senior JHA Officials that the EU and US would work together in the UN to avoid dilution of the body of international law on cybercrime (Council, 2011).

15. It seems apparent that the WGCC had first and foremost ‘global’ rule-making objectives. The WGCC Group mentions specific countries to be ‘encouraged’ to become parties to the Convention, countries within and outside the EU (WGCC Concept Paper, 4; Carrapico and Farrand, 2015). Another goal of the EU-US cooperation includes the endorsement of EU-US ‘deliverables’ in cybercrime by the Internet Corporation for Assigned Names and Numbers (ICANNs). This latest EU-US cooperation may be said to indicate new boundaries in the transatlantic relationship on account of their global rule-making

ambitions, notwithstanding formal limitations on the conduct of the US as an actor outside of the Council of Europe (Fahey, 2014). Unlike earlier bilateral rule-making, this newer rule-making appears to have joint-shared 'global' objectives. The goals of the WGCC suggest that they will lead eventually to the adoption of a global-like cyber policy or at the very least, global standard-setting, through their promotion of the primacy of external norms. Instead, this newer bilateral rule-making is distinctive because it does not seek to engage in mutual recognition in justice and home affairs but rather has 'larger' global-like legal goals.

This leads to an analysis of the last area studied here, fundamental rights in EU-US JHA.

Fundamental rights in EU-US JHA and legal integration challenges

Overview

16. As the account above in respect of evolving cooperation has demonstrated, not all agreements are viewed in the same light. In the post-9/11 context, the place of fundamental rights in EU-US JHA cooperation has also been thorny. While the US Attorney General Eric Holder claimed before the European Parliament in 2011 that no human rights violations have *ever* resulted from EU-US JHA cooperation, by contrast, certain Members of the European Parliament, have claimed that the secrecy surrounding the transmission of data under certain transatlantic Agreements makes it virtually impossible to assess their operation (Holder, 2011; In't veld 2011). The Ombudsman has experienced significant difficulties in obtaining access to EU-US governance materials e.g. as to SWIFT (Ombudsman, 2015). Many civil and administrative proceedings have been successfully taken by the Dutch MEP Sophie in' t veld in respect of EU-US Agreements on data transfer for security/ counter-terrorism purposes (See *In't veld v. Department of Homeland Security*, 2008) (2008 No. 1151, US District of Columbia District Judge Collyer) (15 December 2008); See T-529/09 *In't Veld v. Council*, Judgment of the General Court of 4 May 2012 [2012] ECR II-000; Case C-350/12, *Council v. in't veld*) (Fahey, 2016). These developments demonstrate the significance of oversight and accountability and the complexity of discerning fundamental rights violations in the absence of transparency.

17. The recent NSA surveillance saga has placed EU-US JHA Affairs cooperation centre stage once more. The outbreak of the NSA/ Snowdon/ PRISM surveillance saga in the midst of the rule-making processes has in fact operated to place EU citizens fundamental rights and data protection centrally in *all* rule-making of the EU with the US, from trade to security (Council, 2013). It notably caused the EP to vociferously call into question a range of existing EU-US JHA agreements (EP Resolution, 2013). This resistance has now legal significance going forward given the place of the EP in international agreements negotiations pursuant to Article 218 TFEU (Ripoll Servant, 2014). For example, high profile litigation recently, such as the recent *Data Retention Ireland*, *Google v. Spain* and the landmark *Schrems* decisions demonstrates that the CJEU is not afraid to put EU fundamental rights centrally in this context (2013; 2014). The Court and its President have been highly vocal, inside and outside of the Courtroom, about its role in protecting

EU citizenships from the effects and consequences of the US legal order (Lenaerts, 2015). These developments have started to have more significant repercussions for the content of EU-US JHA cooperation. For example, these particular developments appeared to have spurred the development of a significant new Agreement, the EU-US Umbrella Agreement, predicated upon stronger protection of citizens rights, considered here next. Another very significant new EU-US Agreement, the Privacy Shield is not considered here for reasons of its specific content and application, which fall outside of the present account.

A New era of EU-US JHA Agreements?

18. EU-US negotiations on a harmonised data protection agreement have been on slow-burn for some time until the NSA revelations, arising in particular from a High Level Contact Group established in 2009. The negotiations were premised upon its legal anchor being a framework agreement to protect personal data transferred between the EU and US for law enforcement purposes which would be an international agreement for the purposes of Article 218 TFEU and ensure a measure of harmonised rights protections. The lack of equivalent protection for EU nationals under US privacy law was also a significant hurdle to a finding of adequacy or adequate protection of fundamental rights under EU law. The above revelations noted appear to have had a significant effect. An EU-US Umbrella Agreement was signed on 2 June 2016. The main functions of the Agreement are to put an onus on authorities to do so appropriately or risk considerable sanctions. It strives to develop a system to facilitate claims in the event of misconduct and thus constitutes some form of looser institutionalisation. EU citizens now recently qualify for protection n under the 1974 Privacy Act under changes to US law, which is a tremendous shift in EU-US relations. The Agreement has not been enacted pursuant to Article 218 TFEU thus far and the role of the EP is currently legally ambiguous. While this must be seen as of significance, fundamental rights still remain at the forefront of this newer EU-US JHA cooperation. This newer form of cooperation puts coherent integration between the legal orders as a key principle thereof.

Conclusions on a future research agenda

19. EU-US JHA Agreements have been shown here to have formed a prolific area of legal integration. They have evolved through a deepening enforcement agenda. The evolution of EU-US JHA Agreements must be viewed as having taken effect in waves of deepening and widening cooperation but not necessarily always logically so post-9/11. Cooperation appears to have embedded in different ways. The significant data transfer agreements (PNR and TFTP) signified new shifts in the manner and form of cooperation, appearing to give scant attention to the place of citizens' rights therein. The evolution of the integration agenda however has moved on in many ways. Moving on to the question of a global approach to EU-US JHA, this account considered its multiple meanings e.g. as to PNR and Cybercrime and security and significant shifts are evident here as to the EU's changing ambitions in the world. EU-US JHA cooperation signifies very different levels and forms of legal integration in this context, despite the same global approach goals.

Finally, the account considered the developments as to the place of fundamental rights in EU-US JHA and major shifts recently evident in law and practice. While the secrecy and shortcomings vis a vis fundamental rights of transatlantic cooperation in security continue to be of concern, the Umbrella Agreement represent an important new departure as to the place of fundamental rights in EU-US JHA relations and a welcome turn in EU-US JHA Agreements.

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