Fahey, E. & Santos Vara, J. (2014). Transatlantic Relations and Flexibility within the AFSJ. In: S. Blockmans (Ed.), Differentiated Integration in the EU – From the inside looking out. (pp. 103-125). Centre for European Policy Studies. ISBN 9789461383730

TRANSATLANTIC RELATIONS AND THE OPERATION OF AFSJ FLEXIBILITY

in S. Blockmans (ed.) *Differentiated Integration in the EU – From the inside looking out* (Brussels, Centre for European Policy Studies, 2014) (with Juan Santos Vara)

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Abstract

Variable geometry may constitute an entity that appears to be constantly evolving through the Treaties, however, the UK and Ireland, together with Denmark, appear to be its principal beneficiaries thereof, obtaining positions that new accession States are unable to achieve and thus generating lopsided contours to the phenomenon. The opt-out/in provisions ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and seem to have generated much legal even political incoherence.The paper analyses in detail the impact of the Protocols upon the international relations agreements of the EU, particularly their operation in the specific case of EU-US relations, on the basis of the practice that has developed since the entry into force of the Treaty of Lisbon. Nevertheless, this variable geometry does not in recent years appear to have complicated the negotiation of international agreements dealing with criminal justice and policing measures. Even though it is perhaps too early to establish a definite picture on the UK implication in the external dimension of the AFSJ, it seems clear that the UK is committed to intensify international cooperation in matters dealing with criminal justice and policing measures.

Introduction

The Stockholm Programme laid much emphasis on how its external dimension had to be fully coherent with all other aspects of EU foreign policy[1]. It should come as no surprise that the Stockholm Programme emphasized the relevance of the external dimension given the ever greater importance of the external dimension of the AFSJ to the global action of the EU. The Union and the Member States increasingly work in partnership with third countries and international organizations in ways which directly and indirectly affect the external dimension of the AFSJ.[2]One of the Programme's key objectives was the coherence and the unity of EU law, yet the last major Treaty revision at Lisbon appeared to deepen and widen the nature of variable geometry in the EU.

[*]The present paper has benefited from the support of the research Project DER2011-28459, financed by the Spanish Ministry of Economy and Competitiveness.

[1]Stockholm Programme Mid-term review, Council doc. 15921/12; Stockholm Programme Towards a Citizens Europe in the Area of Freedom, Security and Justice, O.J. 2010, L 115/1. See "Delivering an area of freedom, security and justice for the Europe's Citizen Action plan implementing the Stockholm Programme" COM (2010)171.

[2] On the external dimension of the AFSJ, see inter alia M. Cremona, "EU External Action in the JHA Domain: A Legal Perspective", European University Institute Working Paper 2008/24; J. Monar, "The EU as an international actor in the domain of justice and home affairs", European Foreign Affairs Review 9 (2004); P. Pawlak, "The External Dimension of Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-pillarization?", Journal of European Integration, 31 (2009), 25 and "The EU's Externalization of Internal Security Objectives: Perspectives after Lisbon and Stockholm", The International Spectator, 45 (2010), 23; J. Santos Vara, "The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty", European Journal of Law Reform, 10 (2008), 577; S. Wolff, N. Wichmann, and G. Mounier (eds.), "Special Issue: The External Dimension of Justice and Home Affairs? A Different Security Agenda for the EU", Journal of European Integration, 31 (2009).

Variable geometry may constitute an entity that appears to be constantly evolving through the Treaties, however, the UK and Ireland, together with Denmark, appear to be its principal beneficiaries thereof, obtaining positions that new accession States are unable to achieve and thus generating lopsided contours to the phenomenon. The opt-out/in provisions ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and seem to have generated much legal even political incoherence. The increased variable geometry accorded to them in the Treaty of Lisbon seemed disproportionate to its effectiveness as a matter of EU constitutional law. The limited caselaw of the Court of Justice on the provisions for Ireland and the UK as to the Schengen Protocol, delivered close to the entry into force of the Treaty of Lisbon, appeared hostile to the objective of variable geometry.[3] As explained below in detail, the Court of Justice laid down clear limitations to the right to opt-in in the AFSJ.

According to the Protocol on the Position of the UK and Ireland in respect of the AFSJ, these countries do not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. This phenomenon of exclusion is not a new one. The UK and Ireland did not take part in the measures adopted within the framework of Title IV of the former EC Treaty on visas, asylum, migration and other policies related to the free movement of persons either. However, the Treaty of Lisbon complicated this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.[4] At the same time, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.[5]The sphere of territorial application of acts adopted by the EU in the area of police and judicial cooperation in criminal matters has actually been reduced in comparison with the situation before the Lisbon Treaty[6]. In spite of the troublesome appearance of variable geometry for EU integration through law especially in the AFSJ, this paper will consider how Ireland and the UK have opted-in in the vast majority of circumstances where they had the benefit of variable geometry since the entry into force of the Treaty of Lisbon. Thus it seems clear that the operation of the variable geometry has been without much formal legal "fallout". One specific manifestation of variable geometry in the AFSJ is in the area of the international relations of the EU and it raises an important case study. Accordingly, it provides a specific insight into the understanding of flexibility in this domain as well as the nature of coherence in the practices of the AFSJ

This contribution assesses the practical effects so far of the British, Irish and to a much lesser extent,

[3] Cases C-77/05, UK v. Council of the European Union, [2007] ECR I-11459; Case C-137/05, UK v. Council of the European Union,[2007] ECR I-11593. See J. Rijpma, annotation of Case C-77/05, UK v.Council and Case C-137/05, UK v. Council, Common Market Law Review,45 (2008), 835; Select Committee on European Union, UK Participation in the Schengen Acquis (5th Report, Session 1999-2000, HL Paper 34); M. Fletcher, "Schengen, the European Court of Justice and Variable geometry under the Lisbon Treaty: Balancing the UK's 'Ins' and 'Outs'",The European Constitutional Law Review, 5 (2009), 71;E. Fahey,"Swimming in a sea of law: Reflections on water borders, Irish(-British)-Euro Relations and opting-out and opting-in after the Treaty of Lisbon", Common Market Law Review, 47(3) (2010),645;S. Peers, Statewatch Analysis EU Lisbon Treaty, (No. 4) UK and Irish opt-outs from European Union Justice and Home Affairs Law (26 June 2009) (www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf).

[4] According to Article 9 of the Protocol, the opting-out of Ireland would not apply to the freezing of financial assets or funds of entities or individuals suspected of having links with terrorism (see Article 75 TFEU).

[5] The Protocol on the Position of Denmark applies former opting-out of Denmark regarding Title IV of the TCE on "Visas, asylum, migration and other policies related to the free movement of persons" to the whole AFSJ. The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the other Member States.

[6] On this issue, see also the chapter by C. Matera, "Much ado about "opt-outs"? The impact of 'Variable geometry' in the AFSJ on the EU as a Global Security Actor".

the Danish Protocols, whereby variable geometry in the AFSJ is examined on the basis of the practice that has developed since the entry into force of the Treaty of Lisbon. The paper also considers in detail the impact of the Protocols upon the international relations agreements of the EU, particularly their operation in the specific case of EU-US relations. The paper examines firstly, the key legal provisions shaping variable geometry in the AFSJ (section 1), followed by an analysis of the provisions for parliamentary scrutiny of these provisions in a domestic context in the UK and Ireland (section 2). Then, operation of scrutiny provisions in the area of Transatlantic Relations is considered in Ireland and the UK (section 3), followed by an assessment of the external implications of variable geometry for the negotiation of international agreements (section 4) and the practical consequences for pre-Lisbon Agreements of a UK "mass" opt-out (section 5).

1. Key legal provisions shaping variable geometry in the AFSJ

According to Protocol 21 on the Position of the UK and Ireland in respect of the entire AFSJ, these countries will not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. Given its esoteric nature, Protocol 21 is perhaps is not the epitome of variable geometry in contemporary EU law. The reasons commonly asserted for the need for a striking provision relate firstly, to the Common Travel Area shared by Ireland with the UK and secondly, the common law tradition shared also by both countries a tradition that is asserted to require special treatment in this regard.[7] Consequently, its effect is that "no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable to the UK or Ireland".[8]

The provisions of Articles 3 and 4 of Protocol 21 provide for the practical operation of the opt-in procedure, while Article 4a provides for penalties for the financial consequences of non-participation, to the detriment of the States seeking to avail of constitutional variable geometry. Article 3 of Protocol 21 accepts that these countries may notify the Council, within three months after a proposal or initiative has been presented to the Council that they wish to opt into the adoption and application of the proposed measures. Furthermore, the British-Irish Protocol does not only allow an opt-in ex ante, but also ex post, as either the UK or Ireland may notify to the Council and the Commission at any time after the adoption of an act that they wish to accept it.[9] The ex post opt-out has to be approved by the Commission and the Council and the Commission can impose conditions. In that case, the procedure provided for in Article 331(1) of the Treaty on the Functioning of the European Union (TFEU) shall apply mutatis mutandis.

On the other hand, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.[10] The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the other Member States. The Danish Protocol provides that this country may renounce availing itself of all or part of this Protocol. A novelty introduced by the Treaty of Lisbon is the possibility that Denmark could have an opt-in mechanism similar to that which applies to the UK and Ireland. Denmark has only to notify the

[7] See J. Donoghue &C. Heinl (eds.), Making sense of European Justice & Home Affairs Policy: Ireland and the Lisbon Treaty (Institute of International and European Affairs, Dublin, March 2009); Fahey, (n 4 above).
[8] Article 2, Protocol 21. A similar provision is included on Article 2 of Protocol 22 on the Position of Denmark.
[9] Article 8, Protocol 21.
[10] The Protocol on the Position of Denmark applies as to the opting-out of Denmark regarding Title IV of the former EC Treaty on "Visas, asylum, migration and other policies related to the free movement of persons" to the whole AFSJ.

other Member States in accordance with its constitutional requirements.[11]

Notably, the Council may urge the UK or Ireland to participate where they are not participating which, as Peers suggested, may operate as an incentive to opt-in and also co-extensively giving Ireland or the UK an opportunity to rid themselves of obligations.[12] However, when viewed overall, the opt-in mechanism in the Protocol does not necessarily balance out or neutralise the impact of the extensive opt-outs obtained, given the practical difficulties involved in opting or, alternatively, in not being part of the decision-making process generally. Pursuant to Article 8 of the Protocol, Ireland may notify the Council that it no longer wishes to be covered by the terms of the Protocol and then, in which instance, the normal Treaty provisions will apply to Ireland by way of parliamentary ratification only and not by referendum. Article 8, however, has to be construed along with Declaration (No. 56) annexed to the Treaty of Lisbon such that in three years' time, the position of Ireland was to be subject to review, i.e. in late 2012 prior to the Irish presidency of the Council in 2013, a review which does not appear formally to have yielded any formal outcome yet.[13]The other significant feature of Declaration No. 56 is its provision that Ireland would seek to participate as much as possible in the AFSJ, perhaps borne out in practice, as detailed below. More significantly, it must be construed alongside Protocol 36, the UK's mass opt-out from the AFSJ, considered below.

The situation of the UK, Ireland and Denmark overtly introduces great complexity and diversity into the development of these policies.[14]Ostensibly, this was the price that had to be paid in order to achieve the "communitarisation" of the third pillar. As some have stated, "allowing the possibility of too many "speeds" going in too many different directions might have helped to end the pillarisation but [might have created] an Area of Freedom, Security and Justice too prone to "differentiation" and "exceptionalism"".[15] Accordingly, Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches which has been a feature of the third pillar since it was introduced and throughout the successive reforms of the Treaties. However, practice may suggest otherwise. Ireland and the UK may be said to have participated in a majority of AFSJ measures since the entry into force of the Treaty of Lisbon.[16]

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[11] Article 4, Protocol 21.

[12] See Peers, (n 4 above).

[13]See Declaration (No. 56) by Ireland, annexed to the Lisbon Treaty on Article 3 of the Protocol on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice- CIG 3/1/07 Rev 1;See the account in.Fahey,(n 4above).

[14] Ireland may notify the Council that it no longer wishes to be covered by the Protocol on the Position of the UK and Ireland in respect of the AFSJ (Article 9 of the Protocol) and Denmark may decide to adopt an opting-out position similar to that of the UK and Ireland (Article 8 of the 8 on Position of Denmark).

[15] S. Carrera and G. Florian, The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice, 141 CEPS Policy Brief (2007), at 8.

[16] The UK maintains a comprehensive listing of all JHA opt in and Schengen decisions since 1 December 2009, which at 83 items is considerably more detailed than the equivalent published by Purcell in May 2012: see www.homeoffice.gov.uk/publications/about-us/legislation/jha-decisions. By May 2012, Ireland was said to have opted into 18 out of 22 AFSJ proposals: B. Purcell, "Criminal Justice Cooperation and Ireland's Opt-In Protocol" in European Criminal Justice Post Lisbon: An Irish perspective E. Regan (ed.) (Institute of International and European Affairs, Dublin, October 2012) 35-47, pp 38-44, http://www.iiea.com/publications/european-criminal-justice-post-lisbon-an-irish-perspective, and when this list of measures is cross-referenced (by the present authors) against the official UK database, similarly opted out of the European Protection Order and the Access to a Lawyer Directive. By contrast, Ireland had opted into the Justice Programme and Internal Security Fund unlike the UK, whereas the UK opted into the European Investigation Order, unlike Ireland. See also HM Government, Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2009–30 November 2010), January 2011 (Cm 8000) and Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2010–30 November 2011), January 2012 (Cm 8265).

The high rate of participation has been said to demonstrate Ireland's commitment to advancing all forms of criminal justice cooperation within the EU, approaching all as an opt-in scenario unless a counter veiling reasons of merit pertains.[17] Statistics on Council voting in Civil liberties, Justice and Home Affairs from 2009 to 2013 indicate that out of a total of 24 votes cast that the UK had voted for measures on 22 occasions out of a total of 25 votes cast, had voted against measures on 2 occasions and abstained once.[18]Similarly, Ireland had voted for measures in 23 occasions, voted against measures on zero occasions and abstained on 1 occasion. Thus the two States behaved similarly, politically and legally, in this domain since the entry into force of the Treaty of Lisbon. While on balance it is said that from a legal and administrative perspective the opt-in experience has benefited both Ireland and other EU Member States,[19]the amount of legislative measures has been modest,rendering definitive judgment more difficult.

2. Provisions for Parliamentary Scrutiny of Variable Geometry in the AFSJ in the UK and Ireland

The UK's European Union Act 2011 is a controversial and far-reaching effort to increase UK parliamentary control over EU decision-making. It creates a dramatic series of "dual locks" and referenda requirements supposedly inspired by provisions found in German Constitutional Law. The Act introduces many new scenarios whereby a referendum may be triggered, many of which relate to the AFSJ and are listed in s. 6(5), including the UK's participation in a European Public Prosecutors office, the extension of its powers in the case of participation and a decision to remove any border control of the UK in respect of the Schengen Protocol.[20] The provisions on parliamentary control of the ASFJ in the UK are considerably more stringent than those existing under Irish law. However, as Craig states, it is entirely possible that similar measures would be adopted in any other Member State, despite its impact upon the EU decision-making process through its generation of a pause mechanism for national approval.

The Act of 2011 makes specific provision in S. 9 thereof for parliamentary approval of many aspects of the UK's involvement in measures relating to the shift from the special legislative procedure to the ordinary legislative procedure pursuant to Article 81(3) TFEU concerning family law; the identification of further aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate pursuant to Article 82(2(d) TFEU; and the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate pursuant to Article 83(1) TFEU. It is perceived to be a particularly tough set of executive controls accorded to parliament and it purports to empower an already well-equipped Parliament. A Minister cannot give notification under Article 4 of the AFSJ Protocol that the UK wishes to accept a measure unless the notification has been approved by an Act of Parliament. Prior to this, Parliament must approve the Government's intent to give notification in respect of a specific measure. It is a considerably more stringent regime than its Irish counter-part, considered next.[21]

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[17]See Purcell, ibid.

[18]UK, Ireland: voting in minority in the Council of Ministers from 14 July 2009 to 11 March 2013: See Votewatch Europe: How often the UK voted in the minority in the Council of Ministers of the EU: www.votewatch.eu.

[19]See Purcell, n 17.

[20] P.Craig, "The European Union Act 2011: Locks, Limits and Legality", Common Market Law Review, 48 (2011), 1811; M. Gordon & M.Dougan, "The European Union Act 2011: three questions", European Law Review, 37(1) (2012), 3.

[21]The first use of the European Union Act 2011 was in October 2011 in respect of the amendment of the EU treaties and the European Stability Mechanism, where it was concluded that no referendum was warranted.

The Twentieth-eighth Amendment to the (Irish) Constitution (Treaty of Lisbon) Act 2009 was enacted to amend domestic constitutional provisions relating to EU affairs and to ratify the Treaty of Lisbon. The revised Article 29.4.7° of the Constitution is an enabling provision of the Constitution which permits the State with the approval of Parliament to engage in enhanced cooperation and to take part in the Schengen Area and the Area of Freedom, Security and Justice. It provides that:

> "…under Protocol 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas…".

Thus mere parliamentary approval is needed to opt in pursuant to Article 8 of Protocol 21. This is a unique constitutional provision in so far as a split of divided Supreme Court decision from the 1980s governs the relationship between Ireland and the European Union and mandates a test of "transfer of sovereignty" to warrant a referendum.[22] The decision is much criticised in legal and political circles, given that it has been liberally interpreted and applied to all EU treaties since the Single European Act so as to warrant a referendum, despite the costs, financially and even politically.[23] These specific provisions, in Article 29, have their origins in the Treaty of Amsterdam ratification and opt for a stronger parliament role in this specific policy domain. The nature of the scrutiny taking effect to date may be said to be haphazard or less than rigorous in the manner in which the Government is held to account.[24] Nonetheless, procedures have been adopted where the Joint Committee of the Houses of the Oireachtas discuss the proposals with the Minister prior to approval, which while similar to the UK provisions perhaps as regards "locks" alone, fall short of a similar form of review.

Next then, the account here considers the practical operation of the above in the area of EU-US relations, in the two specific countries.

3. Parliamentary scrutiny of Transatlantic Relations in the UK and Ireland since the Treaty of Lisbon

Cooperation with the US in the fight against terrorism and other serious crimes in the post 9/11 decade led to the conclusion of several agreements in the area of justice and home affairs.[25]The table below provides an overview of agreements concluded between the US and the EU.

Agreement	
EU-US Agreement on Extradition	OJ 2006, L 181/27
EU-US Agreement on Mutual Legal Assistance	OJ 2006, L

See https://www.gov.uk/government/news/minister-for-europe-comments-on-first-use-of-the-european-union-act-2011.

[22] Crottyv. An Taoiseach [1987] IR 713; See E. Fahey EU Law in Ireland (Clarus Press, 2010), Chs. 1 and 5.

[23] See G.Barrett, "Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence", European Constitutional Law Review, 5 (2009), 32.

[24] E. Fahey, "Reflections on the Legal Role of the Irish Parliament (Oireachtas) in EU Affairs After Lisbon", EUI Max Weber Working Paper2010/20.

[25] See J. Santos Vara, "The role of the European Parliament in the conclusion of Transatlantic Agreements on the transfer of personal data after Lisbon", CLEER Working Paper 2013/2.

	181/34
Agreements between the United States of America and the European Police Office of 6.12.2001 and 22.12.2001	
Agreement on intensifying and broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation on container security and related matters	OJ 2004, L 304/34.
Agreement between the United States and Eurojust	6.11.2006
Agreement on the security of classified information	OJ 2007, L 115/30
EU-US Passenger Name Records (EU-US PNR) Agreement	OJ 2012 L 215/5
EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreement	OJ 2010 L 195/5

The place of variable geometry within EU-US relations remains particularly curious and constitutionally ambiguous, in so far as it undermines the ostensible unity or coherence of EU Foreign policy post-Lisbon. EU-US relations may lack much legal coherence potentially but the legal and political options to opt-out have never been exercised, with the UK and Ireland opting-in instead, "acting" thus in legal terms "coherently" as a matter of EU policy. There are many EU Security policies still being pursued which have clear imprints of EU-US policies: for example, an EU PNR and an EU Terrorist Finance Tracking Program (TFTS), mirroring EU-US PNR and EU-US TFTP, although the precise future of the latter is uncertain.

Stronger EU-US cooperation is presently a matter under consideration in the UK as part of its "balance of competences review" to assess the exercise of EU competences and their impact and application in the internal legal order of the UK.[26] It is stated that the UK is sometimes concerned that stronger EU-US co-operation will come at the expense of Britain'sbilateral dealings with Washington.[27] The ability to negotiate with the US on the principle of equality is one of the central benefits of EU-US relations but this only takes place on those issues where the EU has full competence. The Obama Administration made a forceful attempt to intervene in the UK's recent deliberations over its referendum on its future in the European Union.[28] By contrast, the Irish perspective on transatlantic relations is a more singular vision of partnership.[29] For example, the Irish

[26] Review of the Balance of Competences between the UK and the European Union Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty July 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf. See "David Cameron snubbed as Germany and France ignore UK survey on Europe" The Guardian (1 April 2013).

[27] R. Korteweg, "The EU and transatlantic relations" (Centre for European Reform, March 2013), http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/bal_comp_rk_eu_trans_15march13-7087.pdf.

[28] "Britain should stay in European Union, says Obama administration" The Guardian (10 January 2013), a view echoed similarly by Ireland, who held the Presidency of the EU at the time of the most recent public controversy and discourse: http://www.guardian.co.uk/world/2013/jan/09/us-warns-uk-european-union.

[29] See J. Carroll and J. Travers (eds.), An Indispensable Partnership: EU-US Relations from an Irish Perspective (Institute of International and European Affairs, 2004).

Presidency of the EU in 2013 made great play on the advancement of the Transatlantic Trade and Investment Partnership.[30]

We next examine three specific instruments in non-legislative and legislative areas- two bilateral EU-US Agreements in security and one internal EU Directive, largely inspired by one of the former, perhaps indicating the stance of the Member States generally on the content of Transatlantic Relations as applied internally within the EU.[31]

EU-US Terrorist Finance Tracking Programme

As is known, the EU-US TFTP Agreement arose out of a controversy whereby the US Central Intelligence Agency (CIA) was revealed to be running a secret program where it obtained financial messaging data, in order to track terrorist financing.[32] An EU-US TFTP Agreement was entered into so as to meet legal concerns surrounding the US extraction, use and transfer of financial messaging data without a warrant.The Council Decisions on the Terrorist Finance Tracking Programme (TFTP) decisions were adopted in the summer of 2010[33] and the UK opted into them immediately, thus becoming bound by the agreement. The Financial Secretary to the Treasury emphasised the significance of UK involvement from the outset.[34] The UK opted in to the Agreement with the US pursuant to Article 3 of Protocol 21 from the outset, whereas Ireland exercised its opt-in pursuant to Article 4 of Protocol 21, Ireland's first opt-in under this Article to date. Ireland informed the Presidency that it was prepared to waive its 3 month opt-in period and instead would opt-in post-adoption.[35] The Article 4 opt-in is stated to have arisen because Ireland had in the interests of facilitating early Council approval for the Agreement, waived the right to exercise its option under Article 3, demonstrating perhaps rather curiously the underlying coherence and unity at the heart of the operation of these provisions. Recently, however, Article 4 has been deployed by Ireland in its opt-in to the EU-US PNR Agreement, considered next. Finally, on a practical note, usual practice in draft AFSJ Directives is to include a recital stating that either the UK and / or Ireland have notified their intention to participate or will not participate/ be subject to or bound by the instrument.[36] The practice is otherwise in International Agreements which do not envisage anything other than legal coherence, or reflect only minimally actual practice. Thus, for example, Article 22 of the Terrorist Finance Tracking Programme Agreementprovides:[37]

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[30]See for example, "Agreement of draft mandate for EU-US trade talks will be a key step - Minister Bruton" (12 March 2013) <http://www.eu2013.ie/news/news-items/20130312eu-ustradetalks/>.

[31] See Irish Presidency Council agendas and Trio Presidency Council agendas, in legislative and non-legislative areas.

[32]"Bank data is sifted by US in Secret to Block Terror", The New York Times (23 June 2006).

[33] Council Decision of 28 June 2010 on the signing on behalf of the union of the agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (TFTP) 2010 /411/EU 2010 OJ L 195 1.

[34]See House of Commons, Terrorist Finance Tracking Program Session 2010-11 European Committee, 8 February 2011, Column 7, http://www.publications.parliament.uk/pa/cm201011/cmgeneral/euro/110208/110208s01.htm.

[35]See Purcell, (n 17).

[36]Eg Proposal for a Directive of the European Parliament and Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, COM (2010)517 final, recital 17.

[37] Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, 2010 OJ L 195/5. For background see K.Archick, "EU-US Cooperation Against Terrorism", Congressional Research Service 7-5700 (21 May, 2012); M. Cremona, "Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement", Institute for European integration Research Working Paper 2011/4.

> "…2. This Agreement will only apply to Denmark, the UK, or Ireland if the European Commission notifies the United States in writing that Denmark, the UK, or Ireland has chosen to be bound by this Agreement. 3. If the European Commission notifies the United States before the entry into force of this Agreement that it will apply to Denmark, the UK, or Ireland, this Agreement shall apply to the territory of such State on the same day as for the other EU Member States bound by this Agreement…"

Accordingly, this indicates a very particular vision of coherence in EU International Relations, whereby all Member States will participate, arguably rather top-down in its vision of coherence. It is a formula that does not appear to capture the reality of the legal provisions operating as a backdrop to the EU's International Relations.

The EU-US PNR Agreement, 2011

Another high profile example worth considering here is the EU-US PNR Agreement has its origins in US legislation passed in the wake of the 9/11 atrocities, requiring airline carriers flying into the US to provide US authorities with passenger data. An Agreement was eventually reached in 2004 between the EU and US requiring EU airlines flying into the US to provide US authorities with PNR data and was struck down by the Court of Justice in 2006 and replaced by an interim Agreement. The most recent EU-US PRN Agreement replaces the EU-US PNR Agreement provisionally applied from July 2007.[38] The Council Decisions to sign and conclude the Agreement were deposited on 28 November 2012. The UK opted into the Negotiating Mandates of the Council to authorise the Commission to open negotiations with Australia, Canada and the US in December 2010, decisions which were also announced to the UK Parliament at this time.[39]The minutes of the Justice and Home Affairs meeting on 2-3 December 2010 simply indicated that the Council of Ministers had agreed a negotiation mandate with the US without noting any specificities regarding the UK or Ireland.[40]This mandate was said not to be capable of being deposited before Parliament on account of the possibility of the EU negotiating position being prejudiced or restricted.[41]

The UK opted into the Agreement initially through its negotiation with the President of the Council on 9 February 2012. However, on 15 December 2011, the European Scrutiny Committee of the House of Commons had expressed considerable reservations over the haste with which an early opt-in decision necessitated and suggested that compliance with an eight week scrutiny period for an opt-in would not prejudice UK participation in the new EU-US Agreement, reflected itself in the Agreement in Article 27.[42] Instead, the Committee drew attention to the earlier dissatisfaction expressed by the Committee in its Thirty-Fifth report, regarding the 20 days between the publication of the earlier EU-Australia PNR Agreement and the date proposed by the Presidency for the adoption of the draft

[38] Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security 2012 OJ L215/5.

[39] See Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) ('the Treaties') in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2009 - 30 November 2010) Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty (January 2011), Cm 8000.

[40] By contrast, opt ins and outs of the European Investigation Order were expressed in the same document (UK was opting in, Ireland and Denmark opting out: Council doc. 16918/10.

[41] See the detailed Written Ministerial Statement (Mr. Damian Green MP), Hansard 20 Dec 2010: Column 157WS, http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101220/wmstext/101220m0001.htm.

[42] Forty-eighth Report of Session 2010-12 European Scrutiny Committee EU PNR Agreement with the USA, (15 December 2011), http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xliii/42806.htm.

Council decision to provide its signature, whereby the Committee agreed to waive its scrutiny reserve in return for assurances on fundamental rights. Of significance, then is that the EU-US PNR Agreement contained provisions which were arguably more far-reaching than the Australia Agreement as regards data retention limits and effective judicial redress. The subsequent UK Ministerial statement on the decision of the UK Government to opt-in to the EU-US PNR Agreement was laid before the House of Commons and House of Lords on 27 February, 2012.[43] The statement emphasised the importance of working with partners outside the EU, also noting the added value of the collection and analysis of PNR data.

Ireland has more recently also sought to invoke Article 4 so as to participate in the EU-US PNR Agreement, again in contrast to the approach of the UK. The Houses of the Oireachtas adopted a procedure whereby the option proposal was referred to first to the Joint Committee of the Oireachtas, which considered the proposals at a public meeting with the Minister thereafter. Similar concerns to those expressed in the UK Parliament were expressed in the Irish Parliament as to fundamental rights, to lesser avail.[44] Thereafter, On 24 May 2012, the Irish Minister for Justice proposed that Ireland would exercise its option pursuant to Article 4 of Protocol 21, seeking the prior approval of both Houses of the Oireachtas (Irish Parliament) pursuant to Article 29.4.7° thereof for Ireland to participate, motions which were passed.[45]

The third instrument considered is a legislative one, namely the Passenger Name Records Directive.

The Passenger Name Records Directive[46]

An EU Directive on the use of Passenger Name Record (PNR) Data for the prevention, detection, investigation and prosecution of Terrorist Offences and serious crime was proposed in 2011. The Directive explicitly shares the nomenclature and form of EU-US PNR rules and its controversy given its implications for fundamental rights grounds. The Directive would apply to air carriers flying into and out of EU Member States. The possibility of monitoring of EU internal flights had been proposed by the UK as part of its Olympic Games security strategy and did not meet with opposition, instead evolving into the text which would be adopted by the Council.[47] The EU PNR Directive provides that all passengers flying in and out of the EU will have to provide key data which can be checked against national watch lists. Article 17 makes express provision for the possibility of including internal flights within the scope of the Directive would be considered by the Commission, demonstrating the extent to which the UK's position became EU policy.

Accordingly, the House of Lords European Union Committee recommended that the UK should opt-in to the Directive on 7 March 2011 so as to be in a position to play a role in extending the Directive

[43] Damian Green MP, Written statement to Parliament: the UK's opt-in to the EU PNR Agreement with the US (27 February 2012). https://www.gov.uk/government/speeches/uks-opt-in-to-the-eu-pnr-agreement-with-the-us.
[44] Statement by Alan Shatter T. D. Minister for Justice and Equality - Joint Committee on Justice, Defence and Equality (16 May 2012), http://www.justice.ie/en/JELR/Pages/SP12000133.
[45]Statement by Alan Shatter T. D. Minister for Justice and Equality DáilÉireann, having sought the approval of the Seanad the previous day (lower house)**,** (24 May 2012), http://www.justice.ie/en/JELR/Pages/SP12000147.
[46]Proposal For a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime (COM) 2011 32; EU-PNR Commission Staff Working Paper Impact Assessment COM(2011) 32 final.
[47] Note From UK Delegation To Delegations: Council doc. 6359/11. See "Countries rally behind UK on EU Flight data collection", Euractiv (12 April 2011). http://www.euractiv.com/infosociety/countries-rally-uk-eu-flight-dat-news-504007.

to intra-EU flights and to benefit from the data collected by other Member States.[48] Notably, they expressed some dissatisfaction at the lack of guidance from Government, on the basis of a desire to respect the eight week scrutiny period prevailing. What is striking about the parliamentary debate in the House of Lords on this legislative instrument is the fulsome support of parliament for the goals of the EU, their reflection on the long-standing objective of the EU to achieve this and the manner in which the UK policy position is promoted centrally within the context of the EU instrument.

The Irish Parliament on 19 April 2011 debated whether Ireland should exercise its options in Article 3 of Protocol 21 to participate in the Directive and stated that any measure assisting the police in their fight against terrorism was to be welcomed, outlining that the 3 month period to opt-in expired in May, 2013.[49] Additionally, the Minister indicated to Parliament Ireland's support for the inclusion of intra-EU flights within the scope of the measure. Since then, Ireland has now exercised its opt-in and in early 2013, the Irish Presidency of the Council sought to advance the Directive on the Justice and Home Affairs Agenda.[50]The broad tendency for Ireland to adopt its position temporally after that of the UK is replicated in its actions in respect of the Schengen Protocol also.[51] Substantively, the UK and Ireland have exercised largely similar preferences in Transatlantic Relations and also in similar "spillover" internal EU legislation. These represent significant practices of coherence and consistency on the part of the countries enjoying considerable flexibility.

4. External implications of AFSJ Variable Geometry for the negotiation of International Agreements

The stance adopted by the UK, Ireland and Denmark has a direct bearing on the external dimension of the AFSJ, as the international agreements concluded by the EU on these issues might not be binding upon the three countries.[52]As noted above, the territorial application of this kind of agreement is thus limited to the other Member States, constituting an exception to the general rule that the agreements concluded by the EU will become binding on the institutions and the Member States as laid down in article 216.2 TFEU. According to article 29 of the Vienna Convention on Law of Treaties, a treaty "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". Therefore, it should be explicitly described in the text of agreements concluded by the EU within the framework of Title V of the TFEU the territory to which they shall apply. If an international agreement does not include explicit territorial exclusions despite the existence of an internal opt-out, it is possible that other contracting party might argue that non-application to the entire territory of the Member States amounts to a breach of the agreement.[53] While previous third pillar agreements still in force are binding upon all Member States, including the UK, Ireland and Denmark, the position of these countries may give rise in practice to a wide range of

[48] European Union Committee 11th Report, UK opt-into the Passenger Name Records Directive (7 March, 2011). http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/113/11303.htm.

[49]Vol 730 No. 3 DáilÉireann Debate,<http://debates.oireachtas.ie/dail/2011/04/19/00020.asp>

[50] See "Minister Shatter presents Presidency priorities in the JHA area to European Parliament"http://justice.ie/en/JELR/Pages/PR13000021.

[51]See Fahey, (n 3above).

[52] The present contribution does not intend to deal in detail with the external implications of variable geometry within the AFSJ. The analysis of the implications of AFSJ variable geometry for the negotiation of international agreements is the basis for the exam of the consequences of the UK "mass" opt out in the next section. For a detailed exam of the external implications of variable geometry within the AFSJ, see the chapter by C. Matera, "Much ado about "opt-outs"? The impact of 'Variable geometry' in the AFSJ on the EU as a Global Security Actor".

[53] See B. Martenczuk, "Variable Geometry and the External Relations of the EU", in B. Martenczuk and S. van Thiel (eds.), Justice, Liberty and Security: New Challenges for EU External Relations (Brussels University Press, 2008), at 508.

different situations.[54]

When either the UK or Ireland notifies the Council of their willingness to take part in any proposed internal measure, they are also accepting the external competence to conclude international agreements on the same issue. Otherwise, the effects of the Protocol will extend beyond the framework of the AFSJ, also including opting out of Article 216 TFEU, which reflects Court case law on external competences. In contrast, if the EU concludes an agreement affecting an internal act into which the UK or Ireland have chosen not to opt in, the UK or Ireland will not be bound by the international instrument.

Protocols 21 and 22 also affect the application of TFEU provisions in which the procedure for concluding international agreements is regulated. Article 218 TFEU, which lays down the procedure for negotiating and concluding international agreements, is affected as regards the voting rules applicable in the Council for the adoption of the negotiating mandate, the signature of the draft agreement, and conclusion of such agreements.[55]As it is provided in the Protocols, decisions adopted by unanimity will require the unanimity of the members of the Council with the exception of those Member States opting out.[56] A qualified majority will be interpreted in accordance with Article 238 (3) TFEU, which refers to those cases in which not all Member States take in the decision making.

It is important to consider whether the UK and Ireland have an unlimited right to opt-in to any international agreement concluded by the EU under the aegis of the AFSJ. As was stated earlier, in the case of Denmark, the possibility of opting in is not foreseen. A distinction should be made, however, between the Schengen Protocol and Protocol 21 on the position of the UK and Ireland in respect of the AFSJ. The UK and Ireland take part in some aspects of Schengen (in relation to police and judicial cooperation), but they do not accept the border control system.[57] Article 4 of the Schengen Protocol provides that Ireland and the UK may request to take part in some or all the provisions of the Schengen acquis, and according to Article 5, either the UK or Ireland is considered to be participating in any measures which build on those parts of the Schengen acquis in which they already take part, unless they notify the Council that they do not wish to be involved in the measure. The judgments of the Court of Justice in the appeals lodged by the UK against Regulation 2007/2004 establishing FRONTEX and Regulation No. 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States help to provide an answer to this issue.[58] The Court of Justice held that Article 5 of the Schengen Protocol is not independent from Article 4,

[54] According to Article 9 of the Transitional Provisions "the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union".

[55]See P. García Andrade, "La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia", in J. Martín y Pérez de Nanclares (ed.), La dimensión exterior del Espacio de libertad, seguridad y justicia de la Unión Europea (Tecnos, Madrid, 2012).

[56] Article 3.1, Protocol 21 and Article 1, Protocol 22.

[57] See Council Decision of 29 May 2000 concerning the request of the UK of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ 2000, L 131/43 and Council Decision of 28 February 2002concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ 2002, L 64/20.

[58] Council Regulation No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L 341/1 and Council Regulation No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ 2004, L 385/1.

but that the former is subordinated to the later.[59] Consequently, the UK or Ireland cannot opt in to the measures developing the Schengen acquis if they are not bound by those parts of the acquis to which those measures constitute a development according to Article 4. Because of this, when the UK or Ireland wishes to take part in an international agreement that the EU plans to conclude, it should be determined whether or not the agreement at stake is a measure that builds upon the Schengen acquis. If not, the UK and Ireland may notify the Council that they wish to take part in the international agreement on the basis of Article 3 of Protocol 21. On the contrary, if the agreement is a measure which builds upon the Schengen acquis, both countries will only be entitled to opt in should they have been previously authorized to participate in those parts of the acquisto which the international agreement constitute a development according to Article 4.[60]

The most prominent examples of this are the international agreements on visa facilitation. Since Ireland and the UK do not participate in the common visa system, equally they cannot take part in any of the visa facilitation agreements concluded by the EU. In the agreements concluded thus far it is clearly stated that these constitute a development of the provisions of the Schengen acquisin which the UK and Ireland do not take part.[61] The same argument may be applied to the agreements on visa waiver that the EU has concluded with third countries, such as the agreement with Brazil on short-stay visa waiver for holders of diplomatic, service or official passports.[62]

The Danish position as regards this kind of agreements is arguably more complex. Since Denmark is part of the Schengen area it has a strong incentive to participate in the visa facilitation agreements, and accordingly, every time a new act is adopted that builds upon the Schengen acquis, Denmark has to decide within a period of six months whether or not it will implement the new measure. Should it decide to do so, the new act "will create an obligation under international law between Denmark and the other Member States bound by the measure".[63] However, since the Schengen acquis is not binding on Denmark under EU law, international agreements concluded by the EU do not create obligations between Denmark and third states. Consequently, the visa facilitation agreements concluded by the EU are not binding on Denmark and a separate agreement with the respective third country must be signed. In the EU visa facilitation agreements, a declaration is annexed recognizing the desirability of Denmark and the third country conclude a bilateral agreement with similar provisions on visa facilitation.[64]

The fragmentation in the external dimension of the AFSJ may become quite severe, given that the EU may conclude international agreements the material purpose of which goes beyond the AFSJ, and also covers other matters falling under EU competencies in which the UK and Ireland fully take part. This kind of agreements perhaps causes one to recall the former "inter-pillar agreements".[65] Agreements of

[59] Judgments of 18 December 2007, C-77/05 and C-137/05.
[60] See García Andrade, (n 55 above), 102.
[61] See Council Decision of 18 January 2011 on the conclusion of the Agreement between the European Union and Georgia on the facilitation of the issuance of visas, OJ 2011, L 52/33.
[62] OJ 2011, L 273/2.
[63] Article 4, Protocol 22 on the Position of Denmark. If this country decides not to implement a measure building upon the Schengen acquis, "the Member States bound by that measure and Denmark will consider appropriate measures to be taken".
[64] See the agreement concluded with Georgia. It is held that "it is desirable that the authorities of Denmark and of Georgia conclude, without delay, a bilateral agreement on the facilitation of the issuance of short-stay visas in similar terms as the Agreement between the European Union and Georgia".
[65] The conclusion of the agreement between the European Union, the European Community and Switzerland on the Schengen acquis required two separate Decisions by the EU and EC respectively. On behalf of the EU, Council Decision 2008/149/JHA, OJ L 53, 27.2.2008, p. 50, and on behalf of the EC, Council Decision 2008/149/JHA, p. 50. See G. De Kerchove, "Relations extérieures et élargissement", in G. De Kerchove, A.

this nature required constant coordination between the EU and the EC throughout the negotiation process and on the part of the EU consent to be bound had to be expressed in two separate legal instruments. As occurred with the "inter-pillar agreements", the conclusion of this kind of agreements requires the adoption of two separate decisions, one based on Title V of the TFEU, and another based on provisions outside Title V which are not binding on all Member States. An example of this can be found in the two protocols to the UN Convention against Transnational Organized Crime on the Smuggling of Migrants by Land, Sea and Air and the Prevention, Suppression and Punishment of Trafficking in Persons.[66] The need to have recourse to two separate acts in the conclusion of international agreements is another consequence of the variable geometry.

The Protocol on the accession of Liechtenstein to the Agreement between the EU and Switzerland on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis bears a certain similarity to the situation discussed below as to the US. This agreement has allowed Liechtenstein to associate itself with the implementation, application and development of the Schengen acquisunder similar terms to Switzerland, a possibility that was foreseen in the Schengen agreement concluded with Switzerland. Since the UK and Ireland participate in certain provisions of the Schengen acquisas regards police and judicial cooperation in criminal matters, but they are not bound by the provisions on the abolition of controls at the internal borders and on the movement of persons, it was therefore necessary to adopt two separate decisions to conclude the Liechtenstein Protocol.[67]

An examination of the practice that has developed in the last years reveals that the UK has notified it wish to take part in the adoption and application of all international agreements concluded by the EU as regards police and criminal cooperation in criminal matters, namely: the Agreements on the use and transfer of Passenger Name Records to the US and Australia, considered above;[68] the TFTP Agreement concluded with the US, considered below; the Mutual Assistance treaty with Japan;[69] the Agreement with Iceland and Norway on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime;[70] the Protocol on the accession of Liechtenstein to the Schengen acquis; and the Agreement with Iceland and Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States.[71]The UK Government has decided also to opt in into the negotiation mandate tothe

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Weyembergh (Dirs.), *L'espace pénal européenne: enjeux et perspectives* (Brussels UniversityPress, 2002), 257 at 272.

[66] The conclusion of the Smuggling Protocol was based on the former Title IV of the EC Treaty (OJ 2006, L 262/24 and 34) and the Trafficking Protocol on the former Articles 177 and 181a EC (OJ 2006, L 262/44 and 51).

[67] OJ 2011, L 160/1 and 19. In both decisions, it is stated that he conclusion of the Protocol "does not prejudice the position of Denmark under the Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union".

[68]Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service, OJ 2012, L 186/3.

[69] Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, OJ 2010, L 2010/3.

[70] Council Decision of 26 July 2010 on the conclusion of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross- border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto, OJ 2010 L 238/1.

[71] Council Decision of 7 June 2012 on the conclusion of the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of

Proposal for the conclusion of an agreement for a simplified extradition arrangement between Member States of the European Union (EU) and Iceland and Norway.[72] Similarly, Ireland has also decided to take part in all international agreements mentioned and also discussed below. The ex post opting-out of international agreements is, in any case, to be avoided, as if the territory to which they apply be changed, the EU may need to renegotiate the agreements. Accordingly, the TFTP Agreement provides that it will apply to countries that have opted out once they notify their wish to be bound by the Agreement.[73]

Variable geometry in the AFSJ has also consequences for the EU readmission agreements. Since the entry into force of the Lisbon Treaty, the UK has continued its traditional policy of taking part in readmission agreements for immigrants. The UK has opted into EU readmission Agreements with Georgia,[74] Turkey[75] and Pakistan,[76] though it decided not to opt into the EU readmission Agreement with Cape Verde,[77] and it has opted into most of the negotiating mandates for new EU readmission agreements, with the exception of the cases of Armenia and Belarus. Ireland has so far chosen not to participate in the readmission agreements concluded by the EU, with the sole exception of the agreements with Hong Kong and Ukraine. Denmark, on the other hand, is excluded from readmission agreements, even though all these agreements include a Joint Declaration stating that it is appropriate that both parties should conclude a readmission agreement on the same terms as the EU agreement.

5. The practical consequences for pre-Lisbon international agreements of the exercise of the UK "mass" opt-out

Protocol 36 on Transitional Provisions gives the UK the option to opt out from "the acts of the Union in the field of police co-operation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon".[78] The UK may notify the Council that it does not accept the new powers of the Commission and the Court of Justice arising from the communitarisationof the former third pillar up to six months before the end of the transitional period. Should the UK provide this notification, the pre-Lisbon acts will "cease to apply to it as from the date of the expiry of the transitional period" (1 December 2014). If the UK does choose to opt out, which seems increasingly likely, the decisions on the conclusion of international agreements will inevitably be affected. It is, however, important to point out that if the acts in question have already been amended after the entry into force of the Treaty of Lisbon, there is no possibility to opt out. This situation has not arisen to date in the case of international agreements.

On the one hand, "this opt-out is in principle an all or nothing matter",[79] and consequently the exercise of this right entails that the acts adopted by the EU in the AFSJ before the entry into of the

29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, OJ 2012, L 135/1.

[72]Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, COM (2009) 0705 final.

[73] Article 22.2 of the 2010 SWIFT Agreement.

[74] Council Decision of 18 January 2011 on the conclusion of the Agreement between the European Union and Georgia on the readmission of persons residing without authorization, OJ 2011, L 52/47.

[75]European Union Document No. 11743/12, COM (12) 239.

[76] Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorization, OJ 2010, L 287/50.

[77] See COM (2012) 557.

[78] Article 10.1 and 5, Protocol 36.

[79]A. Hinarejos, J. R. Spencer and S. Peers, "Opting out of EU Criminal law: What is actually involved?", CELS Working Paper Series, 2012/1, at 3.

Treaty of Lisbon will cease to apply in the UK. It will clearly be necessary to renegotiate international agreements concluded with third countries in order to free the UK from its territorial application. The UK may, however, notify at any moment its wish to take part in measures that have already ceased to be binding on it. In that case, the relevant provisions of Protocols 19 and 21 shall apply,[80] and in either case, the Union institutions and the UK "shall seek to re-establish the widest possible measure of participation of the UK in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence".[81] Should the UK exercise its right to opt back into agreements it has previously opted out, this may have a negative effect on EU external action, undermining it ability to act as a serious and significant international actor. It might be difficult to understand the need to take part in specific agreements, after receiving the communication that they will cease to apply to the UK.

On other hand, the political debate which is taking place in the UK on this question does not appear to be giving serious consideration to the negative consequences which no longer being party to the important measures adopted before December 2009, such as the European Arrest Warrant, would have for the UK.[82] As was recently argued, "the debate has until now developed on the basis of a misunderstanding, both as to what the opt-out would achieve, and as to the consequences that would follow from its exercise".[83]The block opt-out by the UK is viewed by other Member States as a precursor to an attempt to renegotiate the country's EU membership.[84]

Similarly, it does not seem that the negative consequences this decision would entail for the international cooperation with third countries in police and criminal matters, and above all for the transatlantic cooperation, have been taken seriously into account. The announcement made by Britain's Home Secretary, Theresa May, in October 2012, to consider relinquishing most forms of police cooperation and judicial cooperation did not appear to be accompanied by any reflection on these issues.[85]May instead stated that the British Government is considering opting out of all pre-Lisbon acts and negotiating opting back into individual measures which would be in the national interest to rejoin.[86]

The block opt-out would undoubtedly also have negative consequences on the relations with other partners. EU agencies, in particular Europol, have intensified their international relations in the last years in order to achieve its foundational objectives. The international relations of Europol are based on Council Decision 2009/934/JHA adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information and Council

[80] Article 10.5, Protocol 36.
[81] Ibidem.
[82] This debate has intensified after the publication of a paper by the think-tank Open Europe (S. Booth, C. Howarth and V. Scarpetta, "An unavoidable choice. More or less EU control over UK policing and criminal law", Open Europe, (2012), available at http://www.europarl.org.uk/ressource/static/files/jha2014choice.pdf.
[83]See Hinarejos, Spencer and Peers, (n 79 above), 3.
[84] See H. Brady, "Britain's 2014 justice opt out. Why it bodes ill for Cameron's EU strategy", Centre for European Reform (2013).http://www.cer.org.uk/publications/archive/report/2012/saving-schengen-how-protect-passport-free-travel-europe
[85] Oral Ministerial Statement regarding European Justice and Home Affairs Powers by the Home Secretary, Commons Hansard, 15 October 2012. See European Scrutiny Committee-Thirty- Seventh Report, 'The 2014 block opt-out: engaging with Parliament', (22 March 2013).http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news/op-note---2014-block-opt-out/
[86] For a detailed exam of the practical implications, see S. Peers, 'The UK's planned, 'block opt-out' from EU justice and policing measures in 2014', Statewatch analysis.http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf

Decision 2009/935, which determines the list of third countries with which Europol is to conclude agreements.[87] Both acts would cease to apply to the UK, and since the opt-out means that the UK would no longer be a member of Europol, the country would not therefore benefit from the international agreements concluded by the Agency.[88] The immediate consequence of this would be that the UK would no longer benefit from police cooperation with third countries harbouring threats to the internal security of the UK.[89] However, if a Europol regulation is adopted to substitute the 2009 Council Decision, as has already been planned, the UK may opt into the new Europol legislation, which also includes international agreements concluded by Europol.[90]

Similarly, another consequence of the block-out would be that the UK would cease to be a member of Eurojust, an agency which is one of the most important instruments the EU has developed to fight against organized crime. The agreements thus far concluded by Eurojust would cease to apply to the UK.[91] Given the importance of the external actions of Eurojust, the reform of the agency carried out by way of Decision 2009/426 seeks, among other things, to strengthen Eurojust's capacity to cooperate with third countries and international organizations.[92] Another practical consequence of exercising the opt-out would be that the UK would cease to participate in CEPOL (European Police College), which has in fact its Secretariat in the UK at Bramshill. Since the aim of CEPOL is to help train the senior police officers of the Member States, leaving this Agency would have a less significant impact than opting out of Europol and Eurojust.[93]

In conclusion, the UK's legal status in relation to former third pillar agencies would be similar to the current situation as regards Frontex. The creation of Frontex was a development of provisions of the Schengen acquis in which the UK did not take part, and the working arrangements concluded so far by Frontex are not binding on the UK.[94] It is certainly possible to envisage practical arrangements which would allow the UK to continue to benefit from the external action of the former "third pillar" agencies, but this course of action in no way contributes to the strengthening of the external action of

[87] OJ 2009, L 325/6 and 12.

[88] A list of strategic and operational agreements concluded by Europol is available at its web page, available athttps://www.europol.europa.eu/content/page/external-cooperation-31

[89] On the external relations of Europol, see C. Kaunert, "Europol and EU Counterterrorism: International Security Actorness in the External Dimension", Studies in Conflict & Terrorism, 33 (2010), 652; J. D. Heimas, "The external relations of Europol-Political, legal and operational considerations", in Martenczuk and van Thiel (eds.), (n 53 above), 367.

[90] Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM (2013) 173 final, 27.3.2013.

[91]Eurojust has concluded agreements with the following countries: Norway (in 2005), Iceland (in 2006), the United States (in 2006), Croatia (in 2009), Switzerland (2008) and Former Republic of Macedonia (in 2010). On the Eurojust's international relations, see M. Coninsx and J. L. Lopes da Mota, "The International Role of Eurojust in Fighting Organized Crime and Terrorism", European Foreign Affairs Review, 14 (2009), 165; L. Surano, "L'actionextérieured'Eurojust", in *La dimension externe de l'espace de liberté et de justice au* lendemain de Lisbonne et de Stockholm: un bilan à mi-parcours (Brussels University Press, 2012), 211.

[92] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2009, L 138/14.

[93]The Commission proposed in the new Europol Regulation to merger Europol and Cepol. However, the member States do not seem willing to accept this proposal. See the Discussion Paper on the Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol), 29 May 2013.

[94] See Council Regulation (2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L 349/1 and Regulation (1168/2011 of the European Parliament and the Council of 25 October 2011 amending Council Regulation (2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011, L 304/1.

the EU in the AFSJ.

There is, however, a third key group of international agreements that would be affected should the UK exercise its opt-out. The EU has concluded agreements with many countries on security procedures for the exchange of classified information and such treaties deal not only with police and judicial cooperation in criminal matters, but also with CFSP matters.[95] Obviously, only the provisions of these agreements that cover criminal and police cooperation would cease to apply in the UK.[96]

Conclusions

The aspiration of the unity of EU external action perhaps is an unrealistic legal and policy goal that the Stockholm Programme could not resolve or remedy in a very limited time period. The variable geometry accorded to the UK and Ireland as regards the AFSJ may yet generate negative consequences for the unity and coherence of the EU external action. The provisions of Protocol 21 are difficult to fathom in the context of the aspiration for coherence in international relations. In order to avoid incoherence, the ex post opt-in should ostensibly be avoided in the case of international agreements, and the opt-in for the negotiating mandate should be followed by an opt-in for the final decision concluding the agreement. If the territorial application of an international agreement is altered, the EU may need to renegotiate the agreement, and such variable geometry might have negative consequences even for third countries. However, the specific case of Ireland in the area of transatlantic relations indicates different individual intentions and policies so as to facilitate speedy agreement. The casestudy of the Passenger Name Records Directive, a spillover provision into EU law of an EU-US Agreement indicates another curiosity perhaps, that countries with the benefit of variable geometry may seek more far-reaching measures that might not be expected from those perceived to be excluded from or operating far from centrally within the AFSJ.

Nevertheless, this variable geometry does not in recent years appear to have complicated the negotiation of international agreements dealing with criminal justice and policing measures. Even though it is perhaps too early to establish a definite picture on the UK implication in the external dimension of the AFSJ, it seems clear that the UK is committed to intensify international cooperation in matters dealing with criminal justice and policing measures. The UK has opted into all agreements dealing with police and judicial cooperation in criminal matters that have been concluded since the Lisbon Treaty. Similarly, Ireland has decided to take part in all agreements dealing with criminal justice and policing measures, resultingin the relevance of practice-based accounts of flexibility for their theorization.

While variable geometry has functionally formed part of several agreements between the EU and US to date, it has not impacted upon legal coherence of EU external action in transatlantic relations, does not appear to have complicated the negotiation of transatlantic agreements and does not appear to have stalled evolution of the EU's global rule-making objectives. Looking forward to the future, the matters considered here operate in the context of the negotiations on the Transatlantic Trade and Investment Partnership, bringing Transatlantic Relations to a new level of cooperation but also

[95] See, e.g., Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information, OJ 2004, L 362/28; Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information (Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information, OJ 2005, L 94/38.

[96] See Hinarejos, Spencer and Peers, (n 79 above), 3.

parallel negotiations on data protection, privacy and intelligence,[97] issues that have assumed increased prominence in recent times. It seems that opting out of legal instruments considered essential to address the challenges faced by the EU and the US in the AFSJ will pose intricate problems in the transatlantic relationship. As the account here has demonstrated, the non-application of Mutual Legal Assistance and Extradition treaties between the UK and US will require the application of classic judicial cooperation instruments in the relations between the UK and US, not necessarily suitable instruments of the desired level of legal coherence in EU Justice and Home Affairs.

[97] Statement by President Barroso on the Transatlantic Trade and Investment Partnership, 3 July 2013, http://europa.eu/rapid/press-release_MEMO-13-660_en.htm.