



City Research Online

City, University of London Institutional Repository

Citation: Fahey, E. ORCID: 0000-0003-2603-5300 (2019). Transparency in transatlantic trade and data law. In: Abazi, V. and Rosen, G. (Eds.), Foreign Policy Secrets in the Age of Transparency. . Oxford, UK: Oxford University Press.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/23569/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

TRANSPARENCY IN TRANSATLANTIC TRADE AND DATA LAW

In Foreign Policy Secrets in the Age of Transparency, V. Abazi & G. Rosen eds., (OUP, forthcoming)

Prof. Elaine Fahey

Institute for the Study of European Law (ISEL),
The City Law School, City, University of London.

Email: Elaine.fahey.1@city.ac.uk

ABSTRACT

Transparency continues to occupy a patchy and uneven place in EU and US relations in key economic and regulatory areas. This patchiness plays out in a variety of ways including in downgrading by the US of the EU in diplomatic and regional standing albeit non-expressly in recent times. The chapter explores the shifts in practices on transparency in EU-US cooperation from a legal perspective. It focuses on EU-US trade negotiations and data transfer cooperation. Transparency provides a useful point of departure as it is a common value and instrument for the US and EU, yet one that seems to be utilised very differently. Transatlantic relations increasingly show a tension between the government to government model of transparency. In the EU-US data protection regime of the Privacy Shield a complex constellation of subjects is emerging and its genuine enforcement appears open to significant doubt. In trade, the European Parliament increasingly attempts to participate and involve citizens' rights in new EU-US negotiations and raise civil liberties, citizens' mobility rights and public interest themes. In light of these developments, this chapter considers how EU and US are becoming divergent in how they handle both communication with each other and toward citizens. The EU is increasingly becoming an organised transparent actor toward the US and trying to increase transparency toward citizens through different instruments, whereas at the moment we see in the US a disruptive environment of information flows and an administration that disrupts the traditional lines of allies and non-allies in how it behaves.

Keywords: Transparency, Transatlantic relations; trade; data transfer; Privacy Shield; TTIP

1. Introduction

In a digital age, practices of secret diplomacy appear increasingly outdated and impractical. The rise of transparency has exploded many practices and brought daylight upon power dynamics and complexities kept previously behind closed doors, particularly in trade negotiations. It is a powerful message of change that highly executive oriented bureaucracies have either ushered in or even transitioned in. Demands for greater transparency give more information and oxygen to new constellations of power. In the EU context, the depth of new information powers has given force to already newly empowered actors in foreign affairs. Transparency and openness are at the heart of the EU's efforts to become a nascent transnational democracy but are convulsed by (crumbling) exceptions.¹ The EU's international relations are increasingly conducted with higher levels of transparency, openness and participation, making a sharp break with conventional international practices.² On the other side of the pond, the US has witnessed many domestic transparency policies already since the 70s yet foreign affairs have traditionally withstood the transparency pressure. The traditional *modus operandi* of the US of discreetness and secrecy in conducting foreign affairs has been disrupted by an era of unprecedented insights into US Executive diplomacy through the President use and engagement with Twitter.

Transatlantic relations between the EU and US have developed since post WW2 and have until recently across administrations sought to integrate and engage in many forms of significance deepening in their collaborations. Yet Transatlantic Relations have never been the subject of such a complex political alliance as in the post-Trump era. In 2019, the US apparently downgraded the EU's diplomatic status without notifying the European Union, later reversed.³ While its precise political and diplomatic effects are debatable and even unknowable in the short term, it constitutes a striking example of the loss of transparency in EU-US relations

¹ A. Bianchi, 'On Power and Illusion: The Concept of Transparency in International law' in A. Bianchi and A. Peters (eds) *Transparency in International Law* (OUP 2013) 1; A. Von Bogdandy, 'The European Lesson for International Democracy: The Significance of Article 9 to 12 EU Treaty for International Organizations' (2012) 23(2) *EJIL* 315; See D. Curtin, 'The Role of Judge-Made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence' in E. Spaventa et al (eds), *Empowerment and Disempowerment of the EU Citizen* (Hart 2012); V. Abazi & D. Curtin 'The EU Security Exception: Beyond Control?' in C. Harlow et al. (eds) *Research Handbook on EU Administrative Law* (Edward Elgar Publishing, 2017) ; V. Abazi & J. Adriaansen, 'Allies in Transparency? Parliamentary, Judicial and Administrative Interplays in the EU's International Negotiations' (2017) 5(3) *Politics and Governance* 5; The Global Dimension of the EU's AFSJ: On Internal Transparency and External Practice' NYU Jean Monnet Working Paper series (2018/4).

² Abazi, V. and M. Hillebrandt, 2015, "The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In't Veld", *Common Market Law Review* 52, 825–845.

³ See New York Times 'U.S. Downgraded E.U.'s Diplomatic Status (but Didn't Say Anything)' (8 January 2019). <https://www.nytimes.com/2019/01/08/world/europe/eu-us-diplomatic-status.html>

bilaterally. It is striking arguably because it is symptomatic of a broader breakdown in communications in interactions by the Trump administration and a general form of recklessness emerging as to the US engagement with past allies on the part of the Trump administration, as a key marker of its strategic communications (or lack thereof) with the global legal order. The *lack* of notification demonstrated the increasingly hostile engagement of the US with the EU and the precarious state of transatlantic relations. What is all the more significant is the lack of clarity and transparency in the ordinary business of diplomacy with an ally. The manner in which the lack of communication takes effect is an important turning point in transatlantic relations.

This chapter aims to analyse and identify the points of tension in transparency between the EU and US, especially in what it calls the government-to-government transparency. Transparency is meant to be a model of openness from governments towards citizens as a wave of good governance and democratic principles became key in guiding decision-making, including in international relations.⁴ Opening up international negotiations for example was often pushed back by governments with the explanation that such level of openness would lead to loss of candour between the negotiating partners. It is precisely this openness at the negotiating table that the paper seeks to trace in the context of transatlantic relations and beyond that, transparency meant as a communication and explanations generally given between governments in international relations as part of diplomacy. As Farrell and Newman have outlined, over the last 70 years, the US has built a global system in which information, investment and trade move quickly and easily across borders.⁵ It is one which the EU has ‘bought’ into over several decades of the Single Market’s development, internally and externally. The US openness generally to new communications and open systems has created an interdependent world. Yet in the aftermath of the 9/11 attacks, the US began to exploit interdependence deliberately using its economic power as an instrument of national security. In the wake of these developments, subsequent US administrations continued to advance one of the most significant and ambitious trade negotiations of all time, the mega-regionals negotiations, in the shape of the in the form of Obama administration-led EU-US Transatlantic Trade and Investment Partnership (TTIP) and Transpacific-Partnerships (TPP) Agreement negotiations, where transparency and wider participation in their negotiation became central,

⁴ See Abazi & Rosen, Introduction to this volume

⁵ Henry Farrell & Abraham Newman (2016) The new interdependence approach: theoretical development and empirical demonstration, *Review of International Political Economy*, 23:5, 713-736, DOI: [10.1080/09692290.2016.1247009](https://doi.org/10.1080/09692290.2016.1247009);

arguably more so with the EU.⁶ 2016 saw the demise of the TTIP and TPP free trade agreements as part of the mega-regionals, which the Trump Administration quickly moved to withdraw from TPP and abandon TTIP.

While under the Trump administration collaboration with the EU in the TTIP negotiations has been officially frozen, key elements of transatlantic cooperation on data protection and the regulation of private companies in the US have continued to evolve despite the broader political conditions in the form of the EU-US Privacy Shield and EU-US Umbrella Agreement. In fact, EU-US data protection cooperation is some of the most sophisticated and far-reaching globally in terms of its span and partial institutionalisation across regimes, despite its complexity in marrying security and commercial issues and regulating surveillance issues embedded chaotically there between.⁷ These dual-faceted approaches- from trade contrasted with data- are notable and distinctive. They have put mutual communication and dialogue at the heart of their operation where citizen protection is key. Moreover, further trade cooperation has just begun to be mooted and negotiated between the two legal orders. However, EU institutional actors such as the European Parliament are increasingly raising transparency objections. It is thus an opportune moment to reflect upon the broad-brush idea of transparency. Significant transparency gaps have been bridged in the regime of data through institutionalisation.⁸ Yet the number of institutional actors involved is still a cause of concern as to the form of flow of information across the institutions. Transatlantic Trade has recently been the subject of significant actions to institutionalise trade through a deepening. The specific interactions between the regimes of the EU and US in these domains are highly dynamic significant but also difficult to isolate and contrast in the abstract. Transparency provides a useful point of departure and specific mode of analysis of conduct and enables reflections to take effect on the broader regime.

The chapter traces the development of communications between the US and EU (Section 2) upon which it then focuses on transparency issues in two key economic and

⁶ See E. Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' GlobalTrust Working Paper Series 08/2015; Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz, and Atsushi Sunami (eds) *Megaregulation Contested Global Economic Ordering After TPP* (OUP 2019).

⁷ See Henry Farrell & Abraham Newman *Of Privacy and Power: The Transatlantic Struggle Over Freedom and Security* (Princeton University Press 2019).

⁸ See E. Fahey (ed) *Institutionalisation beyond the Nation State: Data Privacy and Trade* (Springer Law, 2018). Cf compare other domains E. Fahey 'The Evolution of transatlantic legal integration: truly, madly, deeply? EU-US justice and home affairs' in Florian Trauner & Adriadna Rippoll-Servent (eds.) *Routledge Handbook on Justice and Home Affairs* (Abingdon: Routledge, 2017).

regulatory fields: trade (Section 3) and data economy (Section 4). Lastly, it offers conclusions and insights for how transatlantic relations and transparency will continue to evolve (Section 5).

2. Mapping EU-US Communication: From Dialogue to Transparency

One area of EU IR which constitutes a fascinating litmus test of the transparency in international relations is EU-US relations, especially trade relations. Transatlantic trade relations have evolved in a series of official and permanent dialogues not generally understood to operate as a model of transparency,⁹ including the Transatlantic Business Dialogue, Transatlantic Labour Dialogue, Transatlantic Consumer Dialogue and Transatlantic Environment Dialogue. They have variable degrees of success or failure and comprise public and private spheres, variable actors and activities.¹⁰ Their composition, use of law, tasks, operation and proximity to policy-makers varies considerably because of their non-transparency (e.g. minimal web presence, absence of institutions, agendas). As a result, the taxonomy of this category appears difficult to gauge. The diversity of the subjects of transatlantic relations, between two of the world's largest economies, one a state and the other an evolving region, is of immense significance in understanding communications between the regimes. The permanent dialogues are furthered by Annual Summits between EU and US leaders. A Transatlantic Legislators Dialogue is on-going since 1972.¹¹ These in turn are supported by thematic entities such as the Transatlantic Economic Council and the EU-US Energy Council, as well as High Level Working Groups. EU and US Representatives cooperate particularly regularly and closely in foreign policy.¹² Nonetheless, there is a particular significance to the role of non-opaque dialogues in generating rule-making in Transatlantic Relations, as wholly regularised and structured process of non-institutional law-making are perceived to have given certain economic actors privileged access to policy makers at the

⁹ Fahey, E. (2014), Transatlantic Dialogues. *European Law Journal*, 20: 368-384. doi:10.1111/eulj.12046.

¹⁰ S Francesca Bignami and Steve Charnovitz, 'Transnational Civil Society Dialogues' in Mark Pollack and Gregory Shaffer (eds.) *Transatlantic Governance in the Global Economy* (Rowman & Littlefield 2001).

¹¹ D. Jančić "Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures" (2015) (17) CYELS 334.

¹² For example, the High Representative and the US Secretary of State are reported to have daily contact and approximately 50 EU diplomats work as part of the EU delegation to the US in the European External Action Service

expense of other sectors of ‘transatlantic society’.¹³ They have long generated the question of their transparency and openness in their operation.

There has been much cooperation between civil society across the Atlantic since the 19th century to the present day, on topics ranging from peace to slavery. There are important differences in how US and EU interest groups are organised, at least up until recently.¹⁴ The history of the participation of civil society in EU-US relations has arguably been to privilege private actors in secret dialogue processes.¹⁵ The institutionalisation of civil society participation within the form of an Advisory Group within the EU-US TTIP negotiations EU-US Cybercrime and security cooperation have shown how openness has become more in transatlantic relations, particularly as to information sharing and participation of a broader range of subjects but it is still highly variable.¹⁶

EU-US relations had become particularly prominent in recent times not least in the Obama era when the coherence of the EU began to become more realised post Lisbon. The TTIP negotiations, on one of the largest trade deals in history would arguably have constituted an important attempt via the mega-regionals to deepen the agenda on global trade, in light with a multilateral agenda. However, under the current administration the US commitment to multilateralism has dramatically diverged away therefrom and instead a hostility to international organisations and multilateralism, from the withdrawal from the Paris Climate Accord to the Iran deal exhibit an entirety. The advent of the Trump administration has witness the EU adopt a Global Strategy explicitly committing to multilateralism.¹⁷

The EU is explicitly and transparently committed in its treaties to being a distinctive ‘globalist’ as a matter of law and to pursuing multilateral solutions.¹⁸ Transparency only operates as a latent entity here in its non-technical sense. Yet it also operates as a key communication tool of clarity, certainty, explicitness and directness with key partners about its

¹³ See Bignami and Charnovitz, *ibid*; Ernst-Ulrich Petersmann, ‘Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?’ (2015) *Journal of International Economic Law* 579

¹⁴ Justin Greenwood and Alasdair Young, ‘EU interest representation or US-style lobbying?’ in Nicolas Jabko and Craig Parsons (eds.) *With US or Against US? European trends in American Perspective* (OUP 2005) 290. Cf A. Young, ‘Not your parents’ trade politics: The Transatlantic Trade and Investment Partnership negotiations,’ (2016) 23(3) *Review of International Political Economy* 345; Ayelet Berman, ‘Taking foreign interests into account: Rulemaking in the US and EU’ (2017) 15(1) *I-CON* 235

¹⁵ Bignami and Charnovitz above, 255 ; Green Cowles, *ibid*, 215.

¹⁶ Acar Kutay, ‘Limits of Participatory Democracy in European Governance’ (2015) 21 *European Law Journal* 803; Berman above.

¹⁷ K Smith, Karen E. (2017) *The European Union in an illiberal world*. *Current History*, 116 (788). pp. 83-87; John Ikenberry, *The end of liberal international order?*, *International Affairs*, Volume 94, Issue 1, January 2018, Pages 7–23.

¹⁸ Cf. Article 21 TFEU; A Taxonomy of the EU’s Global Approach to Law Making’ *NYU Jean Monnet Working Paper series* (2018/4).

core agenda. The manner in which the EU has used the explicitness of its multilateral agenda is notable- it operates as a ‘calling card’ for future partners but also signals how it wishes to engage in international organisations and in multilateral structures.

Significant efforts have been made to procure transparency in transatlantic data transfer measures and in negotiations of trade, particularly from EU institutional actors. The European Parliament in landmark litigation won and lost a leading case on the legal basis of EU-US Passenger Name Records, causing the EU to be forced into accepting a highly disadvantageous legal regime in the wake of the pyrrhic CJEU decision.¹⁹ An individual parliamentarian and member of the LIBE committee has been pivotal in litigating a range of transatlantic security issues in the post 9/11 period.²⁰ Although the European Parliament vetoed the EU-US TFTP / SWIFT Agreement, finally reached in 2009, a second SWIFT agreement was reached in 2010. A request by MEP in ‘t Veld to disclose a classified Council Service Legal Opinion suggesting that the earlier legal basis of the Agreement was flawed succeeded in part before the General Court recently, on the basis that the public interest did not require its suppression.²¹ The Court of Justice delivered a resounding victory in her favour later in 2014, weighing in against blanket institutional secrecy in the area of international relations.²² It is thus a significant time period in transatlantic relations, where many aspects of transparency are squarely the subject of challenge involving embryonic surveillance regimes and the subject of significant institutional debates.

There are significant shifts by all EU institutions and major actors as to their conduct of the global towards openness, contrary to the actual state of the current law, and thus of significance, in a range of areas, from trade to security often in key transatlantic contexts.²³ The Council of Ministers has begun to declassify negotiation mandates for international trade

¹⁹ E. Fahey ‘Between One-Shotters and Repeat Hitters: A Retrospective on the role of the European Parliament in the EU-US PNR Litigation’ in Fernanda Nicola & Bill Davies (eds.) *EU Law Stories* (CUP, 2017).

²⁰ See *In ‘t Veld v. Department of Homeland Security* Case No 1:08-cv-0115-RMC, District Judge Collyer presiding (D.C.C, 15 December 2008); T-529/09, *In ‘t Veld v. Council* [2012] ECR II-000.

²² Opinion of Advocate General Sharpston, 13 February 2014; Case C-350/12 P *Council of the European Union v Sophie in ‘t Veld* [2014] ECR-I 000. See E Fahey, ‘EU Foreign Relations Law: Litigating to Incite Openness in EU Negotiations’ (2014) 4 *European Journal of Risk Regulation* pp. 553-556. See also Vigilenca Abazi, Maarten Hillebrandt, ‘The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In ‘t Veld, V. Abazi and M. Hillebrandt’ (2015) 52(3) *Common Market Law Review* 825.

²³ P. Leino, ‘Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the Widest Possible’ (2014) 3 *EUI Working Papers* 2-3, 25-26 < <http://cadmus.eui.eu/handle/1814/30580>> accessed 31 October 2019.

²³ P Leino, ‘On Knowledge as Power: The Transparency of EU Law-Making Procedures’ (*EU Law Analysis*; 10 Jan 2016) <<http://eulawanalysis.blogspot.co.uk/2016/01/on-knowledge-as-power-transparency-of.html>> accessed 31 October 2019.

; D. Curtin and A. Meijer, ‘Does Transparency Strengthen Legitimacy?’ (2006) 11 *Information Polity* 109, 120.

agreements only *after* individual MEPs began to illegally leak negotiation texts as part of a wave of political and local opposition toward the secrecy of the Transatlantic Trade and Investment Partnership (TTIP) and EU-Canada Economic Partnership Agreement (CETA) negotiations.²⁴ The European Commission, along with a host of other actors (from the EP to the Ombudsman), has put transparency as a lead ideal in all EU international trade negotiations, reacting to political rather than legal principles albeit not in the latest EU-US negotiations.²⁵ The EP notoriously voted down the ACTA copyright agreement because of a lack of information using its newfound powers in the area of IR after the Treaty of Lisbon.²⁶ From security and data transfers to migration, the Ombudsman is increasingly putting international relations at heart of work despite being excluded in her role from the Access to Documents Regulation, e.g. as to EU-US Passenger Name Records (PNR) (i.e. security), EU-Turkey relations (i.e. migration) or EU-Australia PNR (security):- an extraordinary array of decisions on EU international relations, despite the EU IR exception surrounding her role.²⁷ The Brexit negotiations arguably constitute the culmination these developments where far-reaching transparency was practised by the EU at every point, placing negotiation documents and positions in the public domain and leading the political debate. The place of transatlantic relations remains a key pivot point in EU practice in the largest most far-reaching trade negotiations that did not come to fruition.

3. Transparency and the Trade Negotiations: Transparency 2.0?

The EU-US TTIP negotiations were arguably significant because they ‘politicised’ entities or agencies in foreign affairs, previously only mere sub-units of the larger political process without an express mandate in international relations (e.g. Committee of the Regions, Ombudsman and organised civil society), often through transparency.²⁸ These bodies notably insisted upon more input, participation and openness in the TTIP negotiations.²⁹ Civil society

²⁴ See E. Fahey, ‘On the Benefits of the TTIP Negotiations for the EU Legal Order: A Legal Perspective’ (2016) 43(4) *Legal Issues of Economic Integration* 327; E da Conceição-Heldt, ‘Exploring the TTIP Transparency Paradox’ (2019) *Comparative European Politics*.

²⁵ E.g. European Commission, Factsheet: Transparency in EU Trade negotiations (2013) <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf> accessed 31 October 2019.

²⁶ See D. Curtin, ‘Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?’ (2013) 50(2) *CML Review* 423.

²⁷ Access to documents of the institutions and decision of the European Ombudsman of 6 January 2015 closing her own initiative inquiry OI/10/2014/RA concerning the European Commission on dealing with requests for information and access to documents (Transparency).

²⁸ Case T-754/14, *Efler and Others v Commission* ECLI:EU:T:2017:323. E. Fahey, ‘European Citizens Initiative STOP TTIP Can Proceed Says General Court’ (2017) 8 *European Journal of Risk Regulation* 787-790.

²⁹ Fahey, *ibid*.

was increasingly politicised through TTIP. For example, the gathering of 3,284,289 million signatories for a European Citizens Initiative (ECI) on the TTIP, from a range of Member States marked an important step in the mobilisation of ordinary citizens against the TTIP itself as an act of politicisation through activist networks and NGOs, expressing transnational protest. The European Parliament gained significant information rights in the TTIP negotiations through working with other institutional actors. Although the ECI was rejected for ostensibly procedural reasons, a European Citizens Initiative (ECI), supported by the President of the European Parliament, STOP TTIP and CETA with over 3 million signatories succeeded. A General Court decision on the propriety of stopping such trade negotiations has put vibrancy into the idea that citizens can meaningfully contest global governance at European level. It has created a specific climate for transparency which is significant and contributed in no small way to the further democratisation of EU foreign relations. It is worth mentioning transparency in transatlantic relations is of significance because of the concrete shifts taking place in practice.

Initially the Regulatory Cooperation Chapter was the most controversial aspect of the TTIP negotiations because of the broadening of subjects in transatlantic relations where transparency played a significant part. The TTIP negotiations spanned many forms³⁰ and caused more puzzlement than controversy throughout 15 rounds of negotiation because of its policy span, in the absence of any clear vision of horizontal or vertical forms of accountability.³¹ The objectives of the TTIP Regulatory Chapter included: to establish and reinforce bilateral regulatory cooperation, to promote an effective regulatory environment, compatible regulatory approaches and implementation thereof.³² The European Commission initially proposed an institutionalised framework for the TTIP, which would have strong institutions in order to make it ‘living agreement’ and accelerates the transatlantic development of global approaches. It then raised the thorny question as to what a living agreement could or should entail.³³ An EU Textual proposal on Regulatory Cooperation in 2015 proposed a

³⁰ A. Alemanno and J. Wiener, ‘The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Policy Laboratory’, (2015) 78 Law and Contemporary Problems 103 ; Joana Mendes, ‘Participation in a new regulatory paradigm: collaboration and constraint in TTIP’s regulatory cooperation’ IILJ Working Paper 2016/5 (MegaReg Series); R.T Bull, N.A Mahboubi, B.S.Richard, and J.B Wiener ‘New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP and Mega-Regional Trade Agreements’ (2015) 78 Law and Contemporary Problems 1 ; A Alemanno, The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation (April 10, 2014). European Parliament Policy Report, Brussels, April 2014. Available at SSRN: <http://ssrn.com/abstract=2423562>

⁴⁶ 21 March 2016 draft (in Article x1) .’ a high level of protection of inter alia public health, health and safety, animal welfare, the environment, consumers, social protection and social security, personal data and cyber security, cultural diversity and financial stability whilst facilitating trade and investment.’

³² March 2016 draft, *ibid*.

³³ See Article 43 of the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the EU and US, 11103/13 DCL 1 (Brussels, 17 June, 2013): See M. Bartl & E. Fahey, ‘A Postnational

Regulatory Cooperation Body (RCB) with powers of monitoring, powers to prepare proposals or initiatives, reporting to the Joint Ministerial Body. By March 2016, however, the RCB had evolved into a mere ‘institutional mechanism’, seeking to downgrade its significance.³⁴ The textual proposal of March 2016 provided for considerably more emphasis upon learning processes and exchanges and extensive participation.³⁵ Indeed, the sheer number of bodies and people potentially involved or whose participation was called for in ex ante and ex post review (thus going beyond previous proposals for ex ante horizontal review between regulators) then began to raise concerns as to the cost and workability of such levels of participation.³⁶ This form of proposed institutionalisation reached after 15 rounds of negotiation differs from historical EU-US regulatory cooperation and makes it remark-worthy embracing a significant openness and transparency agenda.³⁷

In early 2019, the Commission issued two draft mandates for trade negotiations with the US, pending approval by the Council in turn pending the resolution of the EP a few months after the 2018 EU-US Summit.³⁸ The member states were divided on the opening of the negotiations with the Trump administration given the withdrawal of the US from the Paris accord on Climate Change and the sensitivity of global trade in French domestic politics, riven by *gilet jaunes* strife. The complexities on future transatlantic trade this time are not limited to

Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)’ in E. Fahey and D. Curtin, *A Transatlantic Community of Law* (CUP 2014).

³⁴ Arguably it envisaged an executive dominated structure of officials tasks with charting TTIP’s evolution, through an annual Regulatory Cooperation programme, to outline priorities, suggest new joint initiatives, with reviews only at ministerial level regularly, reporting to the EU-US Summit to legislators every two years, thereby skewing political accountability.

³⁵ e.g. natural or legal persons may jointly submit concrete and sufficiently substantiated proposal, including from public interest bodies (Article x 5 (2)).

³⁶ Cf Elaine Fahey, ‘*The TTIP Negotiations Innovations: On Legal Reasons for Cheer*’ (*Verfassungblog*, 24 Aug. 2016) available at <<http://verfassungsblog.de/the-ttip-negotiations-innovations-on-legal-reasons-for-cheer>> accessed;

³⁷ A final EU Proposal for Institutional, General and Final Provisions was tabled in 2016.

³⁸ Brussels, 18.1.2019 COM(2019) 15 final Recommendation for a COUNCIL DECISION authorising the opening of negotiations of an agreement with the United States of America on conformity assessment ; Brussels, 18.1.2019 COM(2019) 16 final Recommendation for a COUNCIL DECISION authorising the opening of negotiations of an agreement with the United States of America on the elimination of tariffs for industrial goods ANNEX I Joint U.S.-EU Statement following President Juncker's visit to the White House, Washington, 25 July 2018 NOTE FOR THE TPC/INTA EU-US Relations: Interim Report on the work of the Executive Working Group 30 January 2019:

‘This is why we agreed today, first of all, to work together toward zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods. We will also work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans. This will open markets for farmers and workers, increase investment, and lead to greater prosperity in both the United States and the European Union. It will also make trade fairer and more reciprocal. Secondly, we agreed today to strengthen our strategic cooperation with respect to energy. The European Union wants to import more liquefied natural gas (LNG) from the United States to diversify its energy supply. Thirdly, we agreed today to launch a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and slash costs.’

the States. Much significance now lies in the place of transparency and the role of the European Parliament in taking it forward.

In the latest EU-US trade negotiations talks the EP expressed considerable disquiet over the role of the EP in the launch of the negotiations and the executive dominance of the negotiations in the absences of consultation. The EP has been regularly participating in a Transatlantic Legislators Dialogue with the US Congress for several decades, a joint committee composed of Members of the European Parliament and Members of US Congress.³⁹ The formula of words used in a EP Resolution on the opening of the EU-US trade talks is also of significance- regretting the lack of involvement of the EP in the opening of the negotiations, its lack of knowledge thereof. However, the length of issues raised by the EP against the US on the state of EU-US relations in September 2018 runs to 95 paragraphs, from visa waiver, to the environment and was indicative of the often rising force of transparency and openness in the broadest sense.⁴⁰

4. Transparency and the EU-US Privacy Shield Regime

4.1 The EU-US Privacy Shield

The Safe Harbour Agreement was an important departure for transatlantic relations with a so-called ‘hybrid’ style governance founded upon *non-institutionalisation* where the private sector was the primary subject and object of the regulation of transatlantic data flows.⁴¹ The Safe Harbour principles, as endorsed by the European Commission in a Decision,⁴² were until recently the only ‘binding’ and enforceable element of the relationship between the EU, the US, the Federal Trade Commission (FTC) and certification bodies. The essence of Safe

³⁹See D Jancic, ‘The European Parliament and EU-US Relations: Revamping Institutional Cooperation?’ in Fahey and Curtin, ‘A Transatlantic Community of Law’ (n 33).

⁴⁰ European Parliament, Resolution of 12 September 2018 on the State of EU-US relations, 2017/2 Trn271(INI); European Commission, Joint U.S.-EU Statement following President Juncker's visit to the White House, July 2018 ; Draft Motion for a Resolution on the recommendations for opening of trade negotiations between the EU and the US, 2019, 3537(RSP); European Parliament, Draft Motion for a Resolution on the recommendations for opening of trade negotiations between the EU and the US, 2019, 3537(RSP); European Commission, Report on the Implementation of the Trade Policy Strategy Trade for All - Delivering a Progressive Trade Policy to Harness Globalisation, 2017; European Commission, State of the Union 2017, 2017

⁴¹ Cf Gregory Schaffer, ‘Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbour Agreements’ (2002) 9 Columbia Journal of European Law 29, 77.

⁴² Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000/520/EC, OJ L 215 p 7). Article 25 of the Directive provided that Member States would prohibit all data transfers to a third country if the Commission did not find that they ensured an adequate level of protection.

Harbour was to require US companies to treat data of EU citizens as if the data were physically in Europe operating through a voluntary self-certification system with public enforcement conducted by the US FTC. The NSA surveillance saga resulted in an EU-US NSA Surveillance group and a momentum towards the significance of data transfers and surveillance.⁴³ Decisions of the Court of Justice as to the Data Retention Directive⁴⁴ culminated then in 2015 in *Schrems v. Data Protection Commissioner*⁴⁵ a complaint to the Irish Data Protection Commissioner from an Austria law student as to the operation of the Safe Harbour Agreement. The CJEU, having regard to the Charter of Fundamental Rights,⁴⁶ invalidated Safe Harbour.⁴⁷ Shortly thereafter, the EU's General Data Protection Regulation was adopted, giving substantial powers to national data protection authorities as well as individual citizens, within and in certain instances beyond the EU. The decision mostly impugned the light-touch regulation regime of Safe Harbour, highly secretive and complex to obtain citizen data.

A new replacement for Safe Harbour in the form of the EU-US Privacy Shield agreement was adopted in 2016, in a highly non-transparent compilation of 'letters' forming the basis for the reformed regime.⁴⁸ From its inception in 2016, the Privacy Shield, like the Safe Harbour, aims to protect the fundamental rights of EU citizens whose personal data is transferred to the United States for commercial purposes. It permits the transfer of data to companies that are certified in the United States under the Privacy Shield. The Privacy Shield is conveyed by the EU and US to be an improvement upon Safe Harbour and attempts to 'institutionalise' transatlantic data processing through DPA, Ombudsman, Judicial authorities and follows closely existing EU-US data agreements. The guarantees provided by US

⁴³ European Parliament Resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP)); European Parliament Resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens (2015/2635(RSP)); European Parliament Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)). Report on the Findings by the EU Co-chairs of the Ad Hoc EU-US Working Group on Data Protection', Council document 16987/13, 27 November 2013 ; EU-US Justice and Home Affairs Ministerial Meeting of 18 November 2013, Council 16418/13, 18 November, 2013; Commission, 'Rebuilding Trust in EU-US Data Flows' COM (2013) 846 final; Commission, 'Communication on the functioning of the safe harbour from the perspective of EU citizens and companies established in the EU' COM (2013) 847 final.

⁴⁴ In Joined Cases C-293/12 & C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238; Cf C 131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* EU:C:2014:317.

⁴⁵ Case C-362/14 *Schrems v Data Commissioner*, EU:C:2015:650.

⁴⁶ See Statement of the Article 29 Working Party on the implementation of the judgment of the ECJ of 6 October 2015 in Case C-362/14 *Schrems v Data Commissioner*, EU:C:2015:650.

⁴⁸ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176).

authorities in the Privacy Shield are stronger and put citizens more at the heart thereof than previously. From an EU perspective the shift is intended to be more towards institutionalisation beyond private regimes and towards greater accountability. As far as the commercial dimension is concerned, the Privacy Shield has stricter obligations on certified companies receiving personal data from the EU, regarding limitations on how long a company may retain personal data or the conditions under which data can be shared with third parties outside the framework (accountability for onward transfers principle). Citizens' rights are intended to be better protected through information rights, enforceable at national level. DPAs will acquire much significance, whereas US enforcement rests largely with the FTC and appears to strike an imbalance overall through divergent and disparate institutionalisation and enforcement.⁴⁹ The Department of Commerce provides more regular and rigorous monitoring. EU citizens have enlarged possibilities to obtain redress. An Ombudsman has an oversight function whereby they report to the Secretary of State. With regards data protection and mass surveillance, the Privacy Shield also provides supposedly better guarantees that U.S. authorities' access to personal data coming from Europe for national security, law enforcement and other public interest purposes are subject to clear limitations. On 5 July 2018, for example, the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) recommended in a resolution that the Commission suspend the EU/U.S. Privacy Shield unless and until all defined corrective actions are taken by the US Department of Commerce, particularly as to the Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency within the executive branch ensuring protection of privacy and civil liberties in the field of counterterrorism policies.

Clearly, transparency of practices and openness remain core principles of evolution of the model of transatlantic cooperation. Knowledge, certainty and rules are increasingly sought after. It is a good example of institutionalised cooperation in composite levels, where there is increasing communication and certainty through transparency practices. The regimes themselves are not the precise focus, it is assumed that there are variable and debateable levels of institutionalisation. Instead, it is the nature of the communications which is of significance and the communication and information flows.

⁴⁹ Article 29 Working Party Opinion 1/2016 on the EU-US Privacy Shield Draft Adequacy decision 13 April 2016 WP 238; European Data Protection Supervisor, Opinion on the EU-US Privacy Shield Adequacy Decision 30 May 2016, Opinion 4/2016 European Parliament Resolution on transatlantic data flows (26 May 2016) 2016/2727(RSP).

4.2: Inter-regime communications: Reviews of the Privacy Shield of 2016 and 2017

The Privacy Shield is the subject of a detailed new regime predicated upon information exchange between layers of institutional actors with oversight and accountability structures. A strengthened monitoring of the framework has been established, with annual joint reviews by EU and US authorities to monitor the correct application of the arrangement discussed next. The first review took place on 18 and 19 September 2017 in Washington, DC. The second one took place on 18 and 19 October 2018 in Brussels. On the US side, this involved the US Secretary of Commerce, as well as representatives of the Department of Commerce, the Federal Trade Commission (FTC), the Department of Transportation, the Department of State, the Office of the Director of National Intelligence and the Department of Justice. Representatives of official bodies enjoying some degree of independence, like the Ombudsperson, a Member of the Privacy and Civil Liberties Oversight Board (PCLOB) and the Office of the Inspector General of the Intelligence Community, also participated. The American Arbitration Association, acting as administrator of the Privacy Shield Arbitration Panel, and offering independent dispute resolution under the Privacy Shield is also represented. Finally, some Privacy Shield-certified companies are invited to provide some input during the annual review. On the EU side, it comprised the Commissioner for Justice, Consumers and Gender Equality, representatives of the Commission's Directorate General for Justice and Consumers, and on the other, the Chair of the European Data Protection Board (EDPB)⁵⁰ and representatives designated by the EDPB.

The unique difference in the new regimes is that now the Commission makes its own evaluation of how data transferred from the EU to the US is protected. This action is predicated upon distinctive information flows and clarity of communication as between the parties. It is a form of experimental governance or learning which is interesting and fruitful to consider. Thus The Commission's findings have been summarized in two reports, published in 2017 and 2018,⁵¹ after the annual reviews. These reports are based on the discussions held during the annual review but are also informed by a study commissioned by the Commission, which takes into consideration publicly available material, such as: court decisions; implementing rules and procedures of relevant U.S. authorities; annual reports from independent recourse mechanisms;

⁵⁰ The European Data Protection Board has replaced the Article 29 Working Party on 25 May 2018, as requested by the General Data Protection Regulation (Regulation 2016/679).

⁵¹ First Annual Review of the EU-US Privacy Shield, 2017, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en, accessed 31 October 2019. Second Review of the EU-US Privacy Shield, 2018, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en, accessed 31 October 2019.

transparency reports issued by Privacy Shield-certified companies through their respective trade associations; reports and studies from NGOs active in the field of fundamental rights and in particular digital rights and privacy; press articles and other media reports. The Commission is not dependent on assertions made by US authorities when evaluating the framework and this is worth considering as to the study of the principles and requirements of the CJEU in Schrems giving rise to the regime. It thus constitutes a broader and wider form of governance, involving learning and information sharing across institutions and actors. Thus, this improved assessment mechanism, as well as the guarantees provided by the US government, are supposed to prevent the Privacy Shield from another invalidation.⁵² However, the Commission's role is still ambiguous and its decisions with regard the Privacy Shield remain fragile, because they are dependent upon decisions taken at US level and discussed within an transatlantic framework.

4.3: Bureaucratic Divergence: Information Flow in the Privacy Shield Review Process

The Privacy Shield review process is significant in that the outcome of both review processes is that the Commission approves of the U.S. authorities having put in place structures and procedures enabling the proper functioning of the Privacy Shield which ensure an adequate level of protection for Privacy data. It is important to note that the two annual conclusions to date at the time of writing have strictures of conditionality on them concerning the review and report and the recommendations to accept those reviews based upon US information, actions and processes and ensure a trustworthy flow of information. It is not the only form of assessment taking place here. In addition, reports of the WP Article 29 and the European Data Protection Board and external independent assessments are unified in the concerns that they express. The nature of the limits of the review process conducted appear acutely from the 'black hole' of information that the Commission draws from and feedbacks to. The limited number of actors involved in this specific review process is also of interest, made all the more clear from the external judgments of the process by other independent actors.⁵³ In the review, the Commission considered the mechanisms introduced by the Department of Commerce to proactively monitor compliance by certified companies. After a recommendation made by the

⁵² Arguably there are strong parallels here with the EU-US governance arrangements as to the SWIFT (EU-US TFTP 50 Agreement), involving similar learning, exchanges, time periods of governance etc: Marieke de Goede & Mara Wesseling 'Secrecy and security in transatlantic terrorism finance tracking' (2017) *Journal of European Integration*, 39:3, 253-269, M. De Goede, 'The SWIFT Affair and the Global Politics of European Security' (2012) *JCMS*, 50: 214-230.

⁵³ Cf European Data Protection Board, EU-US Privacy Shield, Second Annual Review 2019, https://edpb.europa.eu/our-work-tools/our-documents/other/eu-us-privacy-shield-second-annual-joint-review-report-22012019_en, accessed 31 October 2019.

Commission in its first Report, the certification process has been ameliorated by the Department of Commerce in order to prevent US companies from claiming compliance with the Privacy Shield before the procedure has been finalised by the. The Department of Commerce has introduced new tools, such as a quarterly review of entities that have been identified as more likely to make false claims which enabled the Department of Commerce to cases of false claims to the Federal Trade Commission (FTC). This thus is a significant development relating to the core weakness identified as to the Safe Harbour regime. The Commission also invited the Department of Commerce to better check whether certified companies actually comply with the Privacy Shield principles, which lead the Department of Commerce to introduce new enforcement mechanisms. Accordingly, while the FTC has been shown to be more active in its enforcement approach to compliance monitoring, the FTC also started to investigate into the Facebook / Cambridge Analytica case and much information about its recent work is yet lacking, says the Commission in its 2018 Report. Most recently, the Commission also asks the Department of Commerce, together with the FTC and the DPAs, to develop guidance on the Privacy Shield principles including to interpret key concepts thereof.

Under the Privacy Shield, EU citizens are intended to enjoy strengthened possibilities to obtain redress in case of an illegal use of their personal. In the US regime complaint-handling and enforcement mechanisms and procedures to safeguard individual rights have been introduced through two mechanisms, an arbitration panel and the Ombudsperson mechanism. While an Acting Ombudsperson was designated in January 2017, the nomination of a permanent Ombudsperson was still pending in late 2018, which lead the Commission to fix a deadline of early 2019. The appointment of a permanent Ombudsman began to take effect in early 2019 after considerable EU pressure, albeit not complete at the time of writing. So far, the Ombudsperson has not received any request, except one complaint that has first been submitted to the Croatian data protection authority.

As far as surveillance is concerned, limitations and safeguards result from Presidential Policy Directive 28, issued in 2014.⁵⁴ The Commission proposed to include them in section 702 of the U.S. Foreign Intelligence Surveillance Act (FISA), which was re-authorized at the beginning of 2018. This was not taken over by the US administration and Congress. On the other hand, the powers of the U.S. Intelligence Community to acquire foreign intelligence

⁵⁴ Presidential Policy Directive 28: Signals Intelligence Activities, 2014, <https://www.hsdl.org/?abstract&did=748332>.

information by targeting non-U.S. persons have not been expanded and the Commission appears satisfied with this outcome. Appointments as to the Privacy and Civil Liberties Oversight Board required by the new EU-US regime have been made as requested by the Commission in its 2017 Report, confirmed by the US Senate in 2018. The Commission had also recommended the public release of the Board's report on Presidential Policy Directive 28, done in late 2018. However, the Commission has no real power to confirm the assertion made in the PCLOB Report that the PPD28 is fully applied across the Intelligence Community. The latter reinforces the significance of the understanding the significance divergences between headline or top-level actions and their communicated understandings of information flows. It further reinforces the need to understand the institutional dynamics between the two administrations or regimes as being multi-level and composite, relying upon a vast network of actors and enforcers to similar degrees. The nature of the information flows here is also of significance, where it is complex to question for those in lower-level enforcement actions and regimes.

5. Conclusion: The shifting transparency practices of transatlantic relations

Through mapping formal and informal communications, agreements and other forms of transatlantic cooperation, this chapter aimed to show the importance of transparency in how EU and US have cooperated and the current shaky waters in which this relation is taking place. Transatlantic relations have traditionally operated as an open space for innovation and broad-scale law-making interactions not inhibited by law-making conventions. The institutionalisation of transatlantic data in the form of the Privacy Shield constitutes a significant development in inter-regime communications and the flow of information. With a vast range of subjects, the regime is an important study of certainty, clarity and communication between actors. By contrast, the significant shift away from institutionalisation and the more limited construction of subjects in the latest transatlantic trade negotiations shows a web of cooperation far apart. Transparency offers a unique insight into understanding inter-regime communications in order 'to connect the dots' and study these evolving subjects in different regimes.

The place of transparency continues to radically evolve in international relations even if it is not consistently appreciated or understood. The contours of transparency, pertaining to a vast range of meanings, actions and entities, shows its dynamism and the necessity to engage in broad-ranging study thereof. The manner in which the US has sought to engage bilaterally

with EU Member States instead of the EU and even to ‘dis-acknowledge’ it is particularly remarkable. The shifts in transparency and crumbling exceptions thus represent important developments. Communications and the lack thereof have also have exposed highly variable transparency practices, oscillating between friend and foe. Diplomatic recognition issues, tariff wars, new trade negotiations have put an extraordinary strain on one of the most exceptional alliances in global governance. Digital diplomacy and the openness of engagement even with hostility marks this era. Yet closer cooperation between the two in newly institutionalised regimes of cooperation is also significant, demonstrating highly distinctive flows of information. They necessitate careful reflection about the shifting modes of transparency in institutionalised and non-institutionalised regimes or areas of cooperation under negotiation between the EU and US long-term. One significant feature of this new era irrespective of its outcome is the evolving place of openness and transparency of the evolving relationship and the flexibility of practice. Now, a significant gap is opening up in transatlantic practices in core areas of global governance institutions, where the transatlantic alliance had been forged e.g. WTO reform in particular or in the field of investment law reform bilaterally and multilaterally. Data institutionalisation has been one area of significant distance and closeness in EU-US relations recently (Privacy Shield, Umbrella Agreement in contrast to cloud computing and technology merger control), but with limited multilateral agendas.

This chapter showed that transatlantic relations have led to increased transparency initiatives for the EU towards its citizens and becoming a more organised actor in international relations since pressures from European Parliament, civil society and citizens directly was mounting toward pushing the EU in this direction. Yet on the other side of the pond, at Presidential level, transparency has been replaced by uncertainty and Twitter diplomacy and whilst efforts have been made to maintain levels of institutionalisation, the cases analysed here of trade and data economy show incoherence in US’s approach. How transatlantic transparency will evolve remains also to a large extent contingent on what the next U.S. elections will result, yet it is already clear that transatlantic regime produces distinctive transparency practices that should continue to be further studied and analysed.