

EDITORIAL COMMENTS

A new attempt at a Transatlantic Free Trade Area, or is other work more important?

Some leaders of the Union's half-yearly Presidencies start their "reign" more felicitously than others: for Mrs Merkel not a frontal attack on the Court of Justice, as for Mr Schüssel,¹ but a measured speech with, as one of its most important points, the intent to re-establish good relations across the Atlantic and to inject the transatlantic relationship with some new dynamism. Inevitably on such occasions the idea of a transatlantic free trade area (TAFTA) or a barrier-free North-Atlantic market crops up once again.²

Mrs Merkel's initiative to breathe new life into the TAFTA idea raises two sets of questions. First of all, is a general transatlantic free trade area realistic or can it realistically be delivered within a short time period? To what extent would politico-legal obstacles on both sides of the Atlantic seriously hamper the chances of success of a TAFTA? Second, and perhaps more importantly, would changing the subject help to overcome the current rift in transatlantic relations? Isn't that rift much more inspired by uncertainty about shared values and isn't it much more important to overcome that uncertainty in order to combat the crisis than to shift the attention to a TAFTA?

1. How realistic is a TAFTA?

There are a number of politico-legal reasons why a new Transatlantic Free Trade Association or a barrier-free market is probably not feasible, certainly not in the short run; at least not in the way many Europeans envisage it, on the basis of a binding international agreement. Let us first have a look at some realities on the US side. First of all, the NAFTA (with Canada and Mexico) barely passed Congress and has remained extremely controversial in congressional circles. Secondly, the United States has never concluded a comprehensive economic/trade agreement of any significance with a partner of equal economic weight. Thirdly, concluding such an agreement implies

1. The text of the interview could be found on the website of the Austrian Presidency at the time: www.eu2006.at/de/News/Speeches_Interviews/schuessel_sueddeutsche.html.

2. Speech from Angela Merkel to the European Parliament at the start of the German Presidency. www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html.

relinquishing economic sovereignty on a scale unknown and probably unacceptable to the US Congress. It is the US Congress that must authorize the Executive to negotiate about trade liberalization. This so-called fast track authority must be renewed early this summer; it will be interesting to see if that authorization is forthcoming, not only for the prolongation of the Doha Round, but also for a possible TAFTA. Moreover, in order to have maximum effect at grass roots level, such an agreement should preferably be self-executing (to have direct effect in European terms). So far, however, the US Congress has carefully excluded such direct effect in domestic law both for the WTO and the NAFTA – a position which for the WTO has been mirrored by the Community Institutions, most importantly the Court of Justice.³

The last point already shows that it may be equally difficult for the EC – for legal – institutional reasons – to conclude a fully-fledged agreement on trade liberalization in order to bring about such a TAFTA or North-Atlantic Market. Moreover, the Community is constrained by the fact that certain of its regulatory regimes are fairly recent and of a very specific “European” character. If one thinks, for example, of the new REACH Regulation,⁴ the Cosmetics Directive,⁵ the Hormones⁶ and the GMO legislation⁷ and so forth, it may be very difficult for the Community to conclude binding agreements which would have an impact on these. The hormones and GMO rules are being defended with great persistence in the WTO framework; it would be extremely difficult to modify them substantially. And these are only the regulatory regimes that affect trade in goods. Once one begins to consider trade in services, additional complications appear, such as the regulatory regimes on banking, auditing, corporate governance etc. One only needs to mention the

3. See Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395.

4. Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 Dec. 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), O.J. 2006, L 396/1.

5. Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, last amended by Commission Directive 2007/1/EC of 29 January 2007. It is interesting to note that the Cosmetics Directive forbids animal testing of cosmetics, whereas in the US cosmetics may not be imported if they have not been tested on animals.

6. The Hormones legislation, after condemnation by the Appellate Body of the WTO (WT/DS 26 and 48), has been reformed and based on a new risk assessment and is now the subject of a second WTO litigation in which the report will be officially published in a few months time (WT/DS 320).

7. The GMO legislation as such has been spared in the recent report of the WTO panel (see WT/DS 291), but its application has been seriously criticized in certain cases. The Community must now make all necessary efforts to bring the implementation of the legislation in conformity with WTO law.

US Sarbanes-Oxley legislation⁸ with its extra-territorial effects, in order to realize that the obstacles in that area will also be considerable.

It is no coincidence that recent attempts at closer cooperation, and even integration, in the economic sphere between the two sides of the North-Atlantic have been based on voluntary cooperation between departments of government (transatlantic regulatory dialogue)⁹ and between civil society groups (transatlantic business dialogue).¹⁰ The exceptional cases in which agreements have been concluded in the economic sphere between the US and the EC have typically been sectoral agreements, such as on cooperation between competition authorities. That is not to say that this cooperation agreement is not important and is not fully adhered to, but experience has shown that as soon as sectoral agreements become more ambitious, such as the projected EC-US aviation agreement, they risk foundering on regulatory obstacles (in the case of the aviation agreement, the US legislation on “US control” of the US airline companies – although at the time of writing the prospects for a conclusion of the agreement seem suddenly quite good).

In short, in spite of the ambitious goal set in the German chancellor’s speech, it is likely that the outcome of the discussions between the EC and US in preparation for the late May summit will go more in the direction of a non-binding or programmatic document emphasizing voluntary and incremental steps at regulatory approximation, largely inspired by the private sector. It is arguably only by taking this long road, but doing so with great persistence over a long period of time, that perhaps after a generation the public mentality on both sides of the North-Atlantic may become ripe for the kind of binding integration that Mrs Merkel envisages.

2. *Other transatlantic priorities?*

It is already daunting enough that patience, persistence and a very long-term view are necessary to get anywhere near Mrs Merkel’s goal, but the next question is whether we are presently in a situation where the elites in the US and the EU are likely to be capable of taking such a long-term view? And to what extent would greater integration of the US and EC economies across the Atlantic be able to restore the relation of trust between the two sides?

8. Public Company Accounting Reform and Investor Protection Act.

9. On the Trans-Atlantic Regulatory dialogue see, Bermann, Herdegen and Lindseth (Eds), *Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects* (OUP, 2001).

10. On the Trans-Atlantic Business dialogue or TABD see ec.europa.eu/comm/external/external_relations/us/intro/building_bridges.htm.

Unfortunately, for the moment the answer is very much in doubt. On the European side the underlying cause of the morose mood experienced by many as far as relations with the US are concerned is not economic, but politico-legal. It is linked to a number of issues which have demonstrated that the official US view and the US recourse to certain legal principles do not always coincide with what is considered fundamentally “right” in European perspective. There is in many circles a feeling that perhaps we do not share the same values with the US any longer, at least not at the moment. Excesses at Abu Ghraib, systematic deficiencies in Guantanamo, problems related to the protection of private data, such as the Passenger Name Records (PNR) agreements and the SWIFT affair,¹¹ extra-ordinary renditions and targeted killings of terrorist suspects¹² all contribute to giving grounds to this suspicion on the part of a substantial and well-informed section of the European public. This is an obstacle that cannot be addressed by stronger economic ties and fewer barriers to trade in goods and services.

What has been done so far to address these problems of lack of trust on fundamental issues of humanitarian law and human rights – and this has become known more generally only recently¹³ – has come from the current Legal Adviser of the Department of State, John Bellinger III, who has sought out his European counterparts and European NGOs on this issue. He has explained US positions on some of the issues mentioned above and tried to convince his EU counterparts of their compatibility with international law. On other issues he has announced a change in US legal policy: whether the acceptance of Common Article 3 of the Geneva Conventions as a basic threshold for the treatment of detainees is due to the influence of a united European reaction or rather in response to Supreme Court rulings such as that in the

11. In the so-called PNR case, the original agreement between the EC and the US (O.J. 2004, L 183/83) on the processing and transfer of passenger data by air carriers to the US Department of Homeland Security, accompanied by a so-called adequacy finding under Directive 95/46 (O.J. 2004, L 235/11) was annulled by the ECJ in Cases C-317–318/04, *Parliament v. Council and Commission*, replaced by an *interim* third pillar agreement on the same subject matter (O.J. 2006, L 298/27), which in turn will have to be replaced by another, more permanent third pillar agreement, for which the Council has given negotiation directives.

In the SWIFT case, the Belgian cooperative active in the sector of processing and transfer of financial messages, transfers and holds a copy of all its messages in an establishment in the US, where it is subject to the *subpoena* power of the Department of the Treasury, also for anti-terrorist objectives. The best report on this issue is that of the so-called Article 29 Working Party under Directive 95/46, see Opinion 10/2006 on the processing of personal data by SWIFT, adopted on 22 Nov. 2006.

12. This is the issue of the so-called CIA flights by which allegedly persons were transferred to countries where they had to fear being subjected to torture.

13. See, for instance interview with John Bellinger III in *El Pais* of 1 March 2007.

Hamdan case¹⁴ is an open question. From what has become known about these discussions so far, it is clear that a number of problems continue to divide the two sides: these include the different systems of data protection, the question of what minimum rights the so-called unprivileged combatants can rely on, the notion that the US is engaged in a worldwide war against Al-Qaeda and its affiliates and the consequences of that view, the extraterritorial application of international human rights law, under what conditions so-called renditions are prohibited by international law, whether secret detention is lawful, to mention the most striking.

These are not small matters and they are not merely a question of the US being exposed to greater risks or actually fighting a war; one has only to look at the UK to see the possibility of a different reaction.¹⁵ Data protection has become a fundamental right in Europe, with independent data protection authorities watching over abuse from public and private sources alike.¹⁶ In the US, data protection, like many other regulatory matters, is made much more dependent on private litigation, a non-negligible difference in the effectiveness of protection. The US view that it is engaged in an actual war with Al Qaeda worldwide entails as an ultimate consequence that the US armed forces are legitimized militarily to engage Al Qaeda members wherever they are in the world. Obviously the US says that it would not undertake an attack with helicopter gunships on alleged Al Qaeda operatives in the streets of Brussels or Berlin. However, it would seem that the question whether it would carry out such an attack depends in principle on whether the State on whose territory such an attack could occur would be capable or willing enough to co-operate, through normal criminal law means, with the US against the persons in question. Apparently, this new theory, therefore, is ultimately based on the subjective views of the US on this question and not on objective criteria of international law. Likewise, the US rejection of international human rights obligations when exercising jurisdiction outside US territory, like in Guantánamo, gives rise to serious misgivings. It is not merely that the European Court of Human Rights has determined that every country is responsible for its alleged breaches of human rights not only within its territory, but

14. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

15. In the UK, excessive anti-terrorist legislation has been struck down – The House of Lords ruled on 16 Dec. 2004, that the detention without trial of nine foreigners under the Anti-terrorism, Crime and Security Act 2001 was incompatible with European (and, thus, domestic) human rights laws, *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56. In general the UK does not follow the US in extreme views on the war against Al-Qaeda.

16. Refer to EU Charter of Fundamental Rights Art. 8; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31.

within its jurisdiction and that thus the problem can be reduced to the difference in human rights law applicable in Europe and the Americas.¹⁷ If the US is not responsible for acts of its officials carried out on the Cuban base, who is? The law on State responsibility is crystal-clear on the issue.¹⁸ The US attitude on so-called extra-ordinary rendition reflects an equally narrow view of that country's international human rights obligations. European countries are clearly constrained by the restrictive conditions that have been laid down in two cases decided by the European Commission and Court of Human Rights,¹⁹ which essentially say that a person must immediately after his rendition be notified of the accusations against him and can only be detained on the basis of an arrest warrant issued in an ordinary criminal procedure. The US, though now accepting that nobody should be rendered to a country where he suffers a serious risk of torture, does not accept the other restrictions, not least because it is not subject to the European Convention of Human Rights. Finally, one can only hope that the US view that secret detention is not prohibited by international law will be revised some day.

It is obvious from this list of some of the most important differences in points of view, that the problems dividing the US and the EU on fundamental issues of humanitarian law and human rights are still considerable. It is equally obvious that a large amount of work is still necessary to restore full confidence in the belief that the US and the EU stand for the same values. The kind of contacts and exchanges of ideas that have been taking place between the Legal Advisors of both sides is crucial in this process. It is here that efforts must be concentrated, as a pre-condition for the ultimate success of the economic discussions to be undertaken.

17. See the "jurisdiction phase" of the case of *Loizidou v. Turkey*, ECHR, 1995 ECHR 10, para 10.

18. See the criteria of the law of State responsibility, Arts. 4 and 5 of the Draft Articles on State Responsibility.

19. *Ramirez Sanchez v. France*, Application No. 59450/00; *Öcalan v. Turkey*, Application No. 46221/99.