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The role of the European Parliament in the conclusion of the Transatlantic Agreements on the transfer of personal data after Lisbon

Juan Santos Vara



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**The role of the European Parliament in the
conclusion of the Transatlantic Agreements
on the transfer of personal data after Lisbon**

Juan Santos Vara*

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ABSTRACT

The application of the ordinary legislative procedure to the adoption of acts in the area of police and judicial cooperation in criminal matters has enhanced the role of the European Parliament in the conclusion of international agreements. In the past, the European Parliament strongly opposed to the US demands on data transfers. It must be recognised that the new powers vested in the European Parliament by the Lisbon Treaty have enabled it to influence the negotiation of agreements in the area of police and judicial cooperation in criminal matters, in particular in the field of data processing. However, the analysis of the 2010 SWIFT and 2011 PNR Agreements reveal that the European Parliament decided not to oppose to US demands on data transfers. Even though many MEPs expressed strong reservations against these Agreements, the Parliament decided to accept most of the US' requirements. The change of the Parliament's position is due to the fact that it felt included and listened in the negotiation process by the actors involved. In conclusion, the European Parliament is using the powers conferred on it by the Lisbon Treaty more to assert its new role on the conclusion of international treaties in the area of police and judicial cooperation in criminal matters than to influence the substantial content of the transatlantic agreements.

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1. Introduction

Since the terrorist attacks of 11 September 2001, the European Union (EU) and the United States (US) have intensified police and judicial cooperation in criminal matters. One important element in the transatlantic cooperation is the transfer and processing of personal data for the prevention, investigation and prosecution of crimes, including terrorism. The cooperation with the US in the fight against terrorism has led to intensified political dialogue and the conclusion of several agreements in the area of justice and home affairs. The treaties concluded so far are the following: the Agreements on extradition and mutual legal assistance of 2003,¹ Agreements between the US and Europol,² the 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,³ the Agreement between the US and Eurojust of 2006,⁴ the Agreement on the security of classified information,⁵ the Agreements on the use and transfer of Passenger Name Records (PNR) to the US Department of Homeland Security (DHS) of 2004, 2006, 2007 and 2011,⁶ and the Agreements on the processing and transfer of Financial Messaging Data from the EU to the US for the purposes of the Terrorist Finance Tracking Program of 2009 and 2010.⁷

The conclusion of transatlantic agreements to facilitate the transfers of data for the purpose of combating terrorism and organised crime is essential to address the challenges the EU and the US face in this area, but poses very intricate issues, in particular as regards the protection of fundamental rights. In the past, the European Parliament strongly opposed to the US demands on data

¹ OJ 2006, L 181/27 and OJ 2006, L 181/34.

² Agreements between the United States of America and the European Police Office of 6 December 2001 and 20 December 2002.

³ OJ 2004, L 304/34.

⁴ Agreement between Eurojust and the United States of America of 6 November 2006.

⁵ OJ 2007, L 115/30.

⁶ Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004, L 183/84; Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ 2006, L 298/29; Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ 2007, L 204/18; Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, COM(2011) 807 final.

⁷ 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 purposes of the Terrorist Finance Tracking Program, OJ 2010, L 8/11; 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, OJ 2010, L 195/5.

transfers. The Parliament requested to strike a balance between the fight against terrorism and other serious crimes and the protection of civil liberties and fundamental freedoms. However, the role attributed to the European Parliament in the conclusion of international agreements in the Area of Freedom, Security and Justice (AFSJ) was marginal.

The application of the ordinary legislative procedure to the adoption of acts in the area of police and judicial cooperation in criminal matters has enhanced the role of the European Parliament in the conclusion of international agreements. The new powers vested in the Parliament by the Lisbon Treaty have enabled it to influence the negotiation of agreements in the area of police and judicial cooperation in criminal matters, in particular in the field of data processing. The European Parliament seems willing to use the new powers in the conclusion of international agreements conferred on it by the Lisbon Treaty in this area. The refusal to give its consent to the EU-US SWIFT agreement in February 2010 and the deferral of its consent on the PNR agreements with the USA and Australia in December 2010 are good examples. If the Parliament must give its consent to this kind of treaties, it will need to be involved at early stages of the negotiation process.

The PNR and SWIFT Agreements fall within the scope of the current negotiations for an agreement between the EU and the US on the exchange of personal data in the framework of police and judicial cooperation in criminal matters.⁸ On 3 December 2010, the Council authorised the opening of the negotiations for an agreement between the EU and the US on the protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police and judicial cooperation in criminal matters. This proposal was included in the Action Plan Implementing the Stockholm Programme.⁹ The objective is to negotiate an umbrella agreement that provides for a coherent set of data protection standards in the relations between the EU and the US. However, this agreement would not provide the legal basis for any specific transfers of personal data. A specific legal basis for such data transfers would always be required. The conclusion of this agreement would not provide for a higher level of protection of personal data if it does not contain additional rules to the specific agreements on data transfer. It would also be required to ensure the effective application of data protection and their supervision by independent authorities.

The aim of this paper is to analyse to what extent the European Parliament is using in practice the new powers to influence the substantial content of the transatlantic agreements or to assert its new role in the conclusion of international treaties. The paper focuses on the agreements concluded in the area of

⁸ See European Commission, *European Commission ready to start talks with US on personal data agreement to fight terrorism or crime*, Press Release, 3 December 2010, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1661>> (last visited 18 May 2012).

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions-Delivering an area of freedom, security and justice for Europe's citizens-Action Plan Implementing the Stockholm Programme, COM(2010) 171 final.

police and judicial cooperation in criminal matters, in particular in the field of data processing with the US. The first section of the paper will examine the new powers attributed to the European Parliament on the conclusion of international agreements in the AFSJ. In the following two sections, it will be shown how transferring substantial powers to the European Parliament is affecting the field of data processing in the external dimension of the AFSJ. The study will focus on the two agreements concluded so far since the entry into force of the Lisbon Treaty: the SWIFT and the EU-US PNR Agreements. The vote of the European Parliament on the SWIFT and PNR agreements will have significant implications for EU external relations and, in particular, for the cooperation with US in the fight against terrorism.

2. An enhanced role for the European Parliament in the conclusion of agreements in the area of police and judicial cooperation in criminal matters

The role that the former Treaty on European Union (TEU) attributed to the European Parliament in the third pillar was wholly marginal within both the internal and the external dimensions of the AFSJ. In a Resolution from 2007 the European Parliament pointed out the need to improve the democratic accountability in the external dimension of the AFSJ.¹⁰ The Parliament had also urged the Council Presidency and the Commission to consult the Parliament when the agreements would affect the fundamental rights of Union citizens and the main aspects of judicial and police cooperation with third countries or international organisations.¹¹ However, there is no doubt that the Parliament managed to make intelligent use of the mechanisms of political and judicial control provided for in the TEU in order to try to influence the content of third-pillar acts.¹² For example, the European Parliament was not involved in the negotiations of the Agreements on extradition and mutual legal assistance between the EU and the US. Nonetheless, the European Parliament exploited the possibilities for political control bestowed upon it by former Articles 39(1)-(2) TEU to try to influence the content of the agreements.¹³ As will be shown in the second part of this paper, the Parliament has also been very critical with the conclusion of the PNR Agreements and the SWIFT Agreements with the US.

¹⁰ European Parliament Resolution of 21 June 2007 on an area of freedom, security and justice: Strategy on the external dimension, Action Plan implementing the Hague programme (2006/2111(INI)).

¹¹ *Ibid.*, points 1 and 2.

¹² See J. Martín y Pérez de Nanclares, 'La posición del Parlamento Europeo en el espacio de libertad, seguridad y justicia', in E. Barbé Izuel and A. Herranz Surrallés (eds.), *Política Exterior y Parlamento Europeo: hacia el equilibrio entre eficacia y democracia* (Barcelona: Oficina de Información del Parlamento Europeo 2007).

¹³ See the European Parliament Recommendation B5-0540/2002, requesting the Council to inform it as well as national parliaments on the progress of the negotiations and Resolution B4-0813/2001, where the Parliament insisted on safeguards such as not allowing extradition if the defendant could be sentenced to death in the USA.

The entry into force of the Lisbon Treaty has led to major progress that contributes to alleviating the deficiencies that characterised European cooperation in this field from a democratic perspective.¹⁴ The application of the ordinary legislative procedure to the adoption of acts in the area of police and judicial cooperation in criminal matters has strengthened the EU's democratic accountability, and this democratic enhancement is obviously having repercussions on the external dimension of all policies included in the AFSJ. The new powers vested in the European Parliament by the Lisbon Treaty enables it to influence the implementation of the actions undertaken by the EU both in policies on border checks, asylum, and immigration and in police and judicial cooperation in criminal matters.¹⁵ The Parliament will also be able to influence the content of any agreement on the exchange of personal data with third countries.¹⁶

Whereas in the past there was not any parliamentary involvement in the third pillar agreements,¹⁷ the consent of the European Parliament is required in a wide range of international agreements, including those concerning domains subject to the ordinary legislative procedure in the internal sphere of the Union.¹⁸ According to Article 218(6) TFEU, the Council shall conclude the agreements on police and judicial cooperation on criminal matters after obtaining the consent of the European Parliament in the case of agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. It means that the Council shares with the Parliament the power of concluding international agreements in the whole AFSJ.

Since the conclusion of the international agreements in this area depends on the consent of the European Parliament, its involvement in the early stages of the negotiations seems logical. Article 218(6) states that 'the European Parliament shall be immediately and fully informed at all stages of the procedure'. The involvement of the European Parliament is not limited to the conclusion of agreements where consent by the European Parliament is required. However,

¹⁴ See European Parliament, Report on the Treaty of Lisbon (2007/2286(INI)), 29 January 2008 and Resolution of 20 February 2008 on the Treaty of Lisbon, Doc. A6-0013/2008.

¹⁵ For thorough comments on the institutional implications of the Lisbon Treaty for the external dimension of the AFSJ see S. Poli, 'The Institutional Setting and the Legal Toolkit', in M. Cremona, J. Monar, and S. Poli (eds.), *The External Dimension of the European Union's Area of Freedom, Security and Justice* (Brussels: Peter Lang 2011) 25-75; J. Santos Vara, 'The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty', 10 *European Journal of Law Reform* 2008, 577-597.

¹⁶ H. Hijmans and A. Scirocco, 'Shortcomings in EU data protection in the third and second pillars. Can the Lisbon Treaty be expected to help?', 46 *Common Market Law Review* 2009, 1485-1525, at 1522.

¹⁷ See former Arts. 24 and 38 of the TEU.

¹⁸ There are only two exceptions to the application of the ordinary legislative procedure in the area of police and judicial cooperation on criminal matters. Art. 87.3 TFEU deals with operational cooperation between police authorities, and Art. 89 lays down the conditions and limitations under which the competent authorities of the Member States may operate in the territory of another Member. In both cases the Council shall act unanimously after consulting the European Parliament. Consequently, the conclusion of international agreements in this area will not depend on the consent of the European Parliament.

the European Parliament must be included and listened in the negotiation of the agreements whose conclusion depends on the Parliament's consent. Consequently, the European Parliament is not only called to give its consent or not. The involvement of the European Parliament in the process of conclusion of international agreements is much more developed than in the Member States constitutional systems. J. Monar stresses that 'unlike in the case of national governments, neither Council nor Commission is normally able to take the backing of the European Parliament for granted since the clear link between executive governmental power and a stable parliamentary majority typical for democratic parliamentary systems does not exist in the EU'. Consequently, he argues that 'the Commission and Council will therefore have to invest more into majority building within the Parliament'.¹⁹

The obligation to fully inform the Parliament at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives, is further developed in the Framework Agreement on relations between the European Parliament and the European Commission from 2010. The Framework states that 'in the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (...). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled'.²⁰ The Council expressed its concerns to the role attributed to the Parliament by the Framework Agreement. In a Declaration published in the Official Journal, the Council pointed out that several provisions of the Framework Agreement, in particular the provisions on international agreements, 'have the effect of modifying the institutional balance set out in the Treaties in force, according the European Parliament prerogatives that are not provided for in the Treaties and limiting the autonomy of the Commission and its President'.²¹

¹⁹ J. Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications', 15 *European Foreign Affairs Review* 2010, 143-151.

²⁰ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304/47, 20 November 2010, at 61.

²¹ Council statement on the Framework Agreement on relations between the European Parliament and the Commission, OJ C 287/1, 23 November 2010. The interinstitutional tension on the new role conferred to the European Parliament is reflected in the oral interventions made by heads of the institutions' legal services before the FIDE Closing Session in Madrid. See A. Tizziano *et al.*, 'Eleven Months of the Lisbon Treaty: Assessment and Perspectives', *XXIV International Federation for European Law (FIDE) Congress, Final Roundtable and Conclusions. Proceedings of the FIDE XXIV Congress* (Madrid 2010, Vol. IV), 20-23, available at <<http://www.fide-europe.eu/index.php>>.

3. The role of the European Parliament in the negotiation of the SWIFT Agreements

3.1. *The SWIFT Agreement of 2009*

SWIFT is a member-owned cooperative that offers the transfer of financial messaging data to the bank entities. More than 9000 banking organisations, securities institutions and corporate customers in 209 countries use SWIFT every day to exchange millions of standardised financial messages. SWIFT is based in Belgium and has offices in the world's major financial centres, including the US. SWIFT is organised into three regions: Americas, Asia Pacific, and Europe, Middle East and Africa.²²

After 11 September 2001, the US Government initiated the Terrorist Finance Tracking Program (TFTP). The aim of the Program is to fight against the financing of terrorism all over the world. In the context of this Program, the US Treasury Department issued subpoenas, among others, to SWIFT's Centre in the US to obtain financial messaging data. The US Centre had servers that contained the same information as the EU SWIFT Centre. Consequently, the Treasury Department had full access to the financial transfers made by many Europeans.

The press revealed in 2006 the existence of the TFTP. It was also known that the US authorities had been widely accessing European data. The lack of compatibility with the obligations under the Data Protection Directive 95/46 as well as Member States' laws implementing that Directive caused significant controversy in Europe.²³ At the end of 2006, the Article 29 Working Group released an opinion on the processing of personal data by SWIFT. It was stated that the massive transfer of personal data to the US clearly infringed European data protection rules. From the first moment, the European Parliament expressed also its concern on the violation of European and national data protection norms.²⁴ In a Resolution adopted in 2007, the Parliament pointed out that 'businesses with operations on both sides of the Atlantic increasingly find themselves caught between the conflicting legal requirements of the US and EC jurisdictions'.²⁵ For this reason, the Parliament called for the conclusion of an international agreement with the US to end the legal uncertainty with regard to data sharing and transfer between the EU and the US.

On 28 June 2007, US authorities made a series of unilateral commitments (the so-called TFTP Representations) to the EU regarding the controls and safeguards governing the handling, use and dissemination of data under the

²² For more details visit <http://www.swift.com/about_swift/company_information/swift_of_fices.page> (last visited 20 May 2012).

²³ Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 1995, 281, 23/31.

²⁴ European Parliament resolution on the interception of bank transfer data from the SWIFTsystem by the US secret services, OJ 2006, C 303E/843.

²⁵ European Parliament resolution on SWIFT, the PNR agreement and the transatlantic dialogue on these issues, OJ 2007, C 287E/349.

TFTP. The US Treasury pointed out that the Program has been designed and implemented to meet applicable US legal requirements, to contribute meaningfully to combating global terrorism.²⁶ It was pointed out that the information obtained was exclusively used for investigating and prosecuting terrorism or its financing. The US accepted also the appointment of 'an eminent person' to confirm that the program is implemented consistent with these Representations for the purpose of verifying the protection of EU-originating personal data.²⁷ In March 2008, the Commission appointed the French Judge J.-L. Bruguière as 'eminent European person', who issued his first report in January 2009. Judge J.-L. Bruguière considered that the TFTP has generated significant value for the fight against terrorism in the US, in Europe and beyond.²⁸ He stated that the TFTP is implemented in accordance with the US Representations.

In order to understand the need to conclude the SWIFT Agreement, a reference should be made to the restructuring of the SWIFT servers launched in 2007 and completed in late 2009. Before the relocation of the SWIFT servers, SWIFT stored messages on two identical ('mirror') servers in order to enhance data resilience, located in Europe and the US. According to its new messaging architecture, as of 1 January 2010, intra-EU message data will now exclusively be processed and stored within Europe. The result is that a significant part of the data which have formed the basis of TFTP subpoenas will no longer be stored in the US.

On 27 July 2009, the Council decided to authorise the Presidency, assisted by the Commission, to open negotiations for an Agreement between the EU and the US on the processing and transfer of Financial Messaging Data from the EU to the US for the purposes of the TFTP on the basis of the former Articles 24 and 38 TEU. The changes introduced by SWIFT made it necessary to conclude an agreement between the EU and the US on the processing and transfer of financial messaging data. The agreement was aimed at preventing and combating terrorism and its financing, subject to strict compliance with safeguards on privacy and the protection of personal data. The agreement would allow the US to request the designated providers, including SWIFT, to make available to the US Treasury financial payment messaging data stored in the EU.²⁹ As J. Monar said the majority of the EU Member States supported the negotiation of such an agreement, 'not only because of its contribution to transatlantic counter-terrorism cooperation but also because some TFTP-pro-

²⁶ Terrorist Finance Tracking Program - Representations of the United States Department of the Treasury, OJ 2007, C 166/18. See also Council of the European Union, *Processing and protection of personal data subpoenaed by the Treasury Department from the US based operation centre of the Society for Worldwide Interbank Financial Telecommunication (SWIFT)*, 11291/2/07 REV 2 (Presse 157), 28 June 2007, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/95017.pdf>.

²⁷ It is stated in the document sent by the US authorities that 'the eminent person will monitor that processes for deletion of non-extracted data have been carried out' and 'shall act in complete independence in the performance of his or her duties. The eminent person shall, in the performance of his or her duties, neither seek nor take instructions from anybody'.

²⁸ IP/09/264, 17 February 2009.

²⁹ 2009 SWIFT Agreement, *supra* note 7.

vided intelligence would continue to be available for counter-terrorism investigations within the EU'.³⁰

3.2. *The implications of the Lisbon Treaty for the 2009 SWIFT Agreement*

The fate of the 2009 SWIFT Agreement was considered to be indisputably linked to the entry into force of the Lisbon Treaty and the significant changes brought to decision-making procedure in the AFSJ.³¹ As was the case with the PNR Agreement after the judgment of the Court of Justice of 2006,³² the SWIFT Agreement had to be renegotiated. In the third pillar, a marginal role was attributed to the European Parliament in the conclusion of international treaties.³³ However, since the Lisbon Treaty came into force, the consent of the European Parliament is required for the conclusion of the SWIFT Agreement.³⁴

During the negotiations of the SWIFT Agreement the European Parliament started to affirm its new role on the conclusion of international treaties, even though at that time it was still uncertain when the Treaty of Lisbon would enter into force. On 17 September 2009, the European Parliament adopted a Resolution on the proposed SWIFT Agreement.³⁵ Even though the Parliament admitted the relevance of the Agreement in the fight against terrorism, it also pointed to 'the need to strike the right balance between security measures and the protection of civil liberties and fundamental rights, while ensuring the utmost respect for privacy and data protection'. Since the conclusion of the agreement was absolutely necessary, the Parliament required that it had to ensure the following minimum requirements: data were transferred and processed only for the purposes of fighting terrorism, as defined in Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;³⁶ the processing of data was not disproportionate to the objective for which those data have been transferred; the EU citizens and enterprises were granted defence rights and the right of access to justice; a reciprocity mechanism was included in the agreement, requiring US authorities to transfer relevant financial

³⁰ J. Monar, *supra* note 19, at 146.

³¹ 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, Austrian Academy of Sciences*, Working Paper No 04/2011, available at <<http://ideas.repec.org/p/er/p/er/p0022.html>>.

³² ECJ, Joined Cases C-317/04 and C-318/04, *Parliament v. Council* [2006] ECR I-4721. See L. González Vaqué, 'El Tribunal de Justicia de las Comunidades Europeas anula el Acuerdo entre la Comunidad Europea y los EEUU para la transmisión de los datos sobre los pasajeros por las compañías aéreas', 20 *Revista Española de Derecho Europeo* 2006, 557-577; G. Gilmore and J. Rijma, 'Joined cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*, judgment of the Grand Chamber of 30 May 2006, [2006] ECR I-4721', 44 *Common Market Law Review* 2007, 1081-1099.

³³ See J. Santos Vara, *supra* note 15, 592 et seq.

³⁴ See Art. 218(6) (a).

³⁵ European Parliament Resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing, P7_TA(2009)0016.

³⁶ Council Framework Decision of 13 June 2002 on combating terrorism, OJ 2002, L 164/3.

messaging data to the competent EU authorities; the inclusion of a sunset clause in the interim agreement not exceeding 12 months, and the conclusion of a new agreement in accordance with the Lisbon Treaty that fully involves the European Parliament.

However, disregarding the Parliament's concerns, on 30 November 2009, one day before the entry into force of the Treaty of Lisbon, the Council authorised the Presidency to sign the interim Agreement on the transfer of Financial Messaging Data from the EU to the US for purposes of the Terrorist Finance Tracking Program.³⁷ The Agreement would be applied on a provisional basis from 1 February 2010, pending its entry into force and would last for a maximum duration of nine months. It was to be replaced for a long-term agreement to be concluded in accordance with the Treaty of Lisbon. Also, on 17 December 2009, the Commission adopted a formal proposal to conclude the SWIFT Agreement.³⁸

The need to seek the Parliament's approval to conclude the SWIFT Agreement was used by Parliament to put into effect the new powers granted by the Treaty of Lisbon.³⁹ On 10 February 2010, the European Parliament adopted the report of the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), recommending the rejection of the agreement.⁴⁰ Even though the Parliament admitted the importance of transatlantic cooperation for counter-terrorism purposes, it stressed that the TFTP 'must be considered as a departure from European law and practice in how law enforcement agencies would acquire individuals' financial records for law enforcement activities, namely individual court-approved warrants or subpoenas to examine specific transactions instead of relying on broad administrative subpoenas for millions of records'.⁴¹ Also, the Parliament complained about the unwillingness to give the Parliament full information at all stages of the negotiation process, including the opinion of the Council Legal Service and the two reports made by Judge J.-L. Bruguière. Moreover, the Parliament stressed that the duty of parliamentary information was a reflection of the more general duty on the institutions to practice mutual sincere cooperation. In order to avoid the rejection of the Agreement, the Council issued a declaration on 9 February 2011, one day before the

³⁷ Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European 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 purposes of the Terrorist Finance Tracking Program, *OJ* 2010, L/9.

³⁸ COM (2009) 0703 final. The decision was based on Art. 82(1)(d), 87(2)(a) in relation with Art. 218(6)(a) TFEU.

³⁹ Recommendation of February 2010 on the Proposal for a Council decision on the conclusion 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 purposes of the Terrorist Finance Tracking Program, A7-0013/2010.

⁴⁰ European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion 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 purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)).

⁴¹ *Ibid.*

vote in the Parliament.⁴² The Council pointed out that the Agreement should have a transitional nature, having a maximum duration of nine months and contained an important number of the guarantees which were called for by the Parliament's Resolution of 17 September 2009. In addition, the Council accepted the negotiation of a longer term EU-US TFTP agreement and called on the Commission to adopt draft negotiation guidelines that fully take into account the concerns expressed by the Parliament. It was admitted that the Parliament must be fully informed at all stages of the negotiation procedure when its consent is required before the formal conclusion of the agreement.⁴³

Alarmed by the possible rejection of the Interim SWIFT Agreement, the US Administration made an unprecedented lobbying effort towards the Parliament.⁴⁴ For instance, on 5 February 2010, H. Clinton, then US Secretary of State, made a phone call to the Parliament's then President J. Buzek and sent him a joint letter with T. Geithner, Treasury Secretary warning the Parliament about the negative consequences arising from the rejection of the Agreement. Also, the Spanish Presidency of the Council tried to persuade the Parliament to back the SWIFT Agreement, offering the Parliament full access to classified information during the negotiation of the permanent agreement.⁴⁵ Even though Member States did not have exactly the same view on the Agreement, they shared their preference for healthy transatlantic relations.⁴⁶ On 11 February 2010 despite all these guarantees, the European Parliament voted against the Agreement.⁴⁷ Consequently, the provisional application of the Agreement was no longer possible and the Council Presidency had to send a communication to the US, stating that the EU could not become a party to SWIFT Agreement.

In conclusion, in the period of transition to the Lisbon Treaty, faced with the urgent need to reach an agreement on the transfer of Financial Messaging Data to the US, the Council and the Commission presented the Agreement as a *fait accompli*, an Agreement that would start to apply provisionally on 1 February 2010 and could not be renegotiated.⁴⁸ The strategy failed completely. The rejection of the SWIFT Agreement by the European Parliament has shown how significantly the Lisbon Treaty has strengthened the role of the Parliament in the conclusion of international agreements, in particular in the AFSJ. As J.

⁴² Council of the European Union, *EU-US Agreement on the Transfer of Financial Messaging Data for purposes of the Terrorist Finance Tracking Programme*, Council Document No 6265/10, 9 February 2010, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/press-data/en/jha/112850.pdf>.

⁴³ *Ibid.*

⁴⁴ J. Monar, *supra* note 19, at 145.

⁴⁵ C. Brand, 'New Offer to Save EU-US Data Deal', *European Voice* (9 February 2010), available at <<http://www.europeanvoice.com/article/2010/02/new-offer-to-save-eu-us-data-deal/67097.aspx>>.

⁴⁶ A. Ripoll Servent and A. Mackenzie, 'The European Parliament as a "Norm Taker"? EU-US Relations after the SWIFT Agreement', 17 *European Foreign Affairs Review* 2012, 71-86, at 71 et seq.

⁴⁷ Member States severely criticized the European Parliament. See A. Illmer, 'European parliament rejects SWIFT deal for sharing bank data with US', *Deutsche Welle* (11 February 2010), available at <<http://www.dw.de/european-parliament-rejects-swift-deal-for-sharing-bank-data-with-us/a-5238246>> (last visited 15 April 2012).

⁴⁸ M. Cremona, *supra* note 31, at 17.

Monar said ‘the SWIFT case mean that the Council and the Commission will have to reckon much more with the Parliament’s interests and position in the case of nearly all international agreements, and this is not only at the conclusion stage but already at the negotiation stage’.⁴⁹ Another instance, namely the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) by the European Parliament in July 2012 is another good example to illustrate the Parliament’s enhanced role in conclusion of international agreements. The detailed analysis of ACTA goes beyond the purpose of this paper; nevertheless, this case again affirms that the Parliament must be involved at early stages of the negotiation process in the case of agreements the conclusion of which requires Parliament’s consent.⁵⁰

3.3. *The 2010 SWIFT Agreement*

Faced with the difficult situation arisen from the rejection of the SWIFT Agreement, the Commission and the Council reacted very quickly. On 24 March 2010, the Commission proposed a draft mandate of negotiations that was adopted by the Council on 11 May 2010, showing their willingness to fully consult the Parliament during the negotiations. On 5 May 2010, the European Parliament adopted a Resolution on the new draft negotiations mandate.⁵¹ The Parliament ‘welcome(d) the new spirit of cooperation demonstrated by the Commission and the Council and their willingness to engage with Parliament, taking into account their Treaty obligation to keep Parliament immediately and fully informed at all stages of the procedure’.⁵² Also, the Parliament emphasised that the bulk data transfers mark a departure from the principles underpinning EU legislation and practice. It proposed the designation in the EU of a judicial public authority with the responsibility to receive requests from the US Treasury Department. However, if the above arrangements were not feasible in the short term, the Parliament was willing to reach a compromise, differentiating between the inclusion of strict safeguards in the envisaged agreement, on the one hand, and ‘the fundamental longer-term policy decisions that the EU must address’, on the other hand. In this respect, it pointed out that the extraction of data should take place in the EU by an EU judicial authority or joint EU-US investigation teams.

⁴⁹ J. Monar, *supra* note 19, at 147.

⁵⁰ European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (12195/2011 – C7-0027/2012 – 2011/0167(NLE)).

⁵¹ European Parliament resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorize the opening of negotiations for an agreement between the European Union and the United States of America to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing, P7_TA (2010)0143.

⁵² *Ibid.*

The negotiations were successfully concluded on 11 June 2011 and the revised agreement was signed on 28 June 2011.⁵³ The European Parliament gave its consent to a new agreement on 8 July 2010,⁵⁴ and a few days later the Council adopted the Decision concluding the Agreement between the EU and the US on the processing and transfer of financial messaging data from the EU to the US for the purposes of the Terrorist Finance Tracking Program.⁵⁵ The 2010 SWIFT Agreement came into force on 1 August 2010. There is no doubt that the European Parliament was led to give its consent to the conclusion of the Agreement not only by the improvements in data protection standards, but also by the fact that in this occasion it was fully informed and involved at all stages of the negotiation process.⁵⁶

The aim of the Agreement is to ensure that financial payment messages referring to financial transfers and related data stored in the territory of the EU by providers of international financial payment messaging services, that are designated in the Agreement, are provided to the U.S. Treasury Department for the exclusive purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing; as well as to get that relevant information obtained through the TFTP is provided to law enforcement, public security, or counter terrorism authorities of Member States, or Europol or Eurojust.⁵⁷ The US Treasury Department committed itself to communicate to law

⁵³ 2010 SWIFT Agreement, *supra* note 7.

⁵⁴ European Parliament legislative resolution of 8 July 2010 on the draft Council decision on the conclusion 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 (11222/1/2010/REV 1 and COR 1 – C7-0158/2010 – 2010/0178(NLE)). Some MEPs were reluctant to give the consent. The Dutch MEP S. In 't Veld held that 'the United States is looking for a needle and we're sending them the entire haystack' (European Parliament, *SWIFT: MEPs want to limit data transfers to USA*, Press Release, 8 April 2010, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20100406IPR72166&language=EN>>). S. In 't Veld brought an action seeking the annulment of the Council's decision of 29 October 2009 refusing full access to document 11897/09 of 9 July 2009 containing an opinion of the Council's Legal Service entitled 'Recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing – Legal basis'. The General Court annulled Council's Decision insofar as it refuses access to the undisclosed parts of document 11897/09 other than those which concern the specific content of the envisaged agreement or the negotiating directives (ECJ, Case T-529/09, *Sophie In 't Veld v. Council*, [2012] of 4 May 2012).

⁵⁵ Council Decision of 13 July 2010 on the conclusion 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, OJ 2010, L 195/3. In accordance with the Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, the United Kingdom has notified its wish to take part in the adoption and application of this Decision, but Ireland is not taking part in the Decision.

⁵⁶ J. Santos Vara, 'El acuerdo SWIFT con Estados Unidos: génesis, alcance y consecuencias', in J. Martín y Pérez de Nanclares (ed.), *La dimensión exterior del Espacio de Libertad, Seguridad y Justicia* (Madrid: Iustel 2012), 355-380, at 366.

⁵⁷ Art. 1(1), 2010 SWIFT Agreement. The provider of international financial payment messaging services designated in the Agreement is only SWIFT.

enforcement, public security, or counter terrorism authorities of concerned Member States, and, as appropriate, to Europol and Eurojust of information obtained through the TFTP that may contribute to the investigation, prevention, detection, or prosecution by the EU of terrorism or its financing.⁵⁸ Also, it is stated that the EU authorities may send requests for TFTP searches when ‘there is reason to believe that a person or entity has a nexus to terrorism or its financing’.⁵⁹

The Agreement does not only relate to the exchange of personal data, but also to the protection of these data. However, it does not include Article 16 of the Treaty of the Functioning of the European Union (TFEU) as a legal basis, despite the fact that Article 1 of the Agreement underlines a high level of data protection as one of its main purposes. Article 16 TFEU is therefore not less relevant as legal basis than Articles 82 and 87 TFEU relating to law enforcement cooperation. According to Article 16 TFEU the European Parliament and the Council ‘shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities’. The right to the protection of personal data is also enshrined in Article 8 of the Charter of Fundamental Rights.

The 2010 SWIFT Agreement has met some of the concerns raised by the Parliament: the Agreement includes a clearer definition of terrorism as defined by the Council Framework Decision 2002/475/JHA; Europol shall verify whether the requests complies with the requirements of Agreement (Article 4); onward transfer of information to third countries is regulated in the Agreement (Article 7); a detailed regulation of the rights to rectification, erasure or blocking is included (Articles 14-18); an independent person is appointed by the EU to monitor the use of the data (Article 12). However, the Agreement is not fully satisfactory with respect to the protection of personal data and the main causes of concern raised by the European Parliament have not been removed. First, the system is still based on the bulk transfer of data, because SWIFT does not technically allow targeted searches. The European Data Protection Supervisor (EDPS) held that ‘the fact that the current SWIFT system does not allow a targeted search cannot be considered as a sufficient justification to make bulk data transfers lawful according to EU data protection law’.⁶⁰ The transmission of bulk data does not meet the proportionality and necessity requirements. Second, it is not acceptable that the Agreement allows keeping non-extracted data for five years. Third, as regards judicial review the Agreement explicitly states that the agreement ‘shall not create or confer any right or benefit on any

⁵⁸ Art. 9, 2010 SWIFT Agreement.

⁵⁹ Art. 10, 2010 SWIFT Agreement.

⁶⁰ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the conclusion 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 purposes of the Terrorist Finance Tracking Program, *OJ* 2010, C 355/12.

person or entity, private or public' (Article 18). The EDPS pointed out that 'this provision seems to annul or at least question the binding effect of those provisions of the agreement providing for data subjects' rights which are currently neither recognised nor enforceable under US law, in particular when data subjects are non-US citizens or permanent residents'. In consequence, the provisions to protect the rights of EU citizens would not give access to any kind of judicial review in the US.

Even though some of the concerns raised by the European Parliament found a satisfactory solution in the 2010 SWIFT Agreement, data protection provisions are not satisfactory. There are no remarkable differences between the first and second SWIFT agreements. Since the European Parliament was involved during the negotiation process, it was more pleased to accept the second SWIFT compromise. The Parliament was fully informed at all stages of the negotiations and its views were taken into account by the actors involved in the process.

4. **The influence of the European Parliament in the 2011 PNR Agreement with the United States**

4.1. *The 2004 PNR Agreement and 2006 Interim Agreement*

After 9/11, the US authorities imposed the obligation on air carriers to submit electronically to the US DHS passenger data contained in the PNR. The PNR data can include the passenger's full name, date of birth, home and work address, telephone number, e-mail address, passport details, credit card details and method of payment, as well as details of any special meal requirements or sitting preferences. In principle, the transfer of PNR data amounted to a violation of EU data protection.⁶¹ Airlines not complying with the US demands might have faced heavy fines and even lose landing rights. In order to solve this conflict of law and overcome the legal uncertainty for the airlines, the Commission started negotiations with the US. After the adoption of a Commission Decision on 14 May 2004 under the Data Protection Directive, establishing the adequacy of the protection granted to PNR data by the US authorities,⁶² the First PNR Agreement was signed on 28 May 2004 in Washington.⁶³

On 27 July 2004, the Parliament brought two actions before the European Court of Justice seeking the annulment of the Commission's adequacy decision and the Council's decision concluding the agreement. The Parliament claimed that the adoption of the decision on adequacy was *ultra vires*, and the legal basis for the Decision on the conclusion of the agreement was not appropriate

⁶¹ Directive 95/46 EC requires an 'adequate level of protection' for transfer of personal data to third countries.

⁶² Commission Decision (EC) 535/2004 of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, OJ 2004, L 235/11.

⁶³ Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004, L 183/84.

and fundamental rights had been infringed. As a result, the Court of Justice annulled both decisions.⁶⁴ The Court of Justice held that former Article 95 of EC Treaty, read in conjunction with Article 25 of the 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 cannot justify Community competence to conclude the agreement.⁶⁵ In the Court's view, the transfer of PNR data to the US constituted processing operations concerning public security that fell outside the then EU first pillar. The Court held that 'while the view may rightly be taken that PNR data are initially collected by airlines in the course of an activity which falls within the scope of Community law, namely sale of an aeroplane ticket which provides entitlement to a supply of services, the data processing which is taken into account in the decision on adequacy is, however, quite different in nature. (The transfer) concerns not data processing necessary for a supply of services, but data processing regarded as necessary for the safeguarding public security and for law-enforcement purposes'.⁶⁶ The Court decided to preserve the effects of the Agreement until 30 September 2006.

Subsequently, negotiations for the conclusion of the Second PNR Agreement started in July 2006. As a consequence of the Court of Justice ruling the agreement has to be negotiated within the framework of the third pillar.⁶⁷ Due to the difficulties to conclude a new agreement in a short period of time, the conclusion of an interim Agreement was decided. On 11 October 2006, the Council adopted a decision authorising the Presidency to sign an Interim Agreement with the US on the continued use of PNR data.⁶⁸ The Parliament expressed also serious concerns on the lack of adequate data protection.⁶⁹ The interim Agreement enabled PNR data to continue being transferred to the US in the same way as under the previous Agreement. As in the 2004 Agreement, it was noted that 'in view of the Undertakings issued on 11 May 2004 by the DHS, Bureau of Customs and Border Protection, the United States can be considered as ensuring an adequate level of protection for PNR data transferred from the European Union concerning passenger flights to or from the United States'.⁷⁰ Consequently, the Interim Agreement referred to the Undertakings made by DHS within the framework of the First PNR Agreement.

The Interim Agreement provisions were similar to the 2004 Agreement.⁷¹ The American authorities could have access to 34 fields and the purpose of the data transfer were to prevent and combat terrorism and related crimes, other serious crimes, including organised crime, that are transnational in nature,

⁶⁴ ECJ, Joined Cases C-317/04 and C-318/04, *Parliament v. Council* [2006] ECR I-4721.

⁶⁵ OJ 1995, L 281/31.

⁶⁶ *Ibid.*, para. 57.

⁶⁷ See former Art. 24 TEU.

⁶⁸ 2006 PNR Interim Agreement, *supra* note 6.

⁶⁹ See European Parliament, *Balancing security and data protection for air travel and judicial cooperation*, 4 September 2006, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20060901BKG10232&language=FI>> (last visited 21 May 2012).

⁷⁰ 2006 Interim PNR Agreement, para 4.

⁷¹ See J. Faull and L. Soreca, 'EU-US Relations in Justice and Home Affairs', in B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty, Security. New Challenges for EU External Relations* (Brussels: VUBPRESS Brussels University Press 2008), 393-420.

and fight from warrants or custody for the crimes described above.⁷² The Interim Agreement continued to be based on the pull system. The Interim Agreement expanded the number of American Agencies that could have access to PNR data.⁷³ The DHS was allowed to give access to the PNR data to any US agencies with counter-terrorism functions and the DHS could broaden the number of PNR data required, which would be stored for periods longer than 3.5 years.⁷⁴

4.2. *The 2007 PNR Agreement*

The negotiations for a long term deal between the EU and the US that started on 26 February 2006 led to an agreement on 29 June 2007.⁷⁵ Although the European Parliament had a limited influence under the then third pillar framework, it expressed its concerns about the volume of data being passed to the US and the lack of appropriate data protection system. The Agreement has been applied provisionally since 26 July 2007 pending the ratification by all Member States to enter into force. The Agreement was based on the former Articles 24 and 38 TEU.

The Agreement itself is completed by two other documents. Commissioner Frattini, in charge of the negotiations, said before the Parliament: 'the agreement is divided into three parts. First, an agreement signed by both parties. Second, a letter which the United States sent to the EU in which it set out assurances on the way in which it will handle European PNR data in the future. And third, a letter from the EU to the United States acknowledging the receipt of assurances and confirming that on that basis it considers the level of protection afforded by the US Department of Homeland Security to be adequate for European PNR data'. This complex structure has led to intensive criticism. As a result of the fact that many of the substantial clauses of the Agreement were inserted in the letter exchange documents, the data protection has been weakened.⁷⁶

The number of PNR data has been reduced from 39 to 19 in the 2007 PNR Agreement. However, this reduction does not amount to an improvement of the right to privacy afforded to the EU citizens. It is only the result of a process of rationalisation of previous fields and not a real decrease in the number of data transferred to the US authorities. Also, sensitive data could be accessed

⁷² Para (3), Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection, 69 *US Federal Register* 2004, No. 131, 41543-41547, at 41543, available at <<http://www.statewatch.org/news/2004/jul/PNR-Federal-REG-undertakings.pdf>>.

⁷³ See Preamble, 2006 Interim PNR Agreement.

⁷⁴ V. Papakonstantinou and P. de Hert, 'The PNR Agreement and transatlantic anti-terrorism co-operation: no firm human rights framework on either side of the Atlantic', 46 *Common Market Law Review* 2009, 885-919, at 906.

⁷⁵ Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), *OJ* 2007, L 204/18.

⁷⁶ See V. Papakonstantinou and P. de Hert, *supra* note 74, at 909.

by the DHS in exceptional cases, 'where the life of a data subject or of others could be imperilled or seriously impaired'.⁷⁷

As regards the purpose of PNR data processing, it was stated in the DHS Letter sent to the EU that it was to use 'EU PNR strictly for the purpose of preventing and combating: (1) terrorism and related crimes; (2) other serious crimes, including organized crime, that are transnational in nature; and (3) flight from warrants or custody for crimes described above. PNR may be used where necessary for the protection of the vital interests of the data subject or other persons or in any criminal judicial proceedings, or as otherwise required by law'. The American authorities will keep the data for a period of fifteen years. The first seven years the PNR data will be held in active analytical database, after which the data will be retained for eight years in a dormant, non-operational status. The 2007 Agreement imposed a deadline on air carriers to switch to the 'push method' of transfer no later than 1 January 2008, but this obligation has never been enforced. It means that DHS has access to the PNR data by using the 'pull system'. In the 'push method' of transmission, PNR data are transmitted by the carrier to the national authority instead of the national authority obtaining access to the reservation system of the air carrier and taking the data ('pull method').

Even though the 2007 Agreement substantially reduced the list of PNR transferred and imposed a deadline to switch to the push system no later than 1 January 2008, the Agreement was not in compliance with the EU data protection standards. The data transfer was not supervised by an independent authority and there were not effective means of redress. On 12 July 2007, the European Parliament criticised that the PNR Agreement was 'substantively flawed in terms of legal certainty, data protection and legal redress for EU citizens, in particular as a result of open and vague definitions and multiple possibilities for exceptions' and regretted 'the failure of the PNR agreement to offer an adequate level of protection of PNR data'.⁷⁸

4.3. *The 2011 PNR Agreement*

After the entry into force of the Lisbon Treaty, the 2007 PNR Agreement that had been applied provisionally could only be concluded after obtaining the consent of the European Parliament. However, as happened a few months before with the SWIFT Agreement, the Parliament used its new powers conferred by the Lisbon Treaty as regards the conclusion of the PNR agreements with Australia and the US.⁷⁹ On 5 May 2010, the European Parliament decided

⁷⁷ Sensitive information means data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or concerning the health or sex life of the individual.

⁷⁸ European Parliament resolution of 12 July 2007 on the PNR agreement with the United States of America, P6_TA(2007)0347.

⁷⁹ Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS)

to postpone the vote on the request for consent on the PNR agreements with Australia and the US.⁸⁰ The European Parliament held that the proposed agreements did not provide an adequate level of protection for the processing of personal data.⁸¹ The Parliament demanded that new agreements should be negotiated with the US and Australia as well as with Canada (with the latter two PNR agreement has been in force since 2006).⁸² The Parliament asked also the Commission to propose a coherent approach on the use of PNR data, based on a single set of principles to serve as a basis for agreements with third countries, bearing in mind the need to conclude PNR agreements with other countries.⁸³ Also, it was proposed that the EU should develop its own PNR system aiming to harmonise Member States' provisions on obligations for air carriers, operating flights between a third country and the territory of at least one Member State. This EU proposal constitutes a good example of internalisation of US' initiatives in the fight against terrorism.⁸⁴

The European Parliament stressed that the PNR agreements should meet the following minimum requirements:

- PNR data transfer must be limited clearly and strictly to counter terrorism and the fight against serious transnational crime, on the basis of clear legal definitions laid down in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁸⁵ and in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant;⁸⁶

(2007 PNR agreement) (COM(2009)0702); Proposal for a Council Decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of EU-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service (COM(2009)0701).

⁸⁰ European Parliament resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, P7_TA(2010)0144, OJ 2011, C 81E/70. The EU-Australia PNR Agreement has also been applied provisionally since 2008. See Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service, OJ 2008, L 213/47.

⁸¹ At the Council meeting of Justice and Home Affairs of 2-3 December 2010, the Council adopted negotiating directives for agreements on the transfer and use of passenger name records (PNR) with Australia, Canada and the United States.

⁸² See also European Parliament resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorize the opening of negotiations between the European Union and Australia, Canada and the United States, P7_TA(2010)0387.

⁸³ On 21 September 2010, the Commission issued a communication of 21 on the global approach to transfers of passenger name record (PNR) data to third countries, COM (2010) 0492. Also, in February 2011, the Commission released a proposal for an EU PNR system aiming at protecting citizens against terrorist offences and serious crime. See, Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM/2011/0032 final).

⁸⁴ Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, SEC (2011) 132 final.

⁸⁵ OJ 2002, L/3.

⁸⁶ OJ 2002, L 190/1.

- Compliance with data protection legislation at national and European level, in particular regarding purpose limitation, proportionality, legal redress, limitation of the amount of data to be collected and of the length of storage periods;
- PNR data shall in no circumstances be used for data mining or profiling;
- The method of transfer must be only 'push';
- The onward transfer of data by the recipient country to third countries shall be in line with EU standards on data protection, to be established by a specific adequacy finding;
- The results of the data processing will immediately be shared with the relevant authorities of the EU and of the Member States;
- Appropriate mechanisms for independent review and democratic control must be established.

In January 2011, the Commission started new negotiations with the US, Australia and Canada on the PNR Agreements. The Agreement with Australia was signed by the Council on 29 September 2011 and the European Parliament gave its consent on 27 October 2011.⁸⁷ Negotiations with Canada are still ongoing.⁸⁸ The draft PNR Agreement between the EU and the US was discussed with the Parliament and the Council in May 2011. The Parliament's Rapporteur held that the draft Agreement did not meet the conditions laid down by the Parliament in its resolutions. Also, the Commission Legal Service warned that there were grave doubts as to the compatibility of the proposed Agreement with the fundamental right to data protection.⁸⁹

Following new negotiations between the parties, on 23 November 2011, the Commission proposed the Council to adopt a decision approving the conclusion of the new PNR Agreement between the EU and the US.⁹⁰ On 13 December 2011, the Council decided to sign the EU-US PNR Agreement and sent it to the EP with a view to obtain its consent.⁹¹ The European Parliament's Rapporteur S. in 't Veld recommended the Parliament to withhold its consent to the Agreement.⁹² The Rapporteur acknowledged the efforts made by the European Commission to reach a better agreement, but considered that the conditions required

⁸⁷ 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, signed on 29 September 2011.

⁸⁸ Since the 'Adequacy Decision' has expired, a new EU-Canada long-term PNR Agreement is currently being renegotiated. See Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, OJ 2006, L 82/15.

⁸⁹ European Commission Legal Service, 'Subject: Draft Agreement on the Use of Passenger Name Records (PNR) between the EU and the United States', S.J.f.(2011)603245, 18 May 2011.

⁹⁰ Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, COM(2011) 807 final.

⁹¹ Council of European Union, *Council gives green light for the new EU-US agreement on Passenger Name Records (PNR)*, Press Release, 13 December 2011, available at <http://europa.eu/rapid/press-release_PRES-11-490_en.htm>.

⁹² Justice and Home Affairs, Draft Recommendation on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on

by the European Parliament to provide its consent had not been met.⁹³ However, the LIBE Committee disregarded the Rapporteur's opinion and approved the new Agreement on the transfer of EU air passengers' personal data to the US.⁹⁴ The PNR Agreement was approved with 31 votes in favour, 23 against and one abstention. Many MEPs considered that it was better to have an agreement, even though not entirely satisfactory, than to have no agreement at all. Finally, on 19 April 2012, the European Parliament gave its consent to the conclusion of the new Agreement on the transfer of passengers' personal data to the US authorities.⁹⁵ The Agreement was approved by the Council on 19 April 2012 and entered into force on 1 July 2012, in accordance with Article 27 of the Agreement.⁹⁶ The new Agreement replaced the 2007 PNR Agreement that had been applied provisionally in the last years. Similarly to the 2010 SWIFT Agreement, Article 16 TFEU is not included in the legal basis of the Agreement. Since the purpose of the Agreement is to ensure that the transfer of PNR data to the US respects data protection standards, the Agreement should not only be based on Articles 82(1)(d) and 87(2)(a), in conjunction with Article 218(6) (a) TFEU, but also on Article 16 TFEU.

The EU-US deal on the transfer of PNR data was adopted with 409 votes in favour, 226 against and 33 abstentions. It seems that the MEPs were divided on whether the Agreement provides a satisfactory protection of fundamental rights. As some MEPs said, the Agreement may set a negative precedent on the future negotiation of PNR agreements with other partners. It was noted, that, despite certain improvements, the most serious concerns were not removed. Firstly, the processing of PNR data is allowed not only for the purpose of preventing and prosecuting terrorism and serious transnational crimes. The data may also be used to investigate and prosecute 'other crimes that are punishable by a sentence of imprisonment of three years or more and that

the use and transfer of Passenger Name Records to the United States Department of Homeland Security (17433/2011–C7-0511/2011– 2011/0382(NLE)), 30 January 2012.

⁹³ See also the Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, 9 December 2011; and the Report by Art. 29 Data Protection Working Party, Ref. Ares (2012)15841, 6 January 2012.

⁹⁴ European Parliament, *Civil Liberties Committee green light for air passenger data deal with the US*, Press Release, 27 March 2012, available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20120326IPR41838/html/Civil-Liberties-Committee-green-light-for-air-passenger-data-deal-with-the-US>>.

⁹⁵ See L. Abellán, 'La Eurocámara acepta seguir entregando los datos de los viajeros a EE UU', *El País* (19 April 2012), available at <http://sociedad.elpais.com/sociedad/2012/04/19/actualidad/1334836877_242927.html>; T. Vogel, 'MEPs back data-transfer deal with US', *European Voice* (19 April 2012), available at <<http://www.europeanvoice.com/article/2012/april/meps-back-data-transfer-deal-with-us/74181.aspx>>; European Parliament, 'Parliament gives green light to air passenger data deal with the US', *European Parliament-News* (19 April 2012), available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20120419IPR43404/html/Parliament-gives-green-light-to-air-passenger-data-deal-with-the-US>>.

⁹⁶ Information concerning the date of entry into force of the Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, *OJ* 2012, L 174/1.

are transnational in nature'.⁹⁷ Secondly, Article 4(2) allows for the use of PNR 'if ordered by a court'.⁹⁸ This clause would allow the use of PNR for any purpose, provided that it is ordered by a court. Thirdly, the 2011 PNR Agreement retains data almost indefinitely. The data shall be retained for an initial period of five years and then in a dormant data basis for a period of up to ten years. Following the dormant period, data retained must be rendered fully anonymised. Fourthly, even though the Agreement recognises that any individual may seek administrative and judicial redress in accordance with U.S. law,⁹⁹ it does not amount to admit a judicial redress equivalent to the right to effective judicial redress in the EU.¹⁰⁰ Article 21 explicitly states that the Agreement 'shall not create or confer, under U.S. law, any right or benefit on any person or entity, private or public'. Finally, it is not acceptable that data may also be used to ensure border security. According to Article 4(3) 'PNR may be used and processed by DHS to identify persons who would be subject to closer questioning or examination upon arrival to or departure from the United States or who may require further examination'.

Similarly to the 2010 SWIFT Agreement, the new PNR Agreement provides stronger protection of EU citizens' right to privacy than the 2007 EU-US PNR Agreement. EU citizens will have the right to access their own PNR data and seek corrections, including the possibility of erasure or blocking, of his or her PNR data. However, the new PNR Agreement is not satisfactory from the perspective of EU protection of fundamental rights. The Parliament decided not to contest US preferences on the transfer of EU air passengers' personal data. It must be recognised that it was easier to resist opposition to US demands when the Parliament was not a relevant actor in the conclusion of agreements in the AFSJ than after Lisbon. In the author's view, it is disappointing that the Parliament decided not to continue its previous behaviour demanding a high standard in the protection of fundamental rights in the transatlantic relationship.

5. Conclusions

The application of the ordinary legislative procedure to the adoption of acts in the area of police and judicial cooperation in criminal matters has led to enhancing the role of the European Parliament in the conclusion of international agreements. The analysis of the SWIFT precedent shows clearly that the Parliament will not hesitate to use its power to veto the conclusion of international

⁹⁷ See Justice and Home Affairs, Draft Recommendation on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (17433/2011–C7-0511/2011–2011/0382(NLE)), 30 January 2012.

⁹⁸ PNR may be used and processed on a case-by-case basis where necessary in view of a serious threat and for the protection of vital interests of any individual or if ordered by a court.

⁹⁹ Art. 13, 2011 PNR Agreement.

¹⁰⁰ See also the Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, 9 December 2011.

agreements. The Council and the Commission will have to involve the Parliament when defining negotiation mandates and to keep it fully informed during the negotiation process. However, the Parliament was not included in the bargaining process that led to the 2009 SWIFT and 2007 PNR. As a consequence of the rejection of both agreements, the Parliament was included and listened in the negotiations of the 2010 SWIFT and 2011 PNR Agreements.

Analysing the Parliament's role in the negotiations of the SWIFT Agreements and the 2011 PNR Agreement with the US clearly shows that the new powers vested in the European Parliament by the Lisbon Treaty have enabled it to influence the negotiation of agreements in the area of police and judicial cooperation in criminal matters, in particular in the field of data processing. Even though the 2010 SWIFT Agreement and the EU-US 2011 PNR Agreement did not fully meet the criteria laid down by the European Parliament, more safeguards have been introduced than in the past in order to respect the right to the protection of personal data enshrined in Article 16 TFEU and Article 8 of the Charter of Fundamental Rights.

Moreover, bulk transfer of data is not excluded in the 2010 SWIFT Agreement. Solutions should be found to ensure that financial transaction data are filtered in the EU, ensuring that only relevant and necessary data are sent to US authorities. The Council seems willing to develop an equivalent EU system that would allow for the extraction of data on EU territory.¹⁰¹ Once the EU SWIFT system is developed, data transfers to the US would take place according to the EU standards. The improvement in the data protection has not led to the introduction of judicial scrutiny. Since there are no remarkable differences between the two agreements, it seems that the European Parliament was more pleased to accept the second SWIFT compromise because it was involved during the negotiation process. The Parliament was fully informed at all stages the negotiations and its view were taken into account by the actors involved in the process.

The same conclusions apply to the influence of the European Parliament in the 2011 PNR Agreement with the US. The Agreement provides stronger protection of EU citizens' right to privacy than the 2007 EU-US PNR Agreement. EU citizens will have the right to access their own PNR data and seek corrections, including the possibility of erasure or blocking, of his or her PNR data. However, EU citizens will not have full access to US courts to seek judicial redress. As well, the purpose limitation is too broad and the number of data to be transferred to the US authorities is disproportionate and contains too many open fields.

The analysis of the negotiation saga of the SWIFT and PNR agreements reveal that the EP decided not to oppose US demands on data transfers. Even though many MEPs expressed strong reservations against these agreements, the Parliament decided to accept most of the US' requirements. It is true that the US threatened the EU by suspending visa-free travel to the US in case of

¹⁰¹ See Communication from the Commission to the European Parliament and the Council, A European terrorist finance tracking system: available options, COM (2011) 429 final, 13 July 2011.

negative vote to the PNR agreement. However, in the author's opinion, the change of the Parliament's position is due to fact that it felt included and listened to in the negotiation process by the actors involved. In conclusion, the European Parliament is using its new powers conferred by the Lisbon Treaty more to assert its new role in the negotiation and conclusion process of international treaties in the area of police and judicial cooperation in criminal matters than to influence the substantial content of the transatlantic agreements.

