



THE 6<sup>TH</sup> EDITION OF THE INTERNATIONAL CONFERENCE  
**EUROPEAN INTEGRATION  
REALITIES AND PERSPECTIVES**

**An Overview on the Strategic  
Accord between US and EU Concerning Data Protection**

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**Abstract:** Our paper proposes an analysis of the strategic agreement between the EU and US concerning Data Protection of people. Threat after September 11, 2001 has become a matter of security and safety of the entire world. Governments have had to find the fastest and most reliable ways to prevent and combat terrorism of any kind: from a computer, economically at threatening people lives. EU-US transatlantic agreement is an answer to this problem. Creating a common security system requires the most appropriate programs, tools, modes of analysis and experts. The effort of the two powers must relate primarily fundamental rights. This paper is a point of reflection and analysis for researchers, academics, students interested in matters of European security policy analysis and efforts to Member authorities to manage most threatening problem.

**Keywords:** fundamental rights; european policies; cooperation; financial dates; terrorism

## 1 Introduction

In an ideological sense, the EU can be considered part of each of us (which resulted in the rights that we have named *the European spirit*), one of the major vectors for the directions we were going (through sharing of creative forces, power, policies etc.), but also one of the most recent controversy: to what we are going as well as organizational entity? Despite these uncertainties, the European Union proposes that the measures taken and its precise objectives to ensure the best conditions for its citizens. Promoting economic and social progress, asserting the identity of the European Union on the international scene, establishing citizenship, development of an area of freedom, security and justice are among the main objectives of the EU and reaching them is through respect for and protection of personal data, thus not affect the privacy of its citizens. The objectives of the *acquis communautaire* concerning the processing of personal data to consider when transposed into national law is the guarantee and protect fundamental rights and freedoms of individuals, especially the right to privacy, family and private life. Taking into account the need to defend the fundamental right to privacy and private, personal data protection is a particularly important area, as evidenced by the presence of a distinct chapter in the Schengen Convention. Regulated in different laws defining for the European Union (Treaty of Lisbon, the EU Charter of Fundamental Rights, European Convention on Human Rights, European directives and other documents and agreements) the aspects concerning personal data protection is controversial from the perspective of a continuous development of a concrete reality (economic, social, informational, scientific, medical etc.) but also in terms of the increasingly important role played by the EU as an international actor through new treaties, international agreements concluded

with various partners. If these external cooperation in various fields are intended to bring an added value to the community through the creation or improvement benefits to domestic issues (health care, electronic commerce, security and justice, internal market etc.), they must protect adequate personal data of citizens, legal and practical. The *processing* covers activities such as data collection, recording and archiving, retrieving them for consultation, sending them to other people, blocking, erasure or destruction. To this end, a European body was created to arbitrate, both at EU and externally appointed European Controller (from the perspective of EU actions at international level), how to comply with the collection and use of personal data, with the institution or body concerned to rectify, block, erase or destroy personal data have been processed in a manner contrary to law.

## **2 Towards a New EU-US Agreement on Data Protection**

### **2.1 The Conceptual Framework for the Protection of Personal Data**

The new agreement is part of the European Union for the medium-term collaboration with the United States to prevent and combat terrorism, called SWIFT - TFTP (*Society for Worldwide Interbank Financial Telecommunication - Terrorist Finance Tracking Program*) and is based on data transfer bank offering the American side the right to access and process personal data of European citizens, to establish concrete measures for joint action. The treaty is named after Belgian banking services provider SWIFT (*Society for Worldwide Interbank Financial Telecommunication*), which operates about 15 million transactions daily among more than 8300 banking institutions worldwide. US using data on remittances in the TFTP program (*Terrorist Finance Tracking Program*) designed to detect potential sources of funding terrorists. Strategies in terms of common security of this agreement cannot be criticized for anything, but the controversies and ambiguities that arise when it comes to intrusion into the privacy of citizens or access to certain confidential financial data of the Union could jeopardizing its integrity. Through *personal data* we understand the information which may be related directly or indirectly in connection with an identified or identifiable natural person, such as: name, surname, personal identification number, address, phone, image, data on work and social life etc. The protection of such data across all measures taken by the European Union is to ensure privacy (Bailey & Daoud, 2010, p. 269). For several years, European authorities responsible for the protection of personal data must face new challenges. In this sense, technology and oversight mechanisms have had some improvements, bringing an added value in terms to fight against terrorism and organized crime, but also in the fight against corruption and other forms of economic and financial fraud. The most important elements that promote access to personal data and could lead to some abuses in this regard are the technological (internet architecture, relatively easy access anonymization technologies, software errors), standing (poor security practices, still limited global cooperation, development and legislative processes too slow to combat cybercrime, to the development of new forms), human (negligence in securing the use of virtual resources).

### **2.2 European Regulations on Personal Data**

The objective of the *acquis communautaire* concerning the processing of personal data in mind when implementing them into national law is the guarantee and protect fundamental rights and freedoms of individuals, in particular the right of intimate, family and private life. One of the most important European standards in this respect is Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and free movement of such data. The directive makes references to

human rights issues that directly, giving, while various options, exceptions, exemptions, which leaves Member States large discretion regarding its implementation. It is also light regulated and their processing, encompassing any means automatic or non-automatic operation (collection, recording, organization, storage, adaptation or alteration, use, disclosure to third parties by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction). This directive applies only to statements which reveal the field of EU competence, it excludes those particular "*treatments of sovereignty*" (defense, public security, State security) conditions applying to such public-private sector. In the matter of personal data protection, the directive will be equivalent in all countries and will no longer be any reason to be potential barriers to free movement. Instead, it provides a strict and detailed regulation of the transfer of data to third countries. These transfers cannot be admitted unless the country of destination ensures an adequate level of protection is assessed by the European Commission and Member States together. At the root of privacy legislation and an adequate system of protection of personal data to state the need to determine what each person may disclose the information concerning him. Other important regulations on protection of personal data issued by the European Commission and the Council of Europe is Directive 2002/58/EC of the European Parliament and the Council concerning the processing of personal data and privacy in electronic communications, the Convention for the Protection 108/1981 for the protection of individuals with automatic processing of personal data, Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data, the Commission Decision of 27 December 2004 amending Decision 2001/497/EC on the introduction of an alternative set of standard contractual clauses to transfer personal data to third countries, the Treaty of Lisbon, the European Charter of Human Rights, The Program from Stockholm. The right to personal data protection is guaranteed by the European Charter of Fundamental Rights which has become an obligatory value date of entry into force of the Treaty of Lisbon.

### **3 SWIFT – TFTP Agreement Concerning Data Protection**

#### **3.1 SWIFT - TFTP Context of Negotiations on the Agreement**

SWIFT draft interim agreement, under the responsibility of the Commissioner of Internal Affairs Cecilia Malmstrom, on the transfer of banking data to U.S. authorities was a starting point for the fight against terrorism. In its original formula proposed by the Commission on 11 February 2010 was rejected by Parliament, is considered unsatisfactory because of low of personal data protection and fundamental rights. MEPs (member of European Parliament) felt that the lines were not surprised the report as clearly as was necessary. Thus, on 11 May 2010 the Council has allowed the Commission to resume negotiations on behalf of the European Union to adapt to needs and this project is consistent with the rights of citizens. On 11 June 2010, negotiations were completed. The agreement was signed on 28 June and received approval of Parliament, by 41 votes *for* in plenary on 15 July 2010<sup>1</sup>.

The agreement was a request from the U.S. after the terrorist attacks of September 11, 2001, to have access to information on banking transactions through a special program called TFTP (program seeks funding for terrorism) and to develop such cooperation with the company SWIFT, which has, in turn, the monopoly of electronic financial transfers. The need for such US-EU agreement came when we witnessed a change of "internal architecture and European data center storage off to Switzerland".<sup>2</sup> As

<sup>1</sup> Information extracted from the official text of the recommendation, document the meeting, European Parliament, A7-00224/2010, 15/07/2010.

<sup>2</sup> European Parliament-Intranet informative article MEPs canceled SWIFT Interim Agreement.

an interim agreement was signed by ministers the day before the entry into force of the Treaty of Lisbon, which noted the need for approval by the European Parliament to signed international agreements on criminal judicial cooperation, and the agreement had to be renegotiated by Commission to meet the demands of MEPs and to combine harmoniously security, data protection and respect for fundamental rights. Parliament voices have argued that poor security guarantees offered by this agreement and it had re-launched negotiations. However the fight against terrorism is important but the terms of the agreement should be renegotiated in the sense that public confidence must be earned by maintaining a proper balance between protecting civil liberties and global security, but also the U.S. is an equal partner in this joint struggle, blocking and the possibilities of abuse. Or, the original agreement did not ensure that all making the EU an actor vulnerable.

The new agreement between EU and U.S. was passed by Parliament and has the powers to be considered as a "variable geometry of the transatlantic partnership" (Helly & Petiteville, 2005, p. 142) in the sense that the fight against international terrorism is a priority and therefore, by extension, this agreement will serve not only expectations of these two powers and other international entities and the Community. However, the conditions for this agreement to prove their effectiveness and develop a good collaboration to meet certain values of the European Community, the Parliament, as representative of citizens, we must defend. Under the Treaty of Lisbon, each share of the EU as an international player in this case, must comply the European Charter of Human Rights (now mandatory) and, therefore, the principle of proportionality and the need to prevent abuse or to achieve privacy, fundamental rights of citizens. Only through negotiated agreement so well can be obtained such strict and primary guarantees before being made "at any price"<sup>1</sup>.

At the same time, another important safeguard is stated in this agreement relates only to the transfer of SWIFT and SEPA<sup>2</sup> data not related to the transfer of data on financial transactions within the euro area. It is still an important safeguard to stop the Americans can pursue their other interests than the struggle against terrorism in its applications, involving minimal risk economical access to information specific to the EU. Moreover, the bulk transfer of this information (without individual), estimated at 90 million data each month, is contrary to European legislation, they can be customized by any U.S. bank. So *double close* proposed by Liberal MEP Jeanine Hennis-Plasschaert on an initial analysis of data on European soil before being transferred to a filter could be more desirable and advantageous guarantee.

However, the conclusion of this agreement has also opened discussions on a future inter-institutional cooperation aimed at negotiating access to documents. Disquiet about the lack of access to documents of the Commission and Council have determined MEPs to make a legislative proposal in this regard. After the Treaty of Lisbon, Parliament must have access to these documents to study each action of the Commission and, finally, to guide negotiations in correspondence with the interests of European citizens. This will form the basis for discussion of a future report. SWIFT final agreement, discussed at Malmstrom Commissioner Hearings in Parliament, ensure a better balance in the fight against terrorism, security and data protection. Thus, the final agreement reflects very well the commitments made by the Council and Commission, but, equally responsible and demands of Parliament. Equally, it encompasses all proposals and solutions listed legally binding on citizens' privacy and security, which shows that the Commission has done well the work of negotiating a proof for this being the 41 votes *for* received in

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<sup>1</sup> Opinion supported by Busuttill, Simon, MEP (European People's Party), following the debate in Parliament.

<sup>2</sup> Single Euro Payments Area (SEPA) is a unified payment area and implemented by the EPC member countries. This area aims to harmonize financial transfer modes, the euro currency between countries, a single payment area in the heart of which individuals and businesses will be able to transfer funds in Euros in safe, fast, and cost the same rules that you may have to Currently in their country of residence.

plenary session in July 2010. The question is this: "We are really needed a European TFTP?"<sup>1</sup>. That involves a change in the conception of this collaboration in the U.S. and European authorities. Equally, it requires not only a re-size of this cooperation and the creation of premises infrastructure, a legal basis for developing such a program. This new EU-US agreement is not only a transatlantic dimension of cooperation to achieve a common goal-*the fight against terrorism*, but also an enhancement of the new Parliament's powers relating to the control and the right to veto international agreements following the entry into force of the Treaty of Lisbon. In conclusion, this agreement may be regarded as a step toward diplomatic communication plan for sharing similar objectives, to strengthen EU-US cooperation not only in terms of defense. Equally, one can demonstrate the existence of prerequisites for the development of other partnerships, as long as the policy of *win-win* is respected.

### 3.2 Peculiarities Agreement SWIFT - TFTP

The final agreement negotiated and voted on by MEPs in July 2010 will be implemented in the coming years. The fight against terrorism will be ensured by a rigorous control and treatment of data received from SWIFT to U.S. authorities for an "inside the U.S. security contributions and, more generally, to global security"<sup>2</sup>. However, we may notice a date for implementing this agreement will be respected as guarantees data protection and information dissemination. Actions taken by U.S. authorities for analysis of these data involve identifying tracks: "a situation of terrorist networks, to complete some investigations to confirm the identity of suspects to locate physically, and prevent terrorist attacks"<sup>3</sup>, which means that only data received in these situations the European body SWIFT can be used. This is one of the main guarantees of this Agreement. It remains to be seen how this will be respected, especially in reality controlled by Europol and EU special representative appointed for this. An effective respect of these obligations will be subject to evaluation by the Commission carried out after 6 months after entry into force of this Agreement, since normally it is not known yet when they see the first results. It is difficult to capture in practice if the principles of necessity and proportionality were actually observed data requests, although each request will be granted a legal term that will indicate specifically what is strictly necessary. This could be problematic for assessing the exact number of data necessary for a case in circumstances where a large number of applications will be presented regularly. Moreover, another difficulty may arise also be impossible to know exactly where these safeguards were applied non-discriminatory manner for Europeans and Americans. In addition to the control afforded by the designated official, in reality there is no instrument that can measure precisely the question whether Congress has made an abuse of its applications.

"The interest of Europe and its citizens" which refers both to the fight against terrorism involves a well-negotiated agreement that can certainly provide guarantees of privacy and data protection for the European community. To that extent, the existence of a safeguard clause to ensure exemption from the rules of law in case of abuse or a direct threat and violating securities by the U.S. Treasury. Even if the proposals under discussion were MEPs for the existence of this clause, the text of the final agreement is clearly not in such a stipulation. In this context, it cannot take advantage of this opportunity to protect them more. Distrust in the agreement also led Great Britain, Ireland, and Denmark to be outside this agreement. Applicability of this Agreement will be modified as a result of this exemption that the fight

<sup>1</sup> Claim belonging Busuttill, Simon, MEP (EPP Group) during debate on the report aimed at future agreement TFTP-SWIFT

<sup>2</sup> Confidential report of Judge Bruguière, [http://www.lemonde.fr/europe/article/2010/02/04/l-accord-swift-participe-a-la-securite-globale-selon-jean-louis-bruguieres\\_1301338\\_3214.html](http://www.lemonde.fr/europe/article/2010/02/04/l-accord-swift-participe-a-la-securite-globale-selon-jean-louis-bruguieres_1301338_3214.html).

<sup>3</sup> Confidential report of Judge Bruguière, [http://www.lemonde.fr/europe/article/2010/02/04/l-accord-swift-participe-a-la-securite-globale-selon-jean-louis-bruguieres\\_1301338\\_3214.html](http://www.lemonde.fr/europe/article/2010/02/04/l-accord-swift-participe-a-la-securite-globale-selon-jean-louis-bruguieres_1301338_3214.html).

against terrorism cannot be accomplished without a 100% full control and creation of a European TFTP will give more confidence for Europe and demonstrate its usefulness more than the American system. However, the prospects for development of this system are a little insecure because the infrastructure and support necessary to implement the Americans are theoretically available for the moment. This investment requires not only time but also a rethinking and adjustment of the agreement by these two actors.

Achieving this agreement will show the effectiveness of its implementation throughout. At the same time, citizens will be able to see specifically whether safeguards would be applied without discrimination and whether the project of creating a European TFTP will prove its effectiveness to the same extent as those used by U.S. authorities and so quickly. Furthermore, Europol will prove whether he can carry out the control that we need to make applications for information to refute the initial suspicion of MEPs on the ability to have this kind of power. On the other hand, the practical ability of the EU to establish its own TFTP benefiting from U.S. aid cannot be estimated as well as the necessary infrastructure and experience at the moment is only for Americans. Moreover, the agreement does not stipulate details of rethinking the concept of transatlantic cooperation in this case, no words necessary support provided by Congress to develop a program so powerful as the existing.

#### **4 Advantages and Prospects in using SWIFT- TFTP**

Working with a partner strong enough and pooling resources to succeed in achieving a common goal—the *fight against terrorism*, can bring many benefits, because there is less effort for each partner. However, this cooperation should ensure a balance between security and data protection, civil liberties and fundamental rights for the Europeans and for the Americans. With this balance maintained control means secured to prevent abuse, the Commission negotiated agreement rather than managing to meet all the conditions imposed by Parliament and meets of Americans. Equally, the creation of a European TFTP is expected to be able to process data within the EU and prevent terrorism, but we do not know yet whether this project will be feasible. Fight against terrorism is a priority for the EU in its policies by ensuring a space of freedom, security and justice. Sometimes, an equally important objective can be achieved entirely by means of which it has an EU and therefore has to resort to cooperation with another international player that looks much stronger. Through this agreement the Commission was able to negotiate for a better European cooperation and a "contribution to the internal security of the United States and more generally to global security." At European level, the struggle for these objectives is resized and has a different significance. Preventing terrorism is a matter of national security and foreign and should be using the most appropriate programs, tools, modes of analysis and experts. For this, cooperation with the American authorities have the infrastructure to manage this type of application is essential. After the September 11 attacks in the U.S. this objective (preventing other attacks) have become essential to protect the American people from threats and to this end, cooperation with the EU would be possible to provide the data necessary for this analysis SWIFT. So, this Agreement has occurred through the sharing of two ways necessary to achieve a common goal: maintaining security.

At the level of U.S. authorities, SWIFT data are valuable for applications made use of a TFTP and will include SEPA data. This does not prevent the U.S. Treasury to conduct espionage for abuse or other interests as those specified in the agreement. Even during the debate in committee MEPs were skeptical about the possible political interests that Americans can show in this collaboration, noting that also benefit from a high level of protection, excluding the transmission of data in bulk. The fight against terrorism means to defend freedom and this should be done under the control of Parliament.

Furthermore, Member States have expressed concern that cooperation with the U.S. especially in terms of data protection. Cooperation with third countries will be more convenient. Consequently, even if we take the essence of compromise as a Community method to achieve this balance of the agreement "should not be done at any cost"<sup>1</sup> the Commission has managed, in response to these requests, obtaining a good agreement negotiated text, which ensure balance between security and data protection and provide maximum possible guarantees for Europeans. We can say that this agreement was a compromise because the EU had initially intended to comply with U.S. demands and only intervention by the Parliament resulted in a better negotiating terms of negotiating progress and cooperation. In conclusion, we present a cooperation agreement that certain guarantees or promises by the two great powers and unify for a common purpose. The effectiveness of this cooperation, however, will be demonstrated starting from the moment in the future, emphasizing also that each party follows the interests and fight for a common interest: to prevent terrorism. In this case we must ask whether a draft European TFTP will be really accepted by Americans or they will be more interested to keep transatlantic cooperation for a longer period. The next 5 years we will demonstrate this. The union of forces to prevent terrorism has generated more comments among MEPs but also among Europeans who are directly affected. On the other hand, MEPs and the Commission think that the success of negotiations is to guarantee good agreement obtained lines, without making major compromises on the other hand, remain a bit skeptical and concerned citizens across the concrete implementation of this agreement controversial. First, the EU united and prosperous extended to the U.S. could be a potential competition on the international scene, but how it meets only American interests, it becomes a potential partner, as the author H. Kissinger noted: "*Une Europe plus active dans les affaires mondiales est dans l'intérêt de l'Amérique. Mais que cette identité soit définie en opposition aux Etats-Unis ne l'est pas/ Europe more active in world affairs is in the interest of America. But that identity is defined in opposition to the United States is not*" (Kissinger, 2002, p. 81). In conclusion, this partnership includes the interests of both parties both political and diplomatic, but creating a TFTP across Europe remains one of the most important perspective based on this agreement, since it can be interpreted as an ambition of the EU not to U.S. reliance on it to get their support and expertise to develop this system in the first instance. This program will help the EU to pursue its security objectives, while at the same time respecting the rights of citizens, thus in this respect will be the safest possible. There will then be necessary to resort to this *shared leadership* was talking about. But strengthening the defense system by a European TFTP will be the precedent for a *Europe puissance* or *space of Europe*, the U.S. can demonstrate their attempts to control? Concrete results will appear in the coming years.

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<sup>1</sup> Busuttill, Simon, in discussion of the hearing Commissioner Malmstrom  
854