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PNR in 2011: Recalling Ten Years of Transatlantic Cooperation in PNR Information

Valentin M. Pfisterer

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ARTICLE

PNR in 2011: *Recalling Ten Years of Transatlantic Cooperation in PNR Information Management*

Valentin M. Pfisterer*

ABSTRACT

In Fall 2011, U.S. and EU negotiators agreed on new parameters for the collection, processing, use, storage and crossborder transfer of Passenger Name Record (PNR) data. 2011 also marks the tenth anniversary of the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington D.C., which provides the historic reason for the cooperation in this area. These two events thus provide a timely basis and background against which to review the ten year history of the cooperation between the U.S. and the EU in PNR information management.

This article maps the evolution of collaboration between the U.S. and the EU with respect to the PNR program by presenting the major dimensions involved. Moreover, it provides a comprehensive framework with a particular focus on the constant struggle for a consistent EU policy as well as the creation of the U.S.-EU Agreements in 2004 and 2007. It furthermore sketches major legal and political developments that have most likely had a significant impact on the negotiations and are, as a consequence, reflected in the concrete design of the new PNR Agreement. All this leads the author to the conclusion that—as thoroughly as it may have been designed and as complete as it may seem—the new PNR Agreement will not be the end of the transatlantic PNR saga, but rather the beginning of another intriguing chapter.

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I. INTRODUCTION: TEN YEARS AFTER 9/11 AND A NEW AGREEMENT WITHIN REACH

The cooperation between the United States and the European Union in the area of counterterrorism has many faces—political, institutional, economic, social, technological, and legal, among others. Its legal dimension alone is highly complex as it covers a vast array of issues such as the use of force in armed conflicts (especially Afghanistan) and the cooperative management of information for law enforcement purposes. The cooperation in this latter area further comprises at least two loosely connected storylines, each one reflected in an acronym: SWIFT and PNR.

The former stands for Society for Worldwide Interbank Financial Telecommunication, a Belgium-based financial institution, and relates to the transatlantic transfer of financial messaging data for law enforcement purposes. The most visible elements of this storyline are the two corresponding agreements between the U.S. and the EU of 2009 and 2010.¹ The latter stands for Passenger Name Record data, specific files on every passenger and journey created by air carriers, and relates to the transatlantic transfer of information contained in these files for law enforcement purposes.² This storyline has equally gained visibility in the form of two corresponding agreements between the U.S. and the EU in 2004 and 2007.³

Although the 2007 PNR Agreement is envisaged to expire in a few years, the competent U.S. authorities and the European Commission (“Commission”), decided to renegotiate the Agreement.⁴ Only recently, these negotiations have come to an end, and a new PNR Agreement will be produced in the near future.⁵ This is, in itself, reason enough to bring transatlantic cooperation in the sharing of PNR information back to the academic and political agenda. Another reason is that the tenth anniversary of the historical reason that underlies this particular area of cooperation was to be commemorated only a short while ago. Against this backdrop, and although certainly developed from a European perspective, the present article tries to recall the cooperation between the U.S. and the EU in the context of PNR information sharing.

¹ 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, 2010 O.J. (L 8) 11 [hereinafter 2009 SWIFT Agreement]; 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 2010 O.J. (L 195) 5 [hereinafter 2010 SWIFT Agreement]. *See also* Valentin Pfisterer, *The Second SWIFT Agreement Between the European Union and the United States of America – An Overview*, 11 GER. L. J. 1173 (2010). Only recently, a first report on the implementation of the 2010 SWIFT Agreement was released by the European Commission, *Report on the joint review of the implementation 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*, Mar. 16 2011, available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/10_tftpjointreview2011/10_tftpjointreview2011en.pdf.

² For more general information on PNR data, *see* Press Release, Eur. Comm’n, (July 13, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/294&format=HTML&aged=0&language=EN>.

³ Agreement between the European Community and the United States of America on the processing and transfer of Passenger Name Record data by air carriers to the United States Department of Homeland Security 2004 O.J. (L 183) 84 [hereinafter 2004 PNR Agreement]; Agreement between the European Community 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 2007 O.J. (L 204) 18 [hereinafter 2007 PNR Agreement].

⁴ 2007 PNR Agreement, *supra* note 3, at ¶ 9 (“This Agreement and any obligations there under will expire and cease to have effect seven years after the date of signature unless the parties mutually agree to replace it.”).

⁵ *See* Press Release, Eur. Comm’n, New EU-US agreement on PNR improves data protection and fights crime and terrorism (Nov. 17, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1368&format=HTML&aged=0&language=EN&guiLanguage=de>; as to the media coverage, *see* Nikolas Busse, *Neues Abkommen zu Fluggastdaten*, FRANKFURTER ALLGEMEINE [F.A.Z.], Nov. 9, 2011, available at <http://www.faz.net/aktuell/politik/eu-einigt-sich-mit-amerika-neues-abkommen-zu-fluggastdaten-11523193.html> (Ger.).

To this end, it will first map the scene with a particular focus on the substantive legal dimension (II). Second, it will provide a comprehensive retrospect with an emphasis on the two PNR Agreements (III). Third, it will address some selected recent developments that are likely to have determined the negotiations of the new PNR Agreement (IV). Finally, it will conclude and dare to make an outlook to the future (V).

II. MAPPING THE SCENE

Transatlantic cooperation in the context of PNR information sharing basically translates to the collection, processing, use, storage, and—most paradigmatically—crossborder transfer of PNR data. In the face of the complexity of this enterprise, the following chapter will first outline the aspects that were considered of major importance by the Commission as reflected in the corresponding Communications (A). After that, it will sketch its major controversy as far as substantial law is concerned (B).

A. MAJOR CONSIDERATIONS

When it comes to the major concerns that most likely framed the political debate on the transatlantic cooperation on PNR, two Communications released by the Commission can give some guidance.⁶ To a certain degree, they shed light on the considerations that determined and still determine the decision-making of the Commission in this context.

In December 2003, the Commission transmitted a communication on the transfer of air passenger name record data (“2003 PNR Communication”) to the Council of the European Union (“Council”) and the European Parliament (“Parliament”).⁷ In this document, it identified seven overarching aspects that were to be given due weight in the PNR context.⁸ These aspects were:

[T]he fight against terrorism and international crime, the right to privacy and the protection of fundamental civil rights, the need for airlines to be able to comply with diverse legal requirements at an acceptable cost, the broader EU-U.S. relationship, the security and convenience of air travellers, border security concerns, [and] the truly international, indeed world-wide, scope of these issues.⁹

In its communication on the global approach to transfers of passenger name record data to third countries from September 2010 (“2010 PNR Communication”),¹⁰ the Commission basically confirmed the validity of these concerns.¹¹ It listed the five reasons underlying it revised its global approach as follows: the “[f]ight against terrorism and serious transnational crime,”¹² the effort to “[e]nsure the protection of personal data and privacy,”¹³ the “[n]eed to provide legal certainty and streamline the obligations on air carriers,”¹⁴ the attempt to “[e]stablish general conditions aimed at ensuring coherence and further developing an international approach,”¹⁵ and the “[c]ontribution in increasing passenger

⁶ See Commission of the European Communities, *Communication from the Commission to the Council and the Parliament, Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach*, COM (2003) 826 final [hereinafter Comm. of Dec. 16, 2003]; European Commission, *Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries*, COM (2010) 492 final [hereinafter Comm. of Sept. 21, 2010].

⁷ Comm. of Dec. 16, 2003, *supra* note 6.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ Comm. of Sept. 9, 2010, *supra* note 6, at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

convenience.”¹⁶ In addition, it named three general considerations as relevant: the “[s]hared security interest,” the “[p]rotection of personal data,” and “[e]xternal relations.”¹⁷

These aspects already convey a certain impression of the complexity of the entire issue. It can be assumed, however, that there are additional considerations that played and still play a significant role although they may not be meant for the public. Among those most likely is the relation—in other words, the distribution of power—between the different EU institutions as well as between the EU and its Member States.

B. SECURITY VS. PRIVACY

As pointed out above, the transatlantic cooperation in the PNR context concretely refers to the collection, processing, use, storage, and transatlantic transfer of PNR data. The purpose of these actions is to fight terrorism and serious crime.¹⁸

The fight against terrorism and serious crime is indeed one of the major goals of the EU. The EU Treaty (“TEU”) states that the EU:

[S]hall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.¹⁹

The same article transfers that goal to the “relations [of the EU] with the wider world” and urges it to “uphold and promote its values and interests and contribute to the protection of its citizens.”²⁰

The fight against terrorism and serious crime, however, does not take place in a legal vacuum. The EU is attached to “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.”²¹ This means that the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (“ChFREU”).²² Furthermore, “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”²³ Among those fundamental rights is the right to respect for private life²⁴ as well as the right to protection of personal data.²⁵ In its often-cited judgment in the *Niemietz* case of 1992, the European Court of Human Rights (“ECtHR”) held that article 8 of the ECHR:

¹⁶ *Id.* at 6–7.

¹⁷ *Id.* at 7.

¹⁸ 2007 PNR Agreement, *supra* note 3, Preamble, ¶ 1 (“Desiring to prevent and combat terrorism and transnational crime effectively as a means of protecting their respective democratic societies and common values.”).

¹⁹ Consolidated Version of the Treaty of European Union art. 3, Mar. 30, 2010, 2010 O.J. (C 83) 17 [hereinafter TEU].

²⁰ *Id.* The corresponding policies are reflected most explicitly in European Council, *A Secure Europe in a Better World: European Security Strategy*, (Dec. 12, 2003), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>; and European Commission, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM (2010) 673 final (Nov. 22, 2010), available at http://ec.europa.eu/commission_2010-2014/malmstrom/archive/internal_security_strategy_in_action_en.pdf [hereinafter EUISSA 2010].

²¹ TEU, *supra* note 19, at Preamble.

²² *Id.* at art. 6.

²³ *Id.*

²⁴ See Charter of Fundamental Rights of the European Union art. 7, 2010 O.J. (C 83) 389 [hereinafter ChFREU] (“[e]veryone has the right to respect for his or her private and family life, home and communications.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950 [hereinafter ECHR] (“[e]veryone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

[D]oes not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life.’ However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.²⁶

Despite the uncertainty as to the concrete scope of the provision, the ECtHR found it to be its essential object and purpose “to protect the individual against arbitrary interference by the public authorities.”²⁷ In light of and consistent with this broad perception of privacy, the ECtHR turned the collection, processing, use and storage of personal data into a question of fundamental rights in general and the right to respect for private life in particular.²⁸ The European Court of Justice (“ECJ”), in turn, appropriated the corresponding jurisprudence of the ECtHR, including its concept of privacy.²⁹ Although the ChFREU, other than the ECHR, contains a *specific right to the protection of personal data in Article 8, the ECJ keeps highlighting the close connection between the right to protection of personal data and the right to respect for private life.*³⁰

Against this backdrop, transatlantic cooperation in the sharing of PNR information reflects the classical dichotomy between security and privacy.³¹ Security has to be achieved by the vast collection of personal data without suspicion by public authorities for law enforcement purposes. Privacy is a sphere that is particularly sensitive to intrusion by public authorities and, therefore, to be protected by the “most comprehensive of rights and the right most valued by civilized men”³²—the right to privacy.³³

III. LOOKING BACK

This underlying controversy has surfaced repeatedly in the history of the transatlantic cooperation in the PNR context. Finding the right balance between security and privacy has often turned out to be a difficult challenge – not only as regards the negotiation and adoption of the two PNR Agreements between the U.S. and the EU (C), but also as regards the coordination between the EU institutions (B). If the U.S. authorities that are the major advocates for security, this is once more due to the legacy of 9/11 (A).

²⁵ See ChFREU, *supra* note 24, at art. 8 (“[e]veryone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.”).

²⁶ Niemietz v. Germany, 251 Eur. Ct. H.R. (ser. A) at ¶ 29 (1992).

²⁷ See Niemietz, 251 Eur. Ct. H.R. at ¶ 31. See also, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at ¶ 31 (1979).

²⁸ See Leander v. Sweden, 9 Eur. Ct. H.R. 433 (1987); Kopp v. Switzerland, App. No. 23223/94, 27 Eur. H.R. Rep. 91 (1999); Amann v. Switzerland, 30 Eur. Ct. H.R. 843 (2000); Rotaru v. Romania, 8 Eur. Ct. H.R. 449 (2000); Marper v. United Kingdom, 2008 Eur. Ct. H.R. 1581 (2008).

²⁹ See, e.g., Joined Cases C-465/00, C-138/01, & C-139/01, Rechnungshof v. Österreichischer Rundfunk and others, 2003 E.C.R. I-4989, ¶¶ 73–75; Joined Cases C-92/09 & C-93/09, Volker und Marcus Schecke GbR & Hartmut Eifert v. Land Hessen & Bundesanstalt für Landwirtschaft und Ernährung, 2010 E.C.R. I-0000, ¶ 59.

³⁰ Schecke, 2010 E.C.R. at ¶ 47 (“That fundamental right is closely connected with the right to respect of private life expressed in Article 7 of the Charter.”).

³¹ Arthur Rizer, *Dog Fight: Did the International Battle over Airline Passenger Name Records Enable the Christmas-Day Bomber?*, 60 CATH. U. L. REV. 77, 79–83 (2010); Alenka Kuhelj, *The Twilight Zone of Privacy for Passengers of International Flights between the EU & USA*, 16 U.C. DAVIS J. INT’L L. & POL’Y 383, 388–393 (2010).

³² Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J., dissenting).

³³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a comprehensive study of the most important conceptions of privacy as regards U.S. Constitutional law and U.S. Supreme Court jurisprudence, see Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002). For a transatlantic comparison, see James Whitman, *Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1151 (2004).

A. 9/11 AS THE HISTORICAL REASON

The PNR saga began in winter 2001, shortly after the terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington D.C., on September 11, 2001.³⁴ As a reaction to those terrorist attacks, the U.S. Government engaged in counter-terrorism activities of all kinds in the following months and years.³⁵ The U.S. Congress, in particular, enacted a series of laws aimed at the fight against terrorism.³⁶ In this context, air carriers operating flights to, from, or through the U.S. were obliged to grant the competent U.S. authorities access to PNR data contained in their reservation and departure control systems.³⁷ The goal of this legislation was “[t]o improve aviation security” and “[t]o enhance the border security of the United States.”³⁸ The Commission soon became aware of the potential clash of the legislation adopted by the U.S. Congress and the corresponding obligations of the air carriers on the one hand and data protection principles as laid down in EU law on the other.³⁹ As a consequence, it engaged in negotiations with the U.S. authorities to solve these problems and establish a sound legal framework for the respective obligations of the air carriers.

However, apart from the transatlantic negotiations, controversies within the institutional structure of the EU turned the corresponding decision-making into a difficult enterprise.

B. THE CONSTANT STRUGGLE FOR A CONSISTENT EU POLICY

The struggle for a consistent EU policy is again being reflected through the two PNR Communications of the Commission and their creation and evolution.

1. *The 2003 PNR Communication*

The EU Parliament certainly welcomed the fact that a dialogue was opened between the U.S. and the EU on the issue. Apparently, however, it did not share the reserved approach applied by the Commission. As a consequence, it adopted two corresponding resolutions in March and October 2003.⁴⁰

In the first one, it “[c]alls on the Commission to secure the suspension of the effects of the measures taken by the U.S. authorities pending the adoption of a decision regarding the compatibility of those measures with Community law” and “reserves the right to examine the action taken before the next EU-U.S.

³⁴ As to the historical dimension, see also Arthur Rizer, *supra* note 21, 83–91; Marjorie Yano, *Come Fly the (Unfriendly?) Skies: Negotiating Passenger Name Record Agreements between the United States and the European Union*, 5 J. L. & POL’Y FOR INFO. SOC’Y 479, 485–501 (2010).

³⁵ The most controversial aspects of this activity have most likely been the U.S. led interventions in Afghanistan and Iraq and the establishment of the detention camp in Guantanamo Bay (Cuba).

³⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, of 2001 (Patriot Act), Pub. L. No. 107–56 (explaining that the Act intends “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”); see David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 256–62 (2008).

³⁷ See Aviation and Transportation Security Act (ATSA) of 2001, Pub. L. No. 107–71 (codified as amended in scattered sections of 49 U.S.C.A.) [hereinafter ATSA]; see also Enhanced Border Security and Visa Entry Reform Act (EBSV) of 2002, Pub. L. 107–73 codified as amended in scattered sections of 8 U.S.C.A.) [hereinafter EBSV].

³⁸ ATSA, *supra* note 37, at preamble; EBSV, *supra* note 37, at Preamble.

³⁹ Parliament and Council, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data on the free movement of such data, 1995 O.J. (L 281) 31 [hereinafter Data Protection Directive]. To the fundamental rights dimension of data protection, as laid in section II.B.2., relevant secondary legislation is to be added, first and foremost. As to the dilemma faced by the air carriers concerned, see Megan Roos, *Safe on the Ground, Exposed in the Sky: The Battle Between the United States and the European Union over Passenger Name Information*, 14 Transnat’l & Contemp. Probs. 1137 (2005).

⁴⁰ See European Parliament Resolution on transfer of personal data by airlines in the case of transatlantic flights, 2003 O.J. (C 61) [hereinafter European Resolution of Mar. 13, 2003]; see also European Parliament Resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA, 2003 O.J. (C 81) [hereinafter European Parliament Resolution of Oct. 9, 2003].

summit.”⁴¹ In the second, it calls on the Commission, once again, to take action and “urges that a direct contact group be established between Members of the European Parliament and Members of the U.S. Congress, in order to exchange information and discuss the strategy of ongoing and upcoming issues.”⁴²

Against this as the backdrop, the Commission released the 2003 PNR Communication.⁴³ Its goal was to set out the criteria that the EU considered decisive for its future actions in the context of the transfer of PNR data.⁴⁴ In this document, the Commission first sketched the factual background of the Communication, then presented the main components of its future approach and finally laid out its elements in more detail.⁴⁵

As to the main components, the document revealed the political aspects that were to be given due consideration in the issue at hand (II.A.).⁴⁶ Thus, it prioritized the following elements as the the five main components of the EU global approach: (1) “[a] legal framework for existing PNR transfers to the U.S.,”⁴⁷ (2) the “[c]omplete, accurate and timely information for passengers;”⁴⁸ (3) the replacement of the “‘pull’ (direct access by US authorities to airlines’ databases) with a ‘push’ method of transfer, combined with appropriate filters;”⁴⁹ (4) the “development of an EU position on the use of travellers’ data, including PNR, for aviation and border security;”⁵⁰ and (5) the “creation of a multilateral framework for PNR Data Transfer within the International Civil Aviation Organisation (“ICAO”).”⁵¹ For the present article, the legal framework for the PNR transfer to the U.S. is of particular importance. In this context, the Commission claimed to have already “substantially improved” the applicable arrangements on data protection by means of its negotiations with the Bureau of Customs and Border Protection (“BCBP”).⁵² The safeguards—laid out in written Undertakings transmitted by the BCBP—now contained quantitative limits to the amount of data to be transferred, mandatory deletion requirements, a more precise and narrower tailoring of the transfer requests, a limitation of the maximum retention period, the establishment of a responsible Chief Privacy Officer (“CPO”) at the Department of Homeland Security (“DHS”) as well as an annual joint review of these safeguards.⁵³ The adequacy of the level of data protection provided for by these undertakings, however, was questioned by the corresponding opinion of the Article 29 Data Protection Working Party (“DPWP”) from June 2003.⁵⁴ For the future, the Commission would seek a more solid legal arrangement. It was to include a formal Commission Decision pursuant to art. 25(6) of the Data Protection Directive that confirms the adequacy of the level of data protection guaranteed by U.S. authorities and allows for the onward transfer of personal data as well as an international agreement.⁵⁵

In retrospect, particularly in view of the 2010 PNR Communication (2), the 2003 Communication can be said to have identified the major issues and laid ground for further development. However, in some

⁴¹ European Parliament Resolution of Mar. 13, 2003, *supra* note 40, at ¶¶ 5–6.

⁴² European Parliament Resolution of Oct. 9, 2003, *supra* note 40, at ¶ 4.

⁴³ Comm. of Dec. 16, 2003, *supra* note 6.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 3–10.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Id.*; see also Irfan Tukdi, *Transatlantic Turbulence: The Passenger Name Record Conflict*, 45 HOUS. L. REV. 587, 611–13, 620–21 (2009) (describing a multilateral framework as a potential solution to the underlying controversies).

⁵² Comm. of Dec. 16, 2003, *supra* note 6, at 5.

⁵³ *Id.* at 6–7.

⁵⁴ Article 29 Data Protection Working Party [hereinafter DPWP], *Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers’ Data* (June 13, 2003), available at http://www.statewatch.org/news/2003/jun/wp78_en.pdf; see also DPWP, *Opinion 2/2004 on the Adequate Protection of Personal Data Contained in the PNR of Air Passengers to Be Transferred to the United States’ Bureau of Customs and Border Protection (US CBP)* (January 29, 2004), available at <http://www.statewatch.org/news/2004/feb/WG29-PNR-US.pdf>.

⁵⁵ Comm. of Dec. 16, 2003, *supra* note 6, at 4.

aspects it remains in the abstract and is certainly not suitable to give solid guidance as to specific problems potentially arising in the issue.

2. The 2010 PNR Communication

Seven years after the release of the 2003 PNR Communication, the transatlantic PNR landscape had significantly changed (C). On the EU side, however, one well-known pattern remained unchanged: The Parliament was still not convinced by the approach applied by the Commission. Hence, in a Resolution of May 5, 2010, the Parliament called for:

[A] coherent approach on the use of PNR data for law enforcement and security purposes, establishing a single set of principles to serve as a basis for agreements with third countries; invites the Commission to present, no later than mid-July 2010, a proposal for such a single model and a draft mandate for negotiations with third countries.⁵⁶

The Commission indeed responded on September 21, 2010, and released the above-mentioned 2010 PNR Communication.⁵⁷ Seven years after the release of the 2003 PNR Communication, the Commission considered itself confronted with “new trends and challenges” as regards international PNR transfers. “The number of countries in the world developing PNR systems will most likely increase in the coming years. Furthermore, the EU gained important insight into the structure and value of PNR systems through its experience with carrying out joint reviews of the agreements with the U.S. and Canada.”⁵⁸ Because the measures envisaged in the 2003 PNR Communication had either already been implemented or were actually being implemented, the key objective of the 2010 Communication was to reconsider its strategy on the issue and to establish “a set of general criteria which should form the basis of future negotiations on PNR agreements with third countries.”⁵⁹ In the document, the Commission first addressed the factual developments of the recent years.⁶⁰ Second, it commented on international trends in the area.⁶¹ Third, it presented a revised EU approach to the matter and finally provided for a long-term perspective.⁶²

Especially with regard to the revised global approach on PNR for the EU, the document sets out in depth the various safeguards to be incorporated into future agreements. Among those are a strict purpose limitation (with respect to the use and the scope of the data), particular restrictions with regard to sensitive data, special requirements as to data security, provisions on oversight and accountability, the guarantee of a right to access, rectification, deletion and redress, limited retention periods as well as a restriction of potential onward transfers (to other government and other countries).⁶³ With respect to the long-term perspective, the Commission repeats its general dedication to a multilateral solution of the entire issue.⁶⁴

C. TRANSATLANTIC PNR AGREEMENTS

The EU approach was originally directed towards a multilateral solution which was considered “the only practical way to address international air travel issues.”⁶⁵ The approach actually put into practice,

⁵⁶ European Parliament Resolution on the launch of negotiations for Passenger Name Record agreements with the United States, Australia, and Canada, 2010 O.J. (C 81) 70, ¶ 7.

⁵⁷ Comm. of Sept. 9, 2010, *supra* note 6.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Comm. of Sept. 21, 2010, *supra* note 6, at 6–10. Regarding the safeguards in the area of data protection, there is a broad overlap between the mechanisms envisaged by the Communication (and most likely contained in the new PNR Agreement) and the 2010 SWIFT Agreement, *supra* note 1. See Valentin Pfisterer, *supra* note 1, 1173, 1185–86.

⁶⁴ Comm. of Sept. 21, 2010, *supra* note 6 at 10.

⁶⁵ *Id.* at 4. See also *Id.* at 10.

however, was bilateral and on a case-by-case basis.⁶⁶ At present, the EU has three international PNR agreements in place: with Canada (2005), the U.S. (2007) and Australia (2008).⁶⁷ Whereas the struggle of the EU for a consistent policy on PNR information sharing, looked at in isolation, already reflects the difficulty of the entire issue, the effort to establish a legally sound international agreement between the U.S. and the EU turned out to be even more challenging.⁶⁸

1. *Toward the 2004 PNR Agreement*

As alluded to in the 2003 PNR Communication, the Commission led the negotiations with the U.S. authorities with the goal of entering into an international agreement with the U.S. In the course of these talks, it apparently received sufficient commitment from its counterpart that—in its judgement—matched the requirements of an “adequate level of protection.”⁶⁹ Consequently, on May 14, 2004, it released a formal Decision pursuant to Article 25(6) of the Data Protection Directive that confirmed the adequacy of the level of protection guaranteed by U.S. authorities and allowed for the onward transfer of personal data.⁷⁰ As far as the involvement of the Parliament is concerned, a draft version of the Decision had been transmitted to it on March 1, 2004. In reaction, the Parliament adopted a corresponding Resolution on March 31, 2004, that criticized the envisaged Decision as well as the envisaged agreement in many aspects.⁷¹ Consequently, it called on the Commission “to withdraw the draft decision” and “to submit to Parliament a new adequacy-finding decision and to ask the Council for a mandate for a strong new international agreement in compliance with the principles outlined in this resolution.”⁷² In the meantime, the Parliament stated that it “reserves the right to appeal to the Court of Justice should the draft decision be adopted by the Commission” and “[r]eserves the right to bring an action before the Court of Justice in order to seek verification of the legality of the projected international agreement and, in particular, the compatibility thereof with the protection of a fundamental right.”⁷³ As neither the Commission nor the Council shared the perspective of the Parliament, the Council adopted the decision required by Article 300(2) of the then-valid EC Treaty.⁷⁴ Hence, it allowed the Agreement between the European Community and the U.S. on the processing and transfer of PNR data by air carriers to the U.S. Department of Homeland Security, Bureau of Customs and Border Protection (2004 PNR Agreement) to enter into force.⁷⁵ Beforehand, a proposal for the Council Decision had also been forwarded to the Parliament on March 17, 2004. The Parliament, however, had missed the opportunity to make a corresponding statement.⁷⁶

⁶⁶ *Id.* at 5 (stating that the Commission explains this discrepancy by the pressure from other countries is “demand driven”).

⁶⁷ Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, 2006 O.J. (L 82) 15; 2007 PNR Agreement, *supra* note 3; Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record data by air carriers to the Australian customs service, 2008 O.J. (L 213) 49. A new agreement with Australia was adopted in September 2011.

⁶⁸ As to the transatlantic dimension of the PNR saga, see Richard Rasmussen, *Suspicion of Terrorism? The Dispute between the United States and European Union over Passenger Name Record Data Transfers*, 26 WIS. INT. L. J. 551 (2008); Rizer, *supra* note 31, 83–90 (2010).

⁶⁹ The term “adequate level of protection” is a technical term defined in article 25(2) of the Data Protection Directive, *supra* note 39.

⁷⁰ European Commission, Decision 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, 2004 O.J. (L 235) 11.

⁷¹ European Parliament, Resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records transferred to the U.S. Bureau of Customs and Border Protection, 2004 O.J. (C 103) 665.

⁷² *Id.* ¶¶ 4, 10.

⁷³ *Id.* ¶¶ 7–8.

⁷⁴ European Council, Decision of 17 May 2004 on the conclusion of an 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, 2004 O.J. (L 183) 83.

⁷⁵ 2004 PNR Agreement, *supra* note 3.

⁷⁶ As to the inter-institutional difficulties in this respect, see Opinion of Advocate General Léger, Joined Cases C-317/04 & C-318/04, *Parliament v. Council and Comm’n*, 2006 E.C.R. I-4721 ¶¶ 1–16, 33–49.

2. The 2004 PNR Agreement

The 2004 PNR Agreement consisted of a preamble and an operative part consisting of eight paragraphs. Pursuant to the most important provision:

CBP may electronically access the PNR data from air carriers' reservation/departure control systems ("reservation systems") located within the territory of the Member States of the European Community strictly in accordance with the Decision and for so long as the Decision is applicable and only until there is a satisfactory system in place allowing for transmission of such data by the air carriers.⁷⁷

Hence, it basically permitted the CBP to access the relevant data by way of a "pull" mechanism and without major material or procedural restraints. The safeguard mechanisms included in the 2004 PNR Agreement were fragmented at best; the "importance of respecting fundamental rights and freedoms, notably privacy" was superficially acknowledged.⁷⁸ Vague references were made to the Data Protection Directive, the so-called Undertakings of the CBP from May 11, 2004, that accompanied the 2004 PNR Agreement and the above-mentioned Commission Decision that, for its part, relied on the Undertakings.⁷⁹ Then, U.S. laws and constitutional requirements were made the major standard governing the processing of the data received.⁸⁰ Finally, a joint and regular review by the BCBS and the Commission was provided for – but without any temporal or procedural framework.⁸¹

The ignorance of the doubts and objections of the Parliament by the Commission and the Council hastened the Parliament to take action and make the next move.

3. ECJ Proceedings

As alluded to in its Resolution from March 31, 2004, the Parliament had initiated proceedings to the ECJ on April 21, 2004, and requested its opinion on the legality of the agreement or the corresponding acts by the Commission and the Council pursuant to Article 300 (6) of the then-valid EC Treaty. However, as it was ignored by the the Commission and the Council that had finally adopted the relevant acts without a statement of the Parliament, it decided to change course. On July 9, 2004, the Parliament withdrew its request to the ECJ and initiated contentious proceedings. These proceedings aimed at the annulment of the above mentioned acts by the Commission and the Council on procedural and substantive grounds. The European Data Protection Supervisor ("EDPS") was granted leave to intervene in the proceedings in support of the Parliament.⁸²

On November 22, 2005, Advocate General Léger released a thoroughly drafted opinion that covered a wide range of the issues raised by the Parliament.⁸³ In his opinion, Léger argued that both the Commission and the Council Decision were illegal and, therefore, to be annulled by the Court.⁸⁴

In his view, the Commission Decision was to be rejected for lack of legal basis in the Data Protection Directive. The Directive, he stated, did not provide for measures concerning "public security, defence, State security . . . and the activities of the State in areas of criminal law"⁸⁵ and hence, could not serve as a suitable legal basis for the Commission Decision at hand.⁸⁶ Moreover, in his opinion, the Council

⁷⁷ 2004 PNR Agreement, *supra* note 3, preamble.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶¶ 3–5.

⁸⁰ *Id.* ¶ 4.

⁸¹ *Id.* ¶ 5.

⁸² Opinion of Advocate General Léger, Joined Cases C-317/04 & C-318/04, *Parliament v. Council and Comm'n*, 2005 E.C.R. I-2459.

⁸³ Opinion of Advocate General Léger, *supra* note 82.

⁸⁴ *Id.* at ¶¶ 284.

⁸⁵ Data Protection Directive, *supra* note 39, at art. 3(2).

⁸⁶ Opinion of Advocate General Léger, *supra* note 82.

Decision lacked a suitable legal basis as well. The provision of Article 95 of the then-valid EC Treaty, he stated, did not provide for a legal foundation for measures focusing on public security and defense such as the Council Decision at hand.⁸⁷ The most elaborate and—from a fundamental rights perspective—insightful part of Léger’s opinion, however, constitutes the assessment of the pleas that allege an infringement of the right to protection of personal data and a breach of the principle of proportionality.⁸⁸ In this context, he unfolded a thorough analysis of the 2004 PNR Agreement in light of the right to respect for private life as enshrined in Article 8 ECHR and interpreted by the ECtHR as well as the ECJ (II.B.).⁸⁹ As a result of this analysis, Léger found:

[W]hen all those safeguards are taken into account, the Council and the Commission cannot be considered to have exceeded the limits of the wide discretion which they must, in my view, be allowed for the purpose of combating terrorism and other serious crimes. It follows that the pleas alleging infringement of the right to protection of personal data and breach of the principle of proportionality are unfounded and must therefore be dismissed.⁹⁰

Beforehand, however, Léger had made a debatable argument in favor of a limited level of scrutiny in the case at hand which he consequently applied to his legal assessment.⁹¹ Nevertheless, even today, this part of Léger’s Opinion constitutes one of the most important official analyses in the context of PNR information sharing in particular and at the junction of counter-terrorism and human rights in general.

For the very proceedings, however, this part of the Opinion turned out to be—at least formally—ineffective. In its decision handed down on May 30, 2006, the ECJ struck down both the Commission Decision as well as the Council Decision—the first for lack of suitable legal basis, the second for wrong legal foundation—without further addressing questions of conformity with fundamental rights.⁹² At the same time and for reasons of legal certainty, it limited the temporary effects of the judgment so that the 2004 PNR Agreement would preliminarily stay in force and the organs involved would have to terminate it according to the procedures laid down in the very Agreement.⁹³ As a consequence, the Commission and the Council, in compliance with the judgement, terminated the Agreement a few weeks later, set back to the very beginning of its efforts in that matter.⁹⁴

4. *Toward the 2007 PNR Agreement*

The victory of the Parliament, however, did not last long and turned out to be pyrrhic. Following the judicial defeat, in October 2006, an interim Agreement was adopted to secure the transatlantic cooperation in the PNR context until the end of July 2007.⁹⁵ At the same time, negotiations for a new PNR Agreement were carried out and, in June 2007, the Council adopted a decision on the signing of the new Agreement.⁹⁶ By doing

⁸⁷ *Id.* at ¶¶ 126–162.

⁸⁸ *Id.* at ¶¶ 193–262.

⁸⁹ *Id.* at ¶¶ 211–262.

⁹⁰ *Id.* at ¶¶ 261–262.

⁹¹ *Id.*

⁹² *Id.* at ¶¶ 54–61, 67–70.

⁹³ *Id.* at 71–73; *See also*, Vanessa Serrano, *The European Court of Justice’s Decision to Annul the Agreement between the United States and European Community Regarding the Transfer of Personal Name Record Data, its Effects, and Recommendations for a New Solution*, 13 *ILSA J. Int’l & Comp. L.* 453 (2007).

⁹⁴ *Commission Communication to the Council, Termination of the 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*, COM (2006) 335 final (June 16, 2006).

⁹⁵ Agreement between the European Union and the United States of America on the processing and transfer of passenger name record data by air carriers to the United States Department of Homeland Security, 2006 O.J. (L 298) 29.

⁹⁶ Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), 2007 O.J. (L 204) 16.

this, the Council responded to the ECJ judgment and chose Articles 24 and 38 of the then-valid EU Treaty as the corresponding legal foundation.⁹⁷ These provisions were part of the system of rules that established the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters respectively⁹⁸ and allowed the Council to conclude agreements with third countries. According to this set of rules, however, neither the Parliament nor the ECJ had anysay in the procedure of the adoption of such agreements.

5. *The 2007 PNR Agreement*

The 2007 PNR Agreement consists of a preamble and nine paragraphs. Pursuant to the core provision, “the European Union will ensure that air carriers operating passenger flights in foreign air transportation to or from the United States of America will make available PNR data contained in their reservation systems as required by DHS.”⁹⁹ The method to be applied is a “pull system” that allows U.S. authorities to access to the relevant data directly. Only after January 1, 2008, a “push system” was to be used with regard to those air carriers that dispose of the necessary technical requirements.¹⁰⁰ The most striking aspect, however, is that the Agreement is not, like the 2004 Agreement, to be perceived in combination with a Decision of the Commission and Undertakings. It is rather accompanied by a mere letter by the Secretary of Homeland Security whose intent is “to explain how the United States Department of Homeland Security handles the collection, use, and storage of Passenger Name Records.”¹⁰¹ It does, by no means, “create or confer any right or benefit on any person or party, private or public, nor any remedy other than that specified in the Agreement between the EU and the U.S. on the processing and transfer of PNR by air carriers to DHS signed in July 2007 (the Agreement).”¹⁰²

Against this backdrop, there would surely be enough grounds for doubts and objections to be raised by the Parliament or, even for the initiation of new proceedings to the ECJ. For the above-mentioned reasons, however, the latter option in particular is not at the disposal of the Parliament this time. As the 2007 PNR Agreement, pursuant to its ninth paragraph, is to expire in a few years, the Parliament seemed to have given away its influence on the issue for quite some time. However, and most likely due to the recent changes on the legal, institutional and political planes (IV), it will be able to wield its influence on the issue much earlier (IV. B).

IV. THE IMMEDIATE BACKGROUND OF THE NEW PNR AGREEMENT

There is every reason to believe that the negotiators had the lessons—learned from the rich history of the transatlantic cooperation on PNR information management—in mind when they negotiated and agreed upon the new PNR Agreement (III). Apart from that, however, certain developments of the recent past are likely to have had a significant impact on or to have even framed the negotiations and, as a consequence, be reflected in the concrete design of the new PNR Agreement.

Among those developments are the entry into force of the Lisbon Treaty (A) and the translation into practice of the corresponding legal changes by the Parliament (B) and the ECJ (C). Moreover, the Commission (D) as well as the German Federal Constitutional Court (E) may have contributed their share. Finally, there were significant changes in U.S. politics (F).

A. THE LISBON TREATY

A first aspect of the changed situation in which the negotiations on a new PNR Agreement took place is the entry into force of the Treaty of Lisbon on December 1, 2009.¹⁰³ Although it lacked the constitutional

⁹⁷ *Id.* at Preamble.

⁹⁸ TEU, *supra* note 19, art. 11–42 (as in effect 2007).

⁹⁹ 2007 PNR Agreement, *supra* note 3, ¶ 1.

¹⁰⁰ *Id.* ¶ 2.

¹⁰¹ See Letter from U.S. Sec’y of Homeland Sec. to EU (2007) (referencing 2007 O.J. (L 204) 21).

¹⁰² *Id.*

¹⁰³ TEU, *supra* note 19.

pathos of the failed Treaty establishing a Constitution for Europe, the Treaty came along with a complete overhaul of the European constitutional order. It brought about many changes to the European Treaties—among those, institutional, substantive, and procedural changes. As to the PNR context, however, two major changes are of particular importance.¹⁰⁴

First, the distribution of power within the institutional structure of the EU has been modified and, in this context, the position of the Parliament has been significantly strengthened. As a consequence, the influence of the Parliament has been reinforced in areas in which the Parliament had already had a say and it has been granted additional competencies in areas that it had been excluded from before.¹⁰⁵ With respect to the new PNR Agreement, this means that the approval of the Parliament will be required.¹⁰⁶

Second, the importance of the protection of fundamental rights, in general, and of privacy and personal data, in particular, has been underpinned. An expression of this is, amongst others, the newly worded Article 6(1) TEU that made the formerly non-binding ChFREU into binding primary law.¹⁰⁷ Under the new legal framework, the protection of privacy can not only be brought to bear by means of Article 8 ECHR, but also by Article 7 ChFREU (right to respect for private life). Moreover, the protection of personal data can be specifically called for by invoking Article 8 ChFREU (right to protection of personal data) and Article 16(1) TFEU which repeats the guarantee laid down in Article 8 ChFREU.

The shift reflected by these institutional and substantive changes was certainly not limited to the legal text in itself, but was rather put to practice by the Parliament (B) and the ECJ (C).

B. THE REJECTION OF THE 2009 SWIFT AGREEMENT BY THE PARLIAMENT

The Parliament in fact did not hesitate to make use of its new position and the increased power that came along with it. On February 11, 2010, it rejected the 2009 SWIFT Agreement between the U.S. and the EU.¹⁰⁸ The 2009 SWIFT Agreement, governed by the system of rules on the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters respectively, had been adopted by the Council on November 30, 2009 and without the consent of the Parliament. Only one day later, the Treaty of Lisbon would have entered into force and required the consent of the Parliament.¹⁰⁹ Hence, the later rejection of the SWIFT Agreement can be read as a self-conscious signal toward the U.S. as well as the Commission and the Council. In the following re-negotiations towards the 2010 SWIFT Agreement, the concerns raised by the Parliament were taken more seriously. Further, the Parliament also had the opportunity to vote on it.¹¹⁰

C. THE ECJ DECISION ON AGRICULTURAL SUBSIDIES

Similar to the Parliament, the ECJ quickly turned out to be aware of the changes the Treaty of Lisbon brought by to the European Treaties. This holds especially true with regard to the increased

¹⁰⁴ Jörg Terhechte, *Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der Europäischen Rechtsgemeinschaftodertechnischer Änderungsvertrag?*, EuR 143 (2008).

¹⁰⁵ Robert Visser, *Observations on a Change: The European Union, the Treaty of Lisbon, and the Area of Freedom, Security, and Justice*, 32 STATUTE L. REV. 77 (2011).

¹⁰⁶ Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47, at art. 218(6)[2]a [hereinafter TFEU].

¹⁰⁷ See TEU, *supra* note 19, art. 6 at ¶ 1 (“The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”), See also Juliane Kokott & C. Sobotta, *Die Charta der Grundrechte der Europäischen Union nachdem Inkrafttreten des Vertrags von Lissabon*, 37 EuGRZ 265 (2010); Elizabeth Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT’L COMP. L. 413 (2010).

¹⁰⁸ See European Parliament, *SWIFT: European Parliament votes down agreement with the US*, (Feb. 11, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674>.

¹⁰⁹ TFEU, *supra* note 106, at art. 218(6)[2]a.

¹¹⁰ See 2010 SWIFT Agreement, *supra* note 1 (referencing parliamentary approval for the 2010 Agreement on July 8, 2010), in general and the political struggles on the European side in particular; See also Valentin Pfisterer, *supra* note 1, at 1177–79 (2010) (referencing parliamentary approval for the Agreement and the political struggles on the European side in particular).

importance of the protection of fundamental rights.¹¹¹ As far as the increased protection of personal data in particular is concerned, the ECJ already had a chance to forcefully bring its corresponding awareness to bear.¹¹²

In the underlying case, the ECJ had to decide whether the publication of certain information about the beneficiaries of EU agricultural subsidies as provided for by EU secondary law was in conformity with EU primary law.¹¹³ The relevant provisions of secondary law had established that certain personal information (including the full name, the postal code, and the municipality of residence) and certain financial information (including the amount of payments received) were to be disclosed to the general public.¹¹⁴ In its judgment from November 19, 2010, the Court invoked the Charter as the relevant yardstick, declared the provisions as against Articles 7 and 8 ChFREU insofar as natural persons were concerned and correspondingly annulled them.¹¹⁵ The decision has provoked a lively political and academic debate on the proper balance of EU spending transparency and the protection of personal data.¹¹⁶ In any event, the ECJ decision confirms both the determination of the ECJ to translate the substantive changes of the Treaty of Lisbon into practice as well as to hold up fundamental rights protection in politically sensitive circumstances.¹¹⁷

D. INTERNAL EU LEGISLATION

The fourth consideration refers to actions taken by the EU legislature with regard to the implementation of a European PNR system. In the 2004 PNR Agreement, the EU insinuated the possibility of establishing its own system of collection, processing, use, storage, and transfer of PNR data:

In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current travel itinerary includes a flight to or from the European Union, DHS shall, in so far as practicable and strictly on the basis of reciprocity, actively promote the cooperation of airlines within its jurisdiction.”¹¹⁸

The same provision can be found in the 2007 PNR Agreement.¹¹⁹

¹¹¹ Presidents Costa and Skouris, Joint Declaration (Jan. 17, 2011), available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf.

¹¹² EUISSA, *supra* note 20.

¹¹³ *Id.*

¹¹⁴ Council Regulation No. 1290/2005 on the financing of the common agricultural policy, 2005 O.J. (L 209) 1 and Commission, Regulation No. 259/2008 laying down detailed rules for the application of Council Regulation (EC) No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), 2008 O.J. (L 76) 28.

¹¹⁵ EUISSA, *supra* note 20, at 89.

¹¹⁶ See Ferdinand Wollenschläger, *Budgetöffentlichkeit im Zeitalter der Informationsgesellschaft*, 135 ARCHIV DES OEFFENTLICHEN RECHTS, 363 (2010); Stefan Brink and Heinrich Wolff, *Anmerkung zu Eugh (C-92/09 - C-93/09)*, JZ 206 (2011); Friederike Dratwa und Jana Werling, *Die erste Grundrechtsprüfung anhand der Charta der Grundrechte der Europäischen Union – oder: Aller Anfang ist schwer*, Eur. L. R. 23 (2011); Annette Guckelberger, *Veröffentlichung der Leistungsempfänger von EU-Subventionen und unionsgrundrechtlicher Datenschutz*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 126 (2011); Wolfgang Kilian, *Subventionstransparenz und Datenschutz*, NEUE JURISTISCHE WOCHENSCHRIFT 1325 (2011); Markus Kotzur, *Der Schutzpersonenbezogener Daten in der europäischen Grundrechtsgemeinschaft*, 38 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 105 (2011).

¹¹⁷ See Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council of the EU, 2008 E.C.R. I-06351 (providing an example of the substantive changes of the Treaty of Lisbon as well as protecting fundamental rights in politically sensitive circumstances).

¹¹⁸ 2004 PNR Agreement, *supra* note 3, Preamble, ¶ 6.

¹¹⁹ *Id.* ¶ 5.

It should not have come as a surprise when the Commission, on November 6, 2007, released a “Proposal for a Council Framework Decision on the use of Passenger Name Record for law enforcement purposes.”¹²⁰ It provided for “the making available by air carriers of PNR data of passengers of international flights to the competent authorities of the Member States, for the purpose of preventing and combating terrorist offences and organised crime, as well as the collection and retention of those data by these authorities and the exchange of those data between them.”¹²¹ The core provision established:

Member States shall adopt the necessary measures to ensure that air carriers make available the PNR data of the passengers of international flights to the national Passenger Information Unit of the Member State on whose territory the international flight referred to is entering, departing, or transiting, in accordance with the conditions specified in this Framework Decision.¹²²

Despite the safeguard mechanisms contained in the 2007 Proposal (especially Art. 11 and 12 of the 2007 Proposal), it was confronted with fierce criticism by the Parliament.¹²³ Moreover, many doubts and objections were raised by experts on fundamental rights and data protection such as the EDPS,¹²⁴ the DPWP,¹²⁵ and the European Union Fundamental Rights Agency (FRA).¹²⁶ The EDPS in particular forcefully lamented the “move towards a total surveillance society.”¹²⁷ It highlighted the “major impact in terms of data protection of the present proposal” and stated that it is, under the present circumstances, “not in conformity with fundamental rights, notably Article 8 of the Charter of the Fundamental Rights of the Union, and should not be adopted.”¹²⁸ Finally, it made a wise suggestion of a political nature:

“[t]he EDPS notes that the present proposal is made at a moment when the institutional context of the European Union is about to change fundamentally. The consequences of the Lisbon Treaty in terms of decision making will be fundamental, especially with regard to the role of the Parliament. Considering the unprecedented impact of the proposal in terms of fundamental rights, the EDPS advised not to adopt it under the present Treaty Framework, but to ensure it follows the co-decision procedure foreseen by the new Treaty. This would strengthen the legal grounds on which the decisive measures envisaged in the proposal would be taken.”¹²⁹

Indeed, the adoption of the 2007 Proposal was rendered impossible when the Treaty of Lisbon entered into force on November 1, 2009, and, amongst others, abolished the legal instrument of a Council Framework Decision.

¹²⁰ *Commission Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, COM (2007) 654 (Nov. 6, 2007).

¹²¹ *Id.* art. 1.

¹²² *Id.* art.5(1).

¹²³ Resolution on the Proposal for a Council Framework Decision on the use of Passenger Name Record for Law Enforcement Purposes, Eur. Parl. Doc. P6_TA 0561 at 5 (2008), (“strong reservations as to the necessity for and added value of the proposal”) see also Nicolas Busse, *Widerstand gegen Speicherung von Fluggastdaten*, F.A.Z., April 15, 2008 available at <http://www.faz.net/aktuell/politik/europaeische-union/rat-und-eu-parlament-widerstand-gegen-speicherung-von-fluggastdaten-1547454.html> (showing corresponding media coverage).

¹²⁴ Opinion on the Draft Proposal for a Council Framework Decision on the Use of Passenger Name Record Data for Law Enforcement Purposes, 2008 O.J. (C 110) 1.

¹²⁵ DPWP and Working Party on Police and Justice, Joint Opinion on the Proposal for a Council Framework Decision on the use of Passenger Name Record for Law Enforcement Purposes, Presented by the Commission on 6 November 2007, and 18 December 2007 available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp145_en.pdf.

¹²⁶ Opinion of the on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) Data for Law Enforcement Purposes available at http://fra.europa.eu/fraWebsite/attachments/FRA-opinion-PassengerNR_EN.pdf (last accessed on: October 16, 2011).

¹²⁷ Kadi, *supra* note 117, at 35.

¹²⁸ *Id.* at 112.

¹²⁹ ChFREU, *supra* note 24, at 15.

Consequentially, on February 2, 2011, the Commission presented a “Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime.”¹³⁰ The 2011 Proposal provides for “the transfer by air carriers of Passenger Name Record data of passengers of international flights to and from the Member States, as well as the processing of that data, including its collection, use, and retention by the Member States and its exchange between them.”¹³¹ Pursuant to the core provision, “Member States shall adopt the necessary measures to ensure that air carriers transfer ('push') the PNR data as defined in Article 2(c) and specified in the Annex, to the extent that such data are already collected by them, to the database of the national Passenger Information Unit of the Member State on the territory of which the international flight will land or from the territory of which the flight will depart.”¹³² Hence, it establishes, in principle, a system of information gathering, use, and exchange similar to the one envisaged by the 2007 Proposal. The 2011 Proposal claims, however, to take into account the critical opinions expressed on the 2007 Proposal by the Parliament as well as the experts on fundamental rights and data protection mentioned above.¹³³ And indeed, several modifications can be found that reflect an increase of the level of data protection compared to the safeguards provided for by the 2007 Proposal. Nevertheless, the 2011 Proposal has equally been confronted with severe criticism by experts on fundamental rights and data protection.¹³⁴ The so-called Meijers Committee, e.g., concluded with particular force:

Considering the risks of violation of non-discrimination, privacy and data protection, and the freedom of movement of EU citizens and third-country nationals, together with the failure to address its necessity and added value (and the high costs for the individual Member States and air transport organisations), the Meijers Committee recommends the withdrawal of the proposed PNR Directive.¹³⁵

¹³⁰ *Commission 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) 32 final (Feb. 2, 2011); see Evelin Brouer, *Ignoring Dissent and Legality: The EU's proposal to share the personal information of all passengers*, in: *Justice and Home Affairs*, CEPS Liberty and Security in Europe, (2011), available at <http://www.ceps.be/book/ignoring-dissent-and-legality-eu's-proposal-share-personal-information-all-passengers>.

¹³¹ *Id.* at Art.1(1).

¹³² *Id.* at Art.6(1).

¹³³ Explanatory Memorandum, *Commission Proposal of 2 February 2011*, *supra* note 106, at 6.

¹³⁴ Peter Hustinx, *Opinion of the European Data Protection Supervisor on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* (March 25, 2011), available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf; Jacob Kohnstamm, *Opinion 10/2011 on the 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* (April 5, 2011), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp181_en.pdf; *Opinion on the Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* COM (2011) 32 (June 14, 2011), available at <http://fra.europa.eu/fraWebsite/attachments/FRA-PNR-Opinion-June2011.pdf>; E-mail from C. A. Groenendijk, Chairman, Meijers Committee, to Cecilia Malmstrom, Commissioner for Home Affairs, European Commission (June 21, 2011), available at <http://www.commissie-meijers.nl/assets/commissiemeijers/Commentaren/2011/CM1108%20Note%20of%20the%20Meijers%20Committee%20on%20the%20Proposal%20for%20a%20Directive%20on%20the%20use%20of%20PNR%20data%20regarding%20terrorist%20offences%20and%20serious%20crime.pdf>.

¹³⁵ *Id.* at 13.

As the 2011 Proposal is currently in the midst of the legislative procedure, little can be said about the final outcome. However, recent media reports insinuate that there will be an expansion of the scope of the 2011 Proposal rather than a limitation.¹³⁶

E. BVERFG DECISIONS

In addition to these developments on the EU level, relevant developments at the junction of the EU level and the Member State level have to be added to the picture. Among these are two decisions handed down by the German Federal Constitutional Court (BVerfG) in 2009 and 2010.¹³⁷ The background for the decisions is the constant struggle between the ECJ and the national Constitutional Courts of the Member States, first and foremost the BVerfG, about the final say in matters of European integration.¹³⁸

On June 30, 2009, the BVerfG handed down a decision on the constitutionality of the Treaty of Lisbon (more precisely, of the German legislation aimed at its implementation).¹³⁹ *It established that some specific substantive areas constituted essential components of the “Constitutional identity” (Verfassungsidentität) of the Federal Republic of Germany and that these areas were not at the disposal of the EU.*¹⁴⁰ *Not even one year later*, on March 2, 2010, the BVerfG struck down major parts of the German legislation aimed at the implementation of the Data Retention Directive as unconstitutional.¹⁴¹ In this decision, the *BVerfG established*:

[I]t is part of the Constitutional identity of the Federal Republic of Germany that the citizen’s exercise of their freedoms is not totally being observed and registered By implementing a system of precautionary retention of telecommunication data, the possibility to implement other measures of precautionary collection of data is significantly reduced – also by way of the European Union.¹⁴²

¹³⁶ “Großbritannien will Flugpassagierdaten-Speicherungsweite”, SPIEGEL ONLINE, March 3, 2011, available at <http://www.spiegel.de/reise/aktuell/0,1518,748772,00.html> (discussing the pressure of the UK to expand the scope of the 2011 Proposal to EU internal flights as well as train and ship carriers).

¹³⁷ [BVerfG] [The Federal Constitutional Court] June 30, 2009, Lisbon (Ger); Joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 – BVerfGE 123, 267 and BVerfG, Judgment of March 2, 2010 (*Data Retention*) – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08) available at www.bundesverfassungsgericht.de.

¹³⁸ Although the struggle certainly has a political dimension, it unfolds in the area of legal conceptions. In a few words: the ECJ perceives the European Treaties as an “independent source of law” that prevails over national law including national constitutional law. See Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585; see also Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125. The BVerfG, in contrast, perceives European law as derivative of national law and, hence, in principle subordinate to national constitutional law. E.g. Bundesverfassungsgericht [BVerfG] [The Federal Constitutional Court] October 12, 1993, *Maastricht* (Ger.); see 2 BvR 2134, 2159/92; see also Entscheidungen Des Bundesverfassungsgerichts [BVerfGE] [The Federal Constitutional Court] 89, 155 (Ger.). As to a contribution that aims at a conceptually sound conciliation of these concepts under the actual framework of the Treaty of Lisbon. See Armin von Bogdandy and Stephan Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rollenationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs*, 70 HEIDELBERG J. INT’L L. 701 (2011).

¹³⁹ [BVerfG] [Federal Constitutional Court] June 30, 2009, available at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html> (Ger.); see also *supra* text accompanying note 111; see generally Christoph Schonberger et al., *The Federal Constitutional Court’s Lisbon Case*, 10 GER. L. J. 1201-308 (2009).

¹⁴⁰ *Id.* at 218–19, 239–41.

¹⁴¹ [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, available at <http://www.bverfg.de/pressemitteilungen/bvg10-011en.html> (Ger.); see also *supra* text accompanying note 111. See, e.g., Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC, 2006 O.J. (L 105) 54. See generally Christian DeSimone, *Pitting Karlsruhe against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive*, 11 GER. L. J. 291 (2010).

¹⁴² *Id.* at 218 (personal translation of the text).

By saying this, the BVerfG sent a clear signal to Brussels, Strasburg, and Luxemburg on its determination to protect the German Constitutional identity against a potential intrusion by the Union.¹⁴³

F. MAJOR CHANGES IN U.S. POLITICS

Whereas many of the developments on the European side can be traced back to the entry into force of the Treaty of Lisbon, the most important developments on the U.S. side are related to the presidential election held in 2008 and, hence, of a genuinely political nature.

On November 4, 2008, Illinois Senator Barack Obama was elected as the forty-fourth President of the United States. On January 20, 2009, he succeeded George W. Bush, who had controlled the fate of the country since January 2001. The cooperation between the U.S. and the EU in the area of counterterrorism in general and in the context of PNR information sharing in particular appears to have been relatively troublesome. As regards to the latter, the 2003 PNR Communication conveys an impression of how difficult the cooperation between the Bush Administration and the EU sometimes must have been:

The Commission had asked the U.S. authorities concerned to suspend the enforcement of their requirements until a secure legal framework had been established for such transfers. In the light of the U.S. refusal, the option of insisting on the enforcement of law on the EU side would have been politically justified, but it would not have served the above objectives. It would have undermined the influence of more moderate and co-operative counsels in Washington and substituted a trial of strength for the genuine leverage we have as co-operative partners.¹⁴⁴

Against this backdrop, there is every reason to believe that the arrival of the Obama Administration to the White House, in the eyes of the primary institutions of the EU, came along with the hope for and the expectation of a more accessible climate in future cooperation. Correspondingly, the European Council expressed that “[t]he arrival of a new U.S. administration is an opportunity for giving a fresh impetus to EU-U.S. relations which are more important than ever.”¹⁴⁵ More specifically, it stated that it looked forward “to working with the US in the fight against terrorism, in full respect of human rights and international humanitarian law.”¹⁴⁶ Although not less determined than the Bush Administration, the Obama Administration in fact seems to be more aware of the concerns of its allies. After all, the Obama Administration and the EU managed to negotiate and to adopt three important agreements in the area of interest here during the last two and a half years: the 2009 and 2010 SWIFT Agreements as well as the new PNR Agreement.¹⁴⁷

¹⁴³ *But see*, [BVerfG] [Federal Constitutional Court] July 6, 2010, (Ger.), available at www.bundesverfassungsgericht.de (decision in *Honeywell* case revealing a more reconciliatory attitude).

¹⁴⁴ Commission, Communication of December 16, 2003, *supra* note 6, at 5.

¹⁴⁵ Press Release, Eur. Council, *The Prague meeting of EU Heads of State and Government with the U.S. President*, 1 (Apr. 5, 2009), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107130.pdf.

¹⁴⁶ Eur. Council, *supra* note 137, at 4.

¹⁴⁷ The National Security Strategy of 2010 (“NSS 2010”) constitutes another visible example of the emphasis the Obama Administration puts on international cooperation and multilateralism, *see* White House, National Security Strategy, (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, particularly pp. 40-50. As to selected legal aspects of the NSS 2010, *see* Valentin Pfisterer, *Die nationale Sicherheitsstrategie der Vereinigten Staaten von Mai 2010 – ein Bericht*, 70 Heidelberg Journal of International Law 735 (2010) and Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of “Necessary Force”* 15 Journal of Conflict & Security 403 (2011); *see* Marjorie Yano, *supra* note 25 (suggesting an approach the Obama Administration should take to the negotiation of a future PNR agreement).

V. CONCLUSIONS, THE NEW PNR AGREEMENT, AND A LOOK AHEAD

The transatlantic cooperation in the PNR context is closely linked to the old dichotomy between security and privacy. Despite that—or simply because of it—it is a highly complex enterprise of a truly multidimensional nature. Just the legal dimension and its context help to prove the complexity of the issue: the two Commission Communications and the corresponding resolutions of the Parliament reflect the conflicting interests involved in the quest of the EU for a sound legal framework for the crossborder transfer of PNR data. Further, the two PNR Agreements between the U.S. and the EU (plus one interim Agreement), one of them struck down by the ECJ, display the great dynamics involved in the transatlantic dimension of the crossborder information sharing. Recent developments have brought further aspects into the already complex picture. Two things, however, have become clear as the transatlantic PNR saga has unfolded during the last ten years: i) the steady conviction of the U.S. Administration as well as the Commission and the Council to maintain and extend the use of PNR data for law enforcement purposes; and ii) the persistent concerns of the Parliament and data protection experts as to the adequacy of the level of data protection guaranteed by the relevant legal framework.¹⁴⁸

These patterns are also reflected in the new PNR Agreement that will be produced in the following weeks and months. The new PNR Agreement is said to represent “a big improvement over the existing Agreement from 2007.”¹⁴⁹ Moreover, it is said to bring: “more clarity and legal certainty to both citizens and air carriers. It ensures better information sharing by U.S. authorities with law enforcement and judicial authorities from the EU, it sets clear limits on what purposes PNR data may be used for, and it contains a series of new and stronger data protection guarantees.”¹⁵⁰ This refers, among others, to the limitation of the maximum retention period, the depersonalization of the data after a given period of time as well as the application of the “push” method as a general principle.¹⁵¹

With that said it seems likely that the new PNR Agreement does indeed constitute a step forward in the areas of privacy and data protection. In the light of the history of transatlantic cooperation in PNR information sharing, it can be assumed, however, that it still contains provisions that have the potential to cause a fierce legal and political debate. Hence, the new PNR Agreement – as thoroughly as it may have been designed and as complete it may seem – will not be the end of the saga. It will just be the beginning of another intriguing chapter of a story that is already rich in controversy and infighting, but also in reconciliation both within the EU institutional structure as well as between the U.S. and the EU.

¹⁴⁸ With respect to the transatlantic cooperation in the PNR context, the Commission appears in fact to be stuck in a position between U.S. authorities pushing for a more effective mechanism and the EU Parliament pushing for a higher level of data protection. Hence, it is remarkable that it is just the Commission that – as regards internal EU legislation – keeps pushing hard for the adoption and implementation of pieces of legislation with a disputable record in terms of data protection. Among those are not only the 2011 Proposal, *but see* Data Retention Directive, *supra* note 115; and Roland Derksen, *Zur Vereinbarkeit der Richtlinie über die Vorratsspeicherung von Daten mit der Europäischen Grundrechtecharta*, Opinion of the Research and Documentation Services of the German Bundestag, February 25, 2011, available at http://www.vorratsdaten-speicherung.de/images/rechtsgutachten_grundrechtecharta.pdf (expressing doubts about the conformity of the Data Retention Directive with EU fundamental rights).

¹⁴⁹ Eur. Comm'n, *supra* note 5 (quoting Commissioner Cecilia Malström).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*