1. Introduction
After the attack of 9/11 on New York the United States (US) instituted a counterterrorism policy related to United Nations Resolutions imposing obligations to combat and prevent acts of terrorism. The UN Sanctions Committee drafted lists of individuals and groups suspected of participation in terrorism activities. In principle, the enforceability of these measures was to be at national level. The European Union started to build a system of counterterrorism initiatives which could function on the basis of a system of cooperation between EU Member States. Cooperation to combat terrorism between the EU and US led to several PNR agreements and a mutual SWIFT agreement. The growing force of EU law enforcement capacities, especially since the entry into force of the 2009 Treaty of Lisbon, could give the impression that the EU institutions all agree about the way counterterrorism measures are being taken and should be applied, namely as political measures without respect for fundamental rights.

This paper describes the development of new mechanisms in the cooperation between the US and EU to combat terrorism and international crime. It deals with the conclusion of the so-called PNR data agreements and the points of view the European institutions have taken regarding the acceptance of the PNR agreements; in this context the need to issue an European directive on the subject of PNR data protection will be highlighted. Special attention will be given to the constant tension between European values and the political restrictions in protection of individual rights and private data in EU policy for the prevention and prosecution of terrorist offenses and other serious crime. Furthermore, the role of the European Court of Justice will be discussed, in its fight to find the right balance between the need for collective safety, in accordance with political measures and, at the same time, to ensure protection of individual legal rights.

2. Development of an Internal EU Foreign and Safety Policy.
The EU engagement with criminal law began at the end of the 80’s, in line with the legal developments concerning the abolishment of border controls, with the introduction of the Schengen area.\textsuperscript{1} The gradual abolition of border checks at common borders between Member States went along with the EU setting out a framework for police and judicial cooperation and law enforcement in the European Union in order to combat terrorism, international crime, drugs trafficking and trafficking of all types of crime.\textsuperscript{2} Official cooperation between EU Member States in criminal matters started with the 1992 Treaty of Maastricht, which laid down provisions on cooperation in criminal matters in the so-called ‘third pillar’ of the treaty, an intergovernmental pillar of decision making. The third pillar was called the area of justice and home affairs, with the Council as the legislative actor, and the Court of Justice lacking any jurisdiction at all.\textsuperscript{3} Consequently, it would not be easy to take decisions under the third pillar. The 1997 Amsterdam Treaty gives a specific area of police and judicial cooperation between the EU Member States, - incorporating the Schengen Agreement - that all Member States were willing to exchange information in this area.\textsuperscript{4} In the EU the internal information exchange dimension consists of the Schengen Information System, Eurodac and the Visa Information System. The first system - originally meant as a tool for the free movement of persons and police cooperation in the EU - has become an investigative tool since new kinds of data have been included in the system. The original objective of this system was meant to determine the Member State responsible for an asylum seeker, at that time the introduction of the system enriched the EU with a system of biometric data.\textsuperscript{5} Another useful system for obtaining information in the European Union is the Visa Information System (VIS) which indicates which person from what countries should possess a valid visa when crossing the external borders. For that reason, the visa could be seen as a securitizing tool for the European visa organization. The VIS is structured in the same way as the SIS, which means that an ample circle of stakeholders can use its system.\textsuperscript{6} After the attack of 9/11 an important internal counterterrorism measure to be taken by the EU was the establishment of the European Arrest Warrant (EAW), more or less without preliminary discussion between the EU Member States.

\textsuperscript{1}It started with the Schengen Agreement of 1985, signed in Schengen. This Agreement has been incorporated in the 1997 Treaty of Amsterdam

\textsuperscript{2}E. Guild e.a., European criminal law: an integrative approach. Cambridge: Intersentia 2012, p. 14 e.f.

\textsuperscript{3}V. Mitsilegas, EU Criminal law, Oxford: Hart Publishing 2009, p. 11

\textsuperscript{4}See last note, o.w., p. 16

\textsuperscript{5}Council Regulation 2725/2000 Eurodac.

\textsuperscript{6}Think of visa authorities, border control agencies, immigration authorities and internal security officials
The arrest warrant aims at directing and surrendering the suspects of crime to another Member State, without an explicit provision that would allow national authorities to refuse to surrender on the basis of possible violations of human rights in the demanding EU State. There are specific guarantees the requested person can rely on, such as the obligation of Member States to refuse to execute an EAW in case of a final judgment of the requested person by a Member State in respect of the same acts. Also, the age of the requested person can prevent him from being held criminally responsible for the acts set out in the warrant, had the criminal fact be committed in the executing State. 7 In other words, the EAW is familiar with some grounds for refusal of compliance and it would provide some specific provisions on fair trial rights, such as Article 11 that provides that requested persons will be informed on the EAW,8 and the right for the arrested person to be heard by the executing judicial authority when he does not consent to his surrender. Likewise, the EAW contains references to human rights protection for the suspects. 9The right to life has been given special attention in recital 13 of the EAW10 which makes it possible to refuse to execute an arrest warrant in case of doubt about the legal criminal system of the requesting state. Still, the rights in the EAW do not set any minimum standards of protection. There is the assumption that national law and practices are in line with the standards of the ECHR. This assumption will withhold national authorities from refusal of EAWs on human rights grounds. In practice, people challenging extradition may after being extradited suffer infringements of human rights in EU member states. 11 An example is the famous case of M.S.S. versus Belgium and Greece 12 where the European Court of Human Rights (ECtHR) decided that Belgium and Greece were in contravention of the European Convention. This decision has been taken by legal experts as an

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8He article states that the requested person has the right to be assisted by a legal counsel and by an interpreter
9As formulated in the European Charter and in Article 6 of the Treaty on the European Union.
10This right stipulates that no person should be surrendered to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other degrading treatment or punishment.
12European Court of Human Rights, Case of M.M.S. versus Belgium and Greece, Application nr. 30696/09, Strasbourg, 21 January 2011.
example of violation of human rights that could be applied to extradition matters as well. 13

3. Identification of Suspects of Terrorism: cooperation between EU and US.

Since the 9/11 attack the United States and the European Union have sought to develop common instruments of securitization. From this time on, it has become evident that the European Union counter-terrorism policy aims at covering internal and external threats of terrorism and crime. As a consequence, an increase in objects and subjects were being stored in the SIS, such as biometric data fingerprints and facial images. New agencies have been given access to the system, such as Europol, Eurojust, national juridical authorities, and vehicle registration authorities. SIS became part of the EU Action Plans on Combating Terrorism 14, connected to an anti-terrorism road-map, in 2001. These plans were meant to structure the EU agenda. Although they emerged out of a “disordered process of taking decisions and initiatives with a lot of ambiguity” regarding counter-terrorism it was clear the EU’s action plans were aimed at formulating a common counter-terrorism policy for the EU with the United States. 15 The vision on counter-terrorism was “primarily as a law-enforcement and internal security issue” due to the legal pillar system. The Presidency was allowed to formulate highly urgent measures across all pillars of the EU. It was the pressure from external players, such as US, UN and London – which made the EU take measures on the freezing of assets or on aviation security, sometimes against the wish of the EU Member States. The European Commission replaced the initial roadmap with a detailed list of measures and targets. 16 It is said that the EU was not able to stage clear priorities; 17 regarding the actions to be taken; there was neither supervision in the field of counterterrorism from the European Parliament nor legal oversight by the European Court of Justice (due to the EU legal system) before the entry into force of the 2009 Lisbon Treaty. The Council’s decision of February 2005 introduced new functions of SIS, including the fight against terrorism, and


17See Bossing, o.w., p. 38 - 39.
allowing access to Europol and Eurojust by national juridical authorities 18 which changed the original purposes of SIS completely: from a reporting tool into a “investigative system” 19. In the meantime, it would enable Europol to use information transmitted from the system for purposes of prevention and investigation of terrorist offenses, as a law enforcement tool, which is contrary to the primary objective of VIS. 20

European national authorities and their intelligence services had oversight over the creation of lists of suspected organizations and persons. Included in the cooperation between the EU and the US, the lists of the United Nations and the EU list of suspected terrorists were published in the European Union as EU legal measures. At the same time, there were doubts about the ways the listing of organizations and listings took place and the human rights' consequences were acknowledged. 21

4. External and Internal Safety Politics in the 2009 Lisbon Treaty:
In the 2009 Lisbon Treaty the pillar structure had not been preserved. In respect of international safety politics the Union had been given competence - in accordance with the provisions of the Treaty on European Union, to define and implement a Common Foreign and Safety Policy (CFSP) in Article 2 para 4 TFEU “including the progressive framing of a common defense policy”. 22 Decisions in respect of CFSP matters should be taken by the EU Member States unanimously. Executive authority continues to remain with the European Council and the Council. 23 Yet there are some differences. To serve the purposes of the CFSP a High Representative of the Union for Foreign Affairs and Security Policy was established. The ECJ is largely excluded from judiciary in the area of CFSP. 24 How the High Representative is going to act, is not clarified in the Treaty. Since Article 2 para 4 TFEU does not specify which type of competences are applicable in the context of the CFSP, it is accepted that the competence

18 Thierry Balzaco (2008), o.w. p. 86 states that this will “potentially extend access by EU agencies”.
19 European council, Decision of February 2005, 2005/211 JHA,
20 This expectation is in line with the Commission Communication on database interoperability of 2005. See: Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs. COM (2005) 597 final under 6. ….. “In order to ensure full respect for the rights as laid down in Articles 6,7,8,48 and 49 of the Charter of Fundamental Rights of the European Union, the scope for access should thus be limited to terrorist offences as defined in Council Framework Decision 2002/475/JHA and to crimes falling within the competence of Europol. “
22 Article 2(4) TFEU
23 Articles 22 and 24 TEU.
24 Articles 24 TEU end 275 TFEU.
should be placed under Article 4 TFE, which deals with shared competences between the EU with the Member States. The truth is that the CFSP cannot be framed in the setting of shared competences.  

The Lisbon Treaty gave way to judicial cooperation in criminal matters by the communal authorization of the former third pillar on Police-Justice Cooperation (between Member States). The result of this legal alteration is that the co-decision procedure between the Council and the European Parliament is applicable on subjects in criminal matters; secondly, the ECJ has gained full jurisdiction in this area. Regarding judicial cooperation between Member States, Article 67 states that “The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.” In fact this article announces not only EU law enforcement measures regarding combatting fights against terrorism, criminality and corruption by way of coordination of police and justice measures, but it also underlines the values of mutual recognition of judgments of other EU Member States in criminal cases to the purposes of efficacy. Article 75 TFEU provides for a framework of “administrative measures with regard to capital movement and payment, such as the freezing of funds, financial assistance or economic gains belonging to, or owned or held by natural or legal persons, groups or non-state entities.” Another article of importance is Article 222 TFEU which promotes the need for solidarity in case a Member State is the object of terroristic attack or the victim of a natural man-made disaster. In those situations the European Union is competent to mobilize all the instruments at its disposal, including the military resources made available by the Member States. The need to mutual recognition of judgments and judicial decisions of the EU Member States has been regulated in 82 para 1 TFEU which deals with judicial cooperation in criminal matters. Furthermore, Article 83 TFEU provides for the possibility to establish minimum rules for cross-border criminal matters.

5. The EU as international actor

What becomes clear from the Treaty of Lisbon is that it has given the EU the competences to play a role as an international actor. This becomes evident from Article 3 para 5 TEU that states that the EU shall uphold “in the international world its values and interests and should contribute to the protection of its citizens ………and the protection of human rights”; in its external relations the EU should be “guided by the principles and norms, such as democracy, rule of law, the universality and indivisibility of human rights and fundamental

freedoms, respect for human dignity, the principle of equality and solidarity, and respect for the principles of the United Nations Charter and international law” (art. 21 TEU). What is evident is that European norms have an increasing reach beyond particular states. 26 They have been developed since the ECJ put emphasis on human rights. The treaty of Lisbon has recognized “fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and fundamental Freedoms (ECHR) and the norms resulting from the constitutional traditions common to the Member States (Article 6 para 4 TEU); it has also accepted the rights, freedoms and principles of the European Charter of Human Rights conferred with the status of a treaty. To both documents interested parties can refer in cases of preemption and terrorism.

Article 11 para 1TEU stipulates that the Union’s objectives to safeguard the common values, fundamental interest, independence and integrity of the Union are in conformity with the principles of the United Nations Charter”. 27 Thus, the European common values can be derived from these common principles and are part of the European foreign policy system. The European Union has to deal with differences in national standards and norms; Europe as a “normative” does not imply a shared meaning of the EU Member States although at international level it has to give an assessment of responses to terrorist threats.

While the entry into force of the treaty of Lisbon has increased the EU’s power in the area of justice and home affairs, the EU has still to coordinate national anti-terrorism policies, which influence the EU policy framework regarding counter-terrorism. For instance, regarding investigation and prosecution of international suspects of terrorism. The common threat to the EU Member States has engendered a shared “European approach” towards counter-terrorism and international crime which implies that the European counter-terrorism politics differ from the “global war on terror” of the United States. Actually, in the European Union the threat of terrorism and the way it should be combated is not seen as a “war on terror”, since European governments have a focus on the background of the terrorist and its organizations which needs a long-term political approach, rather than the - in the view of Europeans – militarily driven reactions of the United States and its global efforts to combat terrorism. 28

6. European Court of Justice and the Kadi- judgments: Relationship between Safety and the Protection of Human Rights. 29


27 Article 11 (1), Treaty of the European Union


29 See for this paragraph also: Tessa Duzee & Lia Versteegh, “The Position of the European Terrorism Suspect under the Treaty of Lisbon. Improvement of Protection, Working Papers European Studies Amsterdam, nr. 13
How far the role of the European Union reaches in combating terrorism, became visible after 9/11 when the United Nations Security Council adopted several Resolutions to lay down the strategy to combat terrorism. The Resolutions of the UN Sanctions Committee are based on the competence of the Member States pursuant to Article 24 of the United Nations Charter. The 2001 Resolution 1373 provides that all States adhering to the United Nations should freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in terrorist organizations or facilitate terrorist acts or persons or groups or entities acting on behalf of these. This Resolution was adopted unanimously, in accordance with Member States' obligations under the Charter of the United Nations, on 27 December 2001. The Resolutions can impose binding decisions and binding sanctions on the Member States. The UN Sanction Committee may – if peace is at stake – even force national authorities to act according to its discretionary powers. The UN Sanction Committee is familiar with two lists of individuals and groups being under suspicion of financing terrorism; Member states should assist by implementing these lists and measures in national legislation. The list pursuant to Resolution 1373 of 2000 concerned Osama bin Laden and Al Qaeda. In the European Union the legal system in relation to suspects of terrorism was the following before the entry into force of the 2009 Lisbon treaty: terrorism suspects originating from outside the EU were covered by a legal rule implement in regulations -directly applicable in the EU Member States,- such as common positions and regulations that specifically were related to the Taliban and Al Qaeda. Complaint about economic sanctions regarding freezing of goods of suspects of terrorism fell under the EU first pillar, the economic pillar and could be brought before the European Court of Justice (ECJ). The ECJ could decide whether a fundamental right (right of property) of the suspect had been violated. Suspects of terrorism originating from within the EU were legally protected pursuant to the EU legal system of the former third pillar for the police and judicial cooperation in the EU. These suspects could not directly claim fundamental rights from the ECJ since the ECJ was not competent to judge on claims in these areas. This suspect could make a claim before the national judge and only when this judge decided to refer the case to the ECJ, was the ECJ competent to judge the case. Consequently, until the coming into force of the

30Pursuant to Article 24 (1) UN Charter: "In order to ensure prompt and effective action by the United Nations its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

31Member States do not have the competence to interpret UN decisions and resolutions.
Lisbon Treaty, not all suspects of terrorism in the EU could claim the same rights. The EU rules regarding combating terrorism were established by the European Commission and the European Council. The legal relation between UN and EU law regarding the applicability of counter terrorism measures became visible in the Kadi cases before the Court of First Instance (CFI) and the ECJ. Since the assets of the suspects in Kadi were frozen without Kadi having had a possibility to discuss the legality of the freezing, the CFI took the standpoint that the protection of property, the right to a fair trial and access to a judge was part of 'ius cogens' that suppose a hierarchy besides criteria for the validity of other legal rules. As a consequence, it was of the opinion that it could not test UN law against provision regarding European norms of human rights. In appeal, the ECJ experienced the limits of European legal power in the international context. The ECJ emphasized the relationship between the UN and the legal order of the community. It had to test the EU Regulation that had been instituted pursuant to EU law and decided that the particular Regulations could be tested against European fundamental rights. It also decided that this stance could not hold for UN Resolutions. By leaving aside the correctness of the listing of Kadi on the list of suspects, it judged that the CFI reasoning was wrong and that the rights of Kadi had been violated. The result of this verdict was that Kadi remained on the lists of UN suspects, while the ECJ, by questioning the validity of the particular Regulation 881/2002 against Kadi, had decided that Kadi’s rights had been violated. After the ECJ verdict, a summary giving the reasoning for Kadi’s listing on the list of the Sanction Committee, was published on the website of the Sanction Committee. The arguments for the financial sanctions of the Sanction Committee against Kadi, were made known to him and Kadi was put in the position to refute the arguments. After having heard Kadi’s contest, the European Commission decided that Kadi’s listing should remain and that the financial sanctions should be maintained. Upon this decision, Kadi started proceedings again against the European Commission before the CFI. While this case was pending against the CFI several important changes took place both in the EU legal system and in the system of the UN Sanction Committee. In the first place the institutional system had changed in the


European Union by the entry into force of the 2009 Lisbon Treaty. The abolishment of the former pillar structure meant that the community method became applicable in the field of freedom, security and justice in the Treaty on the Functioning of the European Union (TFEU). As a consequence, the ECJ was now fully competent to judge complaints of both types of suspects of terrorism, - the suspect from outside and from within the EU- and decide whether fundamental rights had been violated. The European Union foreign policy was directed at combating terrorism and transnational crimes. Several articles in the treaty, discussed earlier, had been included for the development of an EU counterterrorism policy. Secondly, the UN Security Council’s 1267 counterterrorism sanctions regime consisted of a consolidated list of names. States may now add names to this list. The listing and de-listing procedure has been difficult from the beginning, particularly due to the lack of fundamental processing rights. Moreover, individuals and entities had no right to petition the Commission for de-listing. Furthermore, they were not heard at all before being listed. Any decision concerning de-listing was taken by the Security Council itself. There had been no system of appeal applicable. From 2002 onwards, the Committee adopted guidelines for inclusion in, and removal from, the list. The last update is from March 2007. Since Member States are not obliged to give full information to the person or entity concerned about reasons for their inclusion on the list, and they are also not informed by the Sanction Committee, suspects of terrorism, put on the UN list, are not informed prior to their being listed. The system had changed in that the accused person could approach the Sanctions Committee directly through a “focal point”; this regime has been changed into a three-step mechanism to deal with de-listing requests from targeted entities and individuals. In this three steps proceedings an Ombudsman is involved. The Ombudsman is mandated to gather information by receiving the de-listing request and to answer questions regarding de-listing procedure. The Ombudsperson may talk to the applicant; subsequently, the Ombudsperson reports to the 1267 Committee and UN Member States. Finally, the Committee discusses the report and decides whether the Committee should consider the de-listing request. Although several improvements had been made in the listing system pursuant to the procedures set forth in the Committee guidelines, there is still no system of effective judicial control. Moreover, the UN Charter stipulates that the UN enjoys absolute immunity from every form of domestic legal proceedings.


37See laste note, o.w., p. 457

38See Article 105 paragraph 1 of the UN Charter.
The CFI decided on 20 September 2010 that testing of fundamental rights should be fully applied and that Kadi’s right to defense had not been fully applied, since the European Commission had strictly followed the evidence from the Sanction Committee without putting the evidence against the background of Kadi’s arguments. (para 171); The European Commission had not paid any attention to Kadi’s arguments (para 172) and Kadi had not been given any information nor signs of evidence used against him, while the freezing of his financial assets had restricted him enormously (para 180). In appeal, the ECJ accepted the conclusion of the CFI but rejected all its arguments. The ECJ discussed the case according to the new provisions in the TEU, the TFEU and the EU Charter. For the ECJ the question was whether the maintenance of international law according to EU law and the EU Charter had violated the rights of Kadi. In this, the ECJ found the behavior of the competent authorities, the European Commission, the most decisive since this authority is in the position to give effect to the decision of the Sanction Committee. This authority should examine whether Kadi’s name has been put on the list and should remain on the list grounded on the reasons of the Sanction Committee (para 107-108) while informing Kadi on the elements of the decisions and including the arguments of Kadi’s defense. The motivation for the continuation of the listing should be exactly given indicating the individual and personal circumstances (para 116-126) with required procedural guarantees. (para 117-118); The ECJ emphasized the value of Article 47 of the Charter, stating that everyone whose rights and freedoms, guaranteed by the law of the Union, are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47 Charter. This means that the facts of the case had to be checked by the European Commission in order for it to be able to give a decision. What becomes very clear from the 2013 ECJ judgment in Kadi is that the ECJ is willing to respect the European rules of combating terrorism without losing sight of the intentions of the European norms as established in the EU Treaties. Similarly, in respect of data retention, the ECJ is inclined to protect fundamental rights of the concerned persons.

7. European Court of Justice: Privacy and the Protection of Data

In the European Union directives are applicable guaranteeing the interest of privacy related to other legitimate interests. These are directive 2002/58/EG the privacy and electronic communication and directive 2006/24/EG, called the data retention directive, on the availability of electronic communications services or public communications networks services and retention of data generated or processed in connection with the provision of services. The aim of the first directive is processing of personal data and the protection of privacy in the electronic communications sector. According to its Article 1(1) is harmonization of the provisions of the Member States required to ensure an equivalent level of
protection of fundamental rights and freedoms, and in particular the right to privacy and to confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the European Union. Both directives have been challenged before the ECJ. On 11 August 2006, Digital Rights brought an action before the High Court in Ireland against the Minister for Justice and the Minister for Communications in Ireland, in which “it claimed that it owned a mobile phone which had been registered on 3 June 2006 and that it had used that mobile phone since that date. It challenged the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications and asked the national court, in particular, to declare the invalidity of Directive 2006/24 and of Part 7 of the Criminal Justice (Terrorist Offences) Act 2005, which requires telephone communications service providers to retain traffic and location data relating to those providers for a period specified by law in order to prevent, detect, investigate and prosecute crime and safeguard the security of the State. “39The High Court referred the case to the ECJ with a preliminary question; ‘1.      Is the restriction on the rights of the plaintiff in respect of its use of mobile telephony arising from the requirements of Articles 3, 4 … and 6 of Directive 2006/24/EC incompatible with Article 5 para 4 TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of ensuring that certain data are available for the purposes of investigation, detection and prosecution of serious crime, which should be in compliance with the rights laid down in Articles 7 and 8 of the Charter.” The ECJ concluded that the retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24/EC incompatible with Article 5 para 4 TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of ensuring that certain data are available for the purposes of investigation, detection and prosecution of serious crime, which should be in compliance with the rights laid down in Articles 7 and 8 of the Charter.” The ECJ concluded that the retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically affects private life and, consequently, the rights guaranteed by Article 7 of the Charter. Furthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, therefore, necessarily has to satisfy the data protection requirements arising from that Article (para 29). It continues that “directive 2006/24 constitutes an interference with the fundamental right to the protection of personal data guaranteed by Article 8 of the Charter because it provides for the processing of personal data. “(para 31). The ECJ gives a strong opinion on the principle of privacy by saying that to establish the existence of an interference with the fundamental right to privacy in the light of Article 7, 8 and 11 of the Charter, “it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way” (para 33). What has become clear from this judgment is that data retention concerns the question of principle as to whether

39ECJ 8 April 2014, In joined case C-293 and C-594/12, para...
Directive 2006/24 meets the requirements for the protection of personal data arising from Article 7 and Article 8 of the Charter.

8. The Passenger Name Record (PNR) Agreement for Law Enforcement Purposes

After 9/11 several agreements were signed between the European Union and the USA to combat terrorism. The competences of the EU regarding international agreements were part of the Common Foreign and Safety Policy, formerly the Second Pillar. Article 24 Treaty European Union confers powers on the Council to conclude international agreements, when necessary. The European Council had a political voice. The ECJ had no jurisdiction over the provisions of the EFSP. Within EU external relations the question has been what legal effect international agreements have within the EU legal order. This question became the more important when he European document on “European Security Strategy (EES)”, with the subtitle “A Secure Europe in a Better World” was produced. This document was preceded by a Communication of the European Commission that pleaded for the Union to adopt UN measures in relation to international security, and specific EU implementation actions. Regarding Europol and USA relations agreements were signed on the subject of transmission of information in 2001 and 2002. The second agreement relates to the exchange of personal data, that is, “any information relating to an identified or identifiable natural person”. The scope of information of the 2002 agreement is even wider. As sources of threat in this agreement are seen: race, political opinions, religious or other beliefs, or concerning health and sexual life. The agreement states that data on these subjects can be transmitted to the USA, although a prior consent clause is available. However, the value of this clause is questionable and is not seen as a means of control on the data exchange between Europol and the USA.

Another agreement as the result of a joint initiative between the EU and the US was the agreement signed on 17 May 2004 on Passenger Name Record Data (PNR). The initiative for drafting this agreement was taken after the 9/11 attack as part of the US counter terrorism action. The US wished to strengthen the aviation system and wanted to know who had access to commercial aircraft and which persons were interested in booking flights to the US. This agreement is a US law that required air carriers

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43 Monte R.
operation to or from the US to enable the Department of Homeland Security and the Bureau of Customs and Border Protection to access the PNR information. Airlines that did not want to subscribe to this demand were put under pressure. The European Parliament (EP) started a debate on the PNR related to Article 8 of EU Directive 95/46/EC which prohibits “the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.”

Article 25 of that Directive states that the “third country in question ensures an adequate level of protection.” In this respect it is also of importance, according to Article 25 para 2, that an adequate level of protection should be based on “all the circumstances surrounding a data transfer operation”. This should be done according to the laws and regulations governing in the third country.

A European Committee on fundamental rights released its opinion on the balance between security and the protection of personal rights and stated that the “inclusion of elements of identification such as ‘nationality’, ‘education’ or ‘family situation’ require much greater care, particularly since there is an explicit relationship between these profiles and the policy on immigration”. It concluded the procedures for personal data protection were insufficient and that the existing procedures were without control. A European working party, established in the 1995 Directive, an authority concerning the PNR agreement, did not reject the idea of an exchange of data in the war on terrorism, but stressed the rights of individuals to personal liberties.

After the European Commission had decided that the American authorities could offer a sufficient level of protection of fundamental rights to the EU citizens, the agreement was concluded by the Council on 17 March 2004 without the permission of the European Parliament (EP).

7. European Court of Justice judges on the 2004 PNR Agreement: This brought the EP to challenge the agreement before the ECJ. The EP strongly pleaded in favor of the protection of individual data and for a proper legal basis for the agreement, that had been concluded on erroneous legal grounds. In the 2004 Agreement 34 data elements were required by U.S. Customs and Border Protection (“CPB”), whereas the PNR data provided by the United States was expressly restricted. The CBP could focus on high-risk concerns, while the

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46The working party is responsible for the examination of national measures adopted under Directive 95/46/EC to ensure uniformity of the laws of the Member States.

47European Commission referring to Article 25 of Directive 95/46/EG on Privacy (nazoeken)
Agreement had included the transfer of data between CBP and other United States government agencies. CBP had been authorized to be the party to which the information should be transferred, and was responsible for violations regarding data. The Agreement rules on the storage of the data were received with skepticism. In the proceeding before the ECJ the EP demanded the annulment of the 2004 PNR Agreement between the European Union and the United States, and the annulment of the so-called Adequacy Decision of the European Commission, in which the European Commission stated that the USA agencies receiving PNR data would offer adequate levels of protection over the received information. The EP regarded the adequacy decision not appropriate because of lack of compliance with article 3 para 2 of the 1995 EU Directive that stipulated exceptions regarding data processing in the course of activities of public authorities that did not fall within community law, while the Adequacy Decisions provide for private airlines carriers. The EP argument for the annulment of the 2004 Agreement was founded on the fact that the PNR exchange of PNR data was a matter of law enforcement and internal security for which subjects the European Union lacks the competences (under the law prior to the Treaty of Lisbon). The EU had no authority to conclude the Agreement. Also, the EP referred to violation of the European Convention of Human Rights (ECHR) that provides in its Article 8 that “Everyone has the right to respect for private and family life, his home and his correspondence.” The second part of this article indicates the conditions under which interference with this article by public authorities is allowed. According to the EP the requirements for interference of necessity and proportionality were violated when citizens receive no notice of the circumstances in which the State may conduct surveillance “so that they can regulate their behavior to avoid unwanted intrusions”. The ECJ concluded that “the transfer of PNR data to CBP constitutes processing operations concerning public security and the activities of the State in areas of criminal law.” Regarding the law enforcement nature of the PNR the ECJ concluded that the transfer of data to CBP constituted “processing operations concerning public security and the activities of the State in the areas of criminal law”. The ECJ decided that the transfer of data according to Decision of

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49European Parliament versus Commission of the European Communities, Judgment of the ECJ, 30 May 2006


51European Parliament versus Commission of the European Communities, Judgment of 30 May 2006, PNR Agreement, para 55

52See last note, o.w. para56
Adequacy was related to public security and thus outside the scope of Community law and concluded that “the decision of adequacy must consequently be annulled.” In its verdict the ECJ preserved the applicability of the Decision of Adequacy until September 30, 2006. This fact relieved the US from “all obligation for the protection of PNR data already in the US possession.”


In October 2006 an Interim Agreement was concluded by the US and the EU which would expire when a new agreement was concluded. It differed from the formal agreement in the sense that the airlines would become responsible for giving Customs and Border Protection (CBP) the data. In the view of the Working Party a notification system should be established in which persons concerned could inform about what happens to the data. The new text of the agreement was issued on 11 October 2006. This second agreement was the subject of intense discussion within the EP and the European Commission. This new agreement emphasized the use of data in the context of infectious diseases for the protection of “vital interests”. It goes together with a “letter of understanding” which gives room for changes of the query specification. In this sense a lot of information can be obtained on target groups, “without any public debate or parliamentary control”. This PNR agreement continued the mission of preventing and combating terrorism and transnational crime. The PNR subjects may have access to their PNR data but there are also means for enforcement of the provisions in the PNR Agreement, since “administrative, civil, and criminal enforcement measures are available under US law for violations of US privacy rules and unauthorized disclosure of US records.” The data subjects in the PNR processing should be treated with applicable US laws and constitutional requirements, without discrimination on the basis of nationality and country of residence. The data on passengers would no longer be received by the CBP but by the Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI). The relevant passenger should be a “risk” for those authorities. What was meant by “being a risk” was not made clear; neither was anything decided on the subject of privacy protection. The EU

53See last note, o.w. para 58-61
54See last note, o.w. para 73
55Thierry Balzacq (2008), o.w. p. 92
57See last note, o.w. p. 23
PNR data will be in a database for eleven and half years, after which period they can be moved to another storing place for another three and half years. \(^{58}\) New negotiations followed when the EP did not accept the 2006 agreement. Finally, on 26 July 2007, a new PNR agreement was concluded between the EU and the US. Both the EU and US underlined the importance of the applicability of fundamental rights in the 2007 agreement. The data should be obtained via the “push-system”, which means that airline companies are responsible for transmission of passenger data. EP was still critical about this new agreement, especially about transmission of sensitive passenger information, such as information about race, ethnicity, political background, religion and belief, participation in a union, health and sexual preference. Although this PNR agreement was preliminary entered into force, the EP had still to accept it to make it official. In order not to obstruct legal certainty the EP decided not to decide on the formal entry into force of the agreement but set out the requirement that the European Commission should establish a new PNR agreement giving full attention to the protection of fundamental rights. \(^{59}\) A new PNR agreement has been created, this time with more consideration for fundamental rights. “The European Commission asserted that PNR data should be used exclusively to combat terrorism and other serious transnational crimes; passengers should be given clear information about the exchange of their PNR data and have the right to effective administrative and judicial redress, and that a decision to deny a passenger the right to board an airplane must not be based solely on the automated processing of PNR data.” \(^{60}\) The Commission also admitted that the period the data would be retained should not be longer than absolutely necessary. The EP defended the idea that exchange of PNR data must be both “necessary” and “proportional”. The May 2011 agreement introduced the vision whereby after six months, portions of a passenger’s record would be personalized and masked. Also the time that PNR data would be retained in a database was reduced and the number of authorized persons with access to the data was restricted. This draft provoked criticism from both European and American sides. In November 2011 two changes were included, according to the wishes of the EU: the use of PNR data was limited to terrorist or other serious transnational crimes that could result in three years of more in prison. Secondly, depending on the type of crime, data would be retained ultimately for 15 years for terrorist investigations, but only 10 years for investigations into other types of crimes. “On March 27, 2012 the EP endorsed the November 2011 US-EU

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\(^{58}\) See last note, o.w. p. 5


\(^{60}\) Communication from the Commission on the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries, COM/2010/0492, September 21, 2010.
PNR agreement. This agreement took effect on June 1, 2012 and will be valid until 2019.61


As stated earlier, the 95/46/EG Privacy Directive of the European Union was based on the provisions of the Treaty of Amsterdam and strived for the protection of the rights and freedoms of persons in the European Union and looked after the free movement of data between the EU Member States. This directive was strictly connected to the internal market which means that issues regarding police and justice could not be placed under the protection of this directive. Other legal instruments have been developed to provide for protection regarding data protection, such as the Council Framework Decision 2008/977/JHA on the protection of personal data processes in the framework of police and judicial cooperation in criminal matters.62 In 2007 the European Commission made a proposal for the establishment of a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes. The entry into force of the Treaty on the Functioning of the European Union (TFEU) on 1 December 2009, made the 2007 proposal obsolete while the TFEU also covers police and judicial matters such as serious transnational crime and terrorism. The existing provisions under the Schengen Information System (SIS) which seeks to maintain public security within the Schengen area with a centralized information system and the Visa Information System (VIS) that is an information system for identity verification, are useful for the determination of identity of a suspect. But these systems are not seen as “useful for conducting assessment of persons nor for detecting ‘unknown’ criminals.”. This becomes apparent from the explanatory memorandum of the 2011 proposal PNR directive on the use of Passenger Name Record data.63 The establishment of this directive is seen as necessary since the use of PNR data was not regulated at EU level. National measures on data protection were divergent in several aspects and with differing levels of protection of personal data across the EU. That was why the proposal aimed 'to harmonize Member States’ provisions on obligations for air carriers operating flights between a third country and the territory of at least one Member State, to transmit PNR data to the competent


authorities for the purpose of preventing, detecting, investigating and prosecuting terrorist offenses and serious crime.\textsuperscript{64} It does not require any additional information from air carriers to collect data from passengers. Since the law enforcement authorities need to be able to identify “unknown” persons, they should use PNR data both in real-time\textsuperscript{65} and pro-actively\textsuperscript{66}. This authority will have an impact on the rights of privacy and data protection. The proposal guarantees data protection in the sense that its provisions are compatible with fundamental rights, such as the right to protection of personal data, the right to privacy and the right to non-discrimination as enshrined in Article 8, 7 and 21 of the Charter of Fundamental Rights \textsuperscript{67} which is in line with Article 16 of the TFEU that guarantees the right to the protection of personal data. Regarding the subjects involved, the proposal allows the PNR enforcement authorities data only for the purpose of combating crimes according to a limited lists of specified crimes; the data collected should not be stored longer than a period of 5 years (Article 9 para 2). The national supervisory authority established in national member states according to Article 25 of Framework Decision 2008/977/JHA was to be responsible for advising on and monitoring the application of the present proposal of PNR directive (Article 12).

The draft PNR directive 2012 has been embedded in EU law and EU enforcement criteria: the law enforcement authorities are obliged to restrict the use of the PNR directive for a restricted number of crimes and when using the directive, their actions should be in accordance with the rights of the Charter.

11. US-EU Swift Accord

Another agreement between the US and the EU is the so-called SWIFT Accord, concluded after 9/11 between the two parties in order to allow the US authorities access to the European SWIFT financial data system. US authorities claimed that the use of data would only be for counterterrorism purposes and that they would not be used for their Terrorist Finance Tracking Program (TFTP).

However, the critical attitude of the EP led to renegotiation of the treaty in 2009. The draft Agreement of the European Commission had to be approved or rejected by the members of the EP, which right the EP had gained with the implementation of the 2009 Lisbon Treaty. Many EP members (MEP) wanted less data included in any transfer and some MEPs called for greater supervision.

\textsuperscript{64}See last note, o.w. p. 4

\textsuperscript{65}Use prior to the arrival or departure of passengers in order to prevent a crime, watch or arrest persons before a crime has been committed or because a crime has been or is being committed. See last note.

\textsuperscript{66}Use of the data for analysis and creation of assessment criteria, which can be used for a pre-arrival and pre-departure assessment of passengers. See last note.

\textsuperscript{67}Para 11 of the considerations of the preamble of the 2011 PNR directive.
by an “appropriate EU-appointed authority” over US access to Swift data. This critical attitude led to the negotiation of a revised US-EU SWIFT agreement between European Commission and US authorities.\(^6^8\) The new accord assured that an independent observer appointed by the European Commission would be based in Washington, DC, within one year, to oversee the withdrawal of data and it required the European Commission to present plans for an EU equivalent to the US TFTP. The idea of this was that the EU could withdraw SWIFT data on European soil and send them to the US authorities. This accord was established in June 2010. However, a few MEPs criticized Europol for its approval of the US request for SWIFT data. The European Commission recommended several measures to improve the SWIFT agreement in its reviews of the agreement and it proposed a European Terrorist Finance Tracking System (TFTS).\(^6^9\) A concrete legislative proposal has not yet been put forward. The potential costs, the technical difficulties, the purpose and the scope of such a system are subjects expected to form major obstacles to the introduction of such a system.\(^7^0\)

12. Concluding Remarks:

In the aftermath of the attack of 9/11 cooperation between the EU and the US in combatting terrorism and international crime have been at the forefront of EU initiative. In the evolving counterterrorism relationship between the two, since the 2009 Lisbon Treaty, the EU has had to deal with changes to its legal system. These changes were of institutional and of substantive nature. The full competence of the European Court of Justice to judge questions emanating from the areas of freedom, security and justice, can be seen as an unprecedented and enormous constitutional change. Regarding substantive changes, attention should be drawn to the main ideas of the Lisbon treaty, in that the European Union considers itself a Europe of values and the respect for fundamental rights. These rights can be seen in the applicability of the European Convention on Human Rights, the constitutions traditions of the EU Member States and the European Charter. The protection of human rights became one of the cornerstones of the Lisbon Treaty. It also stipulates that EU’s actions on the international scene should be guided by its own principles and respect for the United Nations. Although the EU legal system allows the Commission and Council to set out strategies with the US for safety reasons, the EU is required to find a balance between collective safety and the individual right to protection of personal data. In the course of negotiations between the US and the EU,

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\(^6^8\)“SWIFT”: Commission to Negotiate Under Pressure from EP”, Europolitics, April 23, 2010


differing attitudes in the EU institutions have become visible. On a political level, the European Commission and the European Council seem to be inclined to give priority to the interests of collective safety, while the European Parliament and the ECJ show a reluctance to surrender any of the fundamental rights of the persons involved to the protection of data, unless it be related to an act of terrorism or serious crime. After long and intensive negotiations on the PNR accords, the EP has agreed to the final 2011 text, not without having long defended the legal rights of individuals and the need of supervision regarding protection of data. The ECJ has been proven to be a constant factor in balancing the judicial process of rights of individuals and entities against the political Resolutions and decisions of the UN Sanction Committee and the EU-US PNR Agreement. The 2012 EU draft directive shows that the European Commission is been convinced by the need to formulate rights to protection of data retention at EU level.

At the internal level the Lisbon treaty allows judicial cooperation between Member States in criminal matters. This is founded on the principle of mutual recognition of judgments and judicial decisions (Article 82 TFEU). This concept supposes the Member States to have trust in one another’s law systems. In fact, a normative judicial system in the EU is still a matter of debate among EU Member States. The right to protection of individual data within the EU has been fragmented but is guaranteed by several legal instruments. The 2011 EU draft directive on Passenger Name Record is seen as necessary because of divergent views on the subject of data protection between the EU Member States. This directive could provide a solid base for the protection of data in the European Union when agreed upon by all the EU Member States. The normative framework of the EU with regard to combatting terrorism seems to be expanding. However, the contrast between the position of the ECJ on the one hand, and the Commission and the Council on the other, arises from the fact that the ECJ judges individual cases, whereas the Commission and Council take political decisions which affect all individuals in the European Union. The result is that current political decisions always have the upper hand and respect for individual rights is in danger of receiving increasingly less emphasis in EU policy-making.