

**The EU oversight of the intelligence cooperation  
with U.S. in the field of counter-terrorism  
after 9/11.**

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# Abstract

The thesis is aimed at the analysis of the existing institutional arrangements of the European Union law concerning internal and external intelligence cooperation in the field of counter-terrorism, which was enhanced in a significant way after terrorist attacks of 11 September 2011. The more impact on the intelligence agencies on the legal status of the individual raises questions about appropriate legal (mainly institutional and procedural) framework which would be able to guarantee the proper control of this part of the executive, which strongly tends to use the argument of the need to keep secrecy in order to protect national security. Analysis of (1) the EU primary and secondary institutional arrangement on the intelligence cooperation and (2) international agreements of intelligence cooperation in the field of counter-terrorism provides a general shape of the “European Intelligence Community”, which will then compared with the democratic standards established by the Council of Europe. The main result of this comparison is that “democratic deficit” which exists under the EU constitutional arrangements may cause unavoidable difficulties with meeting the optimal standard of the democratic oversight of the security services in general and intelligence agencies in particular.

# Table of contents

Abstract.....	1
Table of contents.....	1
Introduction.....	2
Chapter 1. The European Union response to 9/11.....	6
1.1. New European Union counter-terrorism legal framework.....	7
1.2. Transatlantic cooperation against terrorism – legal basis and scope. ....	11
Passenger Name Records agreements.....	14
SWIFT agreements.....	18
1.3. Judicial review of the Court of Justice of EU over the transatlantic cooperation after 9/11.....	22
Chapter 2. – The European standards of the democratic oversight over intelligence agencies and security services. ....	25
2.1. Executive oversight.....	28
2.2. Parliamentary oversight.....	30
2.3. Judicial oversight (review).....	31
2.4. Complaint mechanisms.....	33
2.5. International intelligence cooperation and accountability.....	34
Chapter 3. The oversight of the intelligence cooperation in the European Union.....	37
3.1. Oversight of the “European Intelligence Community” - general comments.....	39
Parliamentary oversight in the European Union.....	39
Executive oversight and complaints mechanism.....	43
Judicial review .....	43
3.2. Oversight of the intelligence sharing under the PNR and SWIFT agreements.....	45
Conclusions.....	49
Bibliography.....	52

# Introduction

After 9/11 Member States of the European Union (hereinafter: EU, Union) decided to cooperate with the U.S. Government in the field of counterterrorism and to share information received by their own intelligence agencies. Such a decision was also made on the level of the European Union. This cooperation bases on international agreements between U.S. and EU concerning issues such as access to bank records (so called “SWIFT” agreements) or passenger records (“PNR” agreements). The U.S. Government tend this cooperation to be much wider<sup>1</sup>. On the EU side there were suggestions and proposal to create an EU intelligence agency<sup>2</sup> that would intensify cooperation between EU Member States at supranational level and make it more efficient in the light of terrorism danger and also make the European Union an equal partner in this intelligence cooperation with U.S.

In parallel, the European Union and Member States more often ask themselves if there is a proper oversight over this cooperation at the EU level, particularly in the light of the rule of law, fundamental rights and data protection. The same doubts were shared by the Court of Justice of European Union<sup>3</sup>. The institutional changes introduced by the Lisbon Treaty in the EU law (“communitarization” of the third pillar, new competences of national parliaments in the EU legislation process, legal capacity of the Union) give the opportunity to analyze whether control over the binding international agreements between U.S. and EU will become more effective and whether it meets the optimal standard of intelligence accountability. It is essentially important in the light of proposals concerning further European integration in the

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1 K. Archick, *Europe and Counterterrorism: Strengthening Police and Judicial Cooperation*, CRS Report for Congress, 2004, RL32509; K. Archick, *U.S.-EU Cooperation Against Terrorism*, Congressional Research Service 2011, RS22030, p. 1-2.

2 B. Muller-Wille, *Building a European Intelligence Community in Response to Terrorism*, European Security Review 2004, no. 22, available at: [http://www.isis-europe.org/pdf/esr\\_23.pdf](http://www.isis-europe.org/pdf/esr_23.pdf) [accessed on 29 March 2012].

3 *Parliament v. Council*, C-317/04, C-318/04, judgement of 30 May 2006; *Kadi*, C-402/05, judgement of 3 September 2008.

field of security.

The thesis deals with the EU-U.S. intelligence cooperation during last ten years – between 2001 and 2011. By intelligence I understand “selected, combined and analyzed information that aids decision makers [which] consists of validated information from different sources.”<sup>4</sup> Dealing with intelligence is told to be the second oldest profession<sup>5</sup>. In turn, intelligence agencies are aimed at “supplying and analyzing relevant intelligence and counter specified threats”.<sup>6</sup> It is a common rule that their work lacks transparency which is trying to be justified by a “strong imperative for secrecy”.<sup>7</sup> Because of it, every attempt to control or supervise their actions meet certain kinds of difficulties. It is even argued that this “globalization of the intelligence”<sup>8</sup> causes an “accountability gap”<sup>9</sup>.

In this thesis, I am working on institutional oversight over transatlantic intelligence cooperation in the field of anti-terrorism after 9/11 to find out whether it is sufficient in the light of European democratic standards in this field in order to understand to what extent it may avert possible future abuses of power by public authorities (e.g. intelligence agencies) participating in this cooperation.

The first aim of the thesis is to describe the scope and legal basis of the EU-U.S. intelligence cooperation as a part of the EU general counter-terrorism legal framework and the

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4 E.R. Hertzberger, *Counter-terrorism Intelligence Cooperation in the European Union*, United Nations Interregional Crime and Justice Research Institute 2007, p. 12; Similarly: S. Duke, *Intelligence, Security and Information Flows in CFSP*, Intelligence and National Security no. 4/2006, p. 608

5 H. Born, *Parliamentary and External Oversight of Intelligence Services* [in:] *Democratic Control of Intelligence Services*, (ed.) H. Born, M. Caparini, Ashgate 2009, p. 165

6 I. Leigh, *The accountability of security and intelligence agencies* [in:] *Handbook of Intelligence Studies*, (ed.) L.K. Johnson, Routledge 2009, p. 68

7 M. Caparini, *Controlling and Overseeing Intelligence Services in Democratic States* [in:] *Democratic Control of Intelligence Services*, (ed.) H. Born, M. Caparini, Ashgate 2009, p. 3

8 Term was proposed by A. Svendsen, *The globalization of intelligence since 9/11: frameworks and operational parameters*, Cambridge Review of International Affairs 1/2008

9 I. Leigh, *Accountability and intelligence cooperation: framing the issue* [in:] *International Intelligence Cooperation and Accountability*, (ed.) H. Born, I. Leigh, A. Willis, Routledge 2009, p. 4; C. Force, *The collateral casualties of collaboration: the consequences for civil and human rights of transnational intelligence* [in:] *International Intelligence Cooperation and Accountability*, (ed.) H. Born, I. Leigh, A. Willis, Routledge 2009, p. 90

response of the Court of Justice of the European Union to the problems concerning this cooperation and agreements [chapter I]. This “EU counter-terrorism framework” including international cooperation with the U.S. will be a result of the analysis of the EU legal acts relevant in this field, including agreements establishing this cooperation. Because of the objective limitations of the thesis I will concentrate on two of those agreements that I have already mentioned – Passenger Name Records (PNR) agreement and so called SWIFT agreement aimed at terrorism financing. In order to present a broader background the transatlantic cooperation, I will summary the main institutional arrangement in the field of counter-terrorism policies in the EU.

In the second chapter I establish the optimal European standard of democratic oversight over security agencies, particularly intelligence agencies. These standards meet however certain challenges when it comes to the international intelligence cooperation, which is of particular importance when discussing the evaluation of the EU intelligence internal (between Member States) and external (with third countries, e.g. the U.S.) cooperation. These optimal standards will be established using three kinds of sources: reports and recommendations established by organs of the Council of Europe, judgements of the European Court of Human Rights and relevant expertise writings.<sup>10</sup>

The third chapter concentrates on the EU regulations providing oversight mechanisms applicable generally (such as European Parliament's powers in the field of justice and home affairs) and particularly (in international agreements on intelligence cooperation with the third states, e.g. PNR or SWIFT). The comparison between those two – optimal standards addressed to nation states and the European Union oversight mechanisms need have however one main limitation which comes from the basic differences which exist between the nation

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<sup>10</sup> H. Born, I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, House of the Parliament of Norway, Oslo 2005.

state and the supranational organization. The core of the security policy still remains the competence of the Member States, which in order to increase their efficiency decides occasionally to cooperate, also in the field of intelligence.

The comparison between EU law and standards established mostly by the Council of Europe may show that under the EU law the oversight over the intelligence and its international (transatlantic) cooperation is not sufficient. Reasons for such outcome may be found in a broadly discussed “democratic deficit” of the European Union, but also in a legal and political architecture of the European Union as a very specific supranational organization with quite limited and particular application of the rule of the separation of powers. Such a result of my research shall provide postulates *de lege ferenda* concerning institutional and procedural changes in EU law – both the EU Treaties and the international agreements between the European Union and the United States. One of the possible conclusion may lead to the proposal that judicial review of the Court of Justice as a part of the required element of the democratic oversight of the security services, in the light of the future accession to the European Convention of Human Rights should be re-evaluated in order to meet the requirements of the Article 6 and 13 of the European Convention.



# Chapter 1. The European Union response to 9/11.

Terrorist attacks which took place in New York on 11 September 2001 were interpreted as new and unknown threat addressed to the whole Western world. Thus coordinated European supranational response to this threat was somehow obvious and natural<sup>11</sup>. However, the scope and means which should have been employed for this aim were not so obvious for heads of the European states.

The first political decisions were made at the European Council extraordinary meeting held 10 days after the attacks<sup>12</sup>. The European Council presented “The European Policy to Combat Terrorism” which consisted of four-points Plan of Action. The first one was “enhancing police and judicial cooperation” and underlined the Tampere conclusions (1999). However, it was not only so called Third Pillar which was to play the main role in the EU counter-terrorism policy. The official communication stated that EU counter-terrorism aims are to be achieved by “developing the Common Foreign and Security Policy (CFSP) and by making the European Security and Defence Policy (ESDP) operational at the earliest opportunity that the Union will be most effective”.

This counter-terrorism approach divided between the Second and Third Pillar mechanisms is characteristic for EU policy in this filed during last 10 years<sup>13</sup>. What was also

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11 European Council stated that „*these attacks are an assault on our open, democratic, tolerant and multicultural societies.*” Conclusions and Plan of Action of the extraordinary European Council meeting on 21 September 2001; available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/140.en.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140.en.pdf) [accessed on: 12 March 2012]

12 Official information states that the meeting was held „*in order to analyse the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union.*”

13 J. Wouters, *The European Union and September 11'*, Indiana International and Comparative Law Review 2003,p. 719-775.

unique for European approach was that it differs strongly from the American counter-terrorism policy. The major difference can be seen with the names of them. U.S. from the very beginning called it “war on terror”, while Europeans usually call it “fight against terrorism”<sup>14</sup>. The second difference, strictly related to the first one, is a nature of the legal response to threat of terrorism – European emphasized the use of criminal law, while U.S. based their counter-terrorism arguments on laws of war.<sup>15</sup> Ten years after introducing counter-terrorism policy in the European Union, there is still plenty of doubts and challenges in the area of EU counter-terrorism policy.<sup>16</sup>

The first chapter analyzes the main EU counter-terrorism legal mechanisms based on the EU Counter-terrorism Strategy. The second sub-chapter (“...”) discusses one of the core element of this strategy – transatlantic intelligence cooperation between the United States and European Union. Since of the part of this cooperation is a supranational organization, the challenges of this cooperation seem to be particularly interesting.

## **1.1. New European Union counter-terrorism legal framework.**

The first political impulse for creating the EU law on counter-terrorism was given by the extraordinary European Council meeting held on 21 September 2001. As it was mentioned before, its conclusions show that Member States tend to engage all available mechanisms to deal with the threat of terrorism, including cooperation under the Second and Third Pillar of the Union. This statement was enthusiastically accepted by the European Parliament who even proposed to “initiate further legislation to combat terrorism, which would introduce a

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14 E. van Sliedregt, *European approaches to fighting terrorism*, Duke Journal of Comparative and International Law Spring 2010, p. 413

15 *Ibidem*

16 European Commission Communication – 20 July 2010, COM(2010)0386 - *The EU Counter-Terrorism Policy: main achievements and future challenges*

distinct added value compared to existing national and international instruments”.<sup>17</sup>

On 27 December 2001 the Council of European Union adopted first important legal act concerning regulation of fight against terrorism - Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and regulation implementing the Common Position<sup>18</sup>. They provided that EU “shall order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex”. The same Common Position was also a basis for Council decision adopted under the Third Pillar<sup>19</sup>. Council established also a specific mechanism of its evaluation.<sup>20</sup> However, the main legal act established under previous Third Pillar of the EU was Council Framework Decision on combating terrorism<sup>21</sup> which established the EU definition of terrorism. EU adopted also other counter-terrorism legal documents such as directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.<sup>22</sup>

Member States adopted also a set of political documents concerning the issue of terrorism, especially after the attacks in Madrid in March 2004. It was a main factor for adopting a political document Declaration on Combating Terrorism on 25 March 2004<sup>23</sup>.

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17 Resolution of the European Parliament of 4 October 2001 on extraordinary European Council meeting; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:087E:0216:0219:EN:PDF> [accessed on 29 March 2012]

18 Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism; available at: - <http://eur-lex.europa.eu/Notice.do?val=262026:cs&lang=fr&list=519523:cs,469543:cs,469542:cs,433920:cs,418047:cs,405482:cs,284772:cs,262026:cs,&pos=8&page=1&nbl=8&pgs=10&hwords=2580/2001~&checktexte=checkbox&visu=#texte> [accessed on 29 March 2012]

19 Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0048:EN:NOT> [accessed on 29 March 2012]

20 Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0996:EN:NOT> [accessed on 29 March 2012]

21 Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:NOT> [accessed on 29 March 2012]

22 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

23 Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/DECL-25.3.pdf> [accessed on 29 March 2012]

During the European Council Summit in June 2004, the Member States adopted European Union Plan of Action on Combating Terrorism<sup>24</sup>. In turn, after the terrorist attacks in July 2005, the Council adopted the EU Counter-Terrorism Strategy.<sup>25</sup>

In parallel to development of EU law on counter-terrorism, also an institutional framework was developed. Today there is a net of few different bodies and institutions dealing with coordination of cooperation in field of counter-terrorism between Member States or other institutions. In the light of the topic of this thesis it should be also noticed, that there is a group of institutions coordinating the functioning of so called European Intelligence Community. The most important are the European Commission, Europol and Eurojust.<sup>26</sup> Apart from them, there is also several interesting institutions such as EU counter-terrorism coordinator or European Joint Situation Centre (SitCen).

As the further analysis will show, one of the main EU-U.S. counter-terrorism agreement (SWIFT agreement of 2010) imposes special obligation on Europol. Under the Lisbon Treaty, the existence of Europol is provided by Article 88 of TFEU, which states that:

“Europol’s mission shall be to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.”

It was first established in 1999 by so called “Europol Convention” between the EU Member States. As a result of adoption Europol Council Decision in 2009, Europol became the EU agency.<sup>27</sup> It is said that Europol “plays the role of intelligence gatherer within intelligence-led law enforcement at the European level”.<sup>28</sup> It also issues annual reports on terrorism situation.<sup>29</sup>

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24 Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/81742.pdf>

25 Available at: <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf>

26 D. Casale, *EU Institutional and Legal Counter-terrorism Framework*, Defence Against Terrorism Review no. 1/2008, p. 55

27 Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol)

28 D. Casale, *EU Institutional ...*, p. 55

29 The last one - Annual Terrorism Situation and Trend Report (TE-SAT) 2011, available at: <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011.pdf>

The main Europol's challenge is however that “Member States are too often reluctant to share intelligence with Europol”.<sup>30</sup>

The judicial equivalent of Europol, Eurojust, was established in 2002 and under Lisbon Treaty is regulated by Article 85 of TFEU:

“Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.”

and by Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. Few months after adoption of this decision it was amended by the Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism,<sup>31</sup> which strengthened the position of Eurojust.

Apart from the agencies established as a part of regulation on area of justice and home affairs, there is also a set of bodies functioning as a part of Second Pillar, such as European Joint Situation Centre (SitCen) based in Brussels and hiring about 24 analysts<sup>32</sup>. Formally it is a part of the European External Action Service (EEAS) but there are no formal rules governing the establishment or operations of SitCen.<sup>33</sup> Moreover, within the Council Secretariat there is a body dealing with the counter-terrorism – the EU counter-terrorism coordinator, whose main aims are to “coordinate the work of the Council in combating terrorism with due regard to the responsibilities of the Commission” and “maintain an overview of all instruments at the Union's disposal with a view to regular reporting to the

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30 D. Casale, *EU Institutional ...*, p. 57

31 Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP

32 M.K. Davis Cross, *EU Intelligence Sharing & The Joint Situation Centre: A Glass Half-Full*, available at: [http://www.euce.org/eusa/2011/papers/3a\\_cross.pdf](http://www.euce.org/eusa/2011/papers/3a_cross.pdf) [accessed on 30 March 2012]

33 S. Peers, *The European Union's Area of Freedom, Security and Justice Architecture after the Lisbon Treaty* [in:] *Parliamentary oversight of security and intelligence agencies in the European Union. Study*, p. 402; available at: <http://www.europarl.europa.eu/document/activities/cont/201109/20110927ATT27674/20110927ATT27674EN.pdf> [accessed on 20 March 2012]

Council”.<sup>34</sup> Its efficiency was argued that it cannot effectively achieve its functions, since the office has no powers and no budget. However, its importance was reaffirmed by the European Council in the adoption of the Stockholm Programme in December 2009. For instance he adopted a set of important reports, such as “Judicial dimension of the fight against terrorism – Recommendations for action”<sup>35</sup> or “Report on the implementation of the revised Strategy on Terrorist Financing”<sup>36</sup>

There is also a set of so called “working groups” dealing with intelligence cooperation within EU, which also covers reactions to the threats of terrorism, such as Article 36 Committee (CATS)<sup>37</sup>, Terrorism Working Group (TWG), Counter-terrorism Group (CTG). The last one works outside the EU legal framework.<sup>38</sup>

## 1.2. Transatlantic cooperation against terrorism – legal basis and scope.

Just after 9/11 terrorist attacks, the officials of the EU accepted that the enhanced cooperation with U.S. was going to be the vital point of the fight against terrorism – as important as the EU internal policy and legislation on counter-terrorism<sup>39</sup>. It was also obvious that such cooperation shall include intelligence cooperation.<sup>40</sup> It was stated in the conclusions of the extraordinary European Council meeting in September 2001 that the EU “will

34 Information available at the official website of the Co-ordinator <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator?lang=en> [accessed on 29 March 2012]

35 Available at: <http://register.consilium.europa.eu/pdf/en/10/st13/st13318-re01.en10.pdf>

36 Available at: <http://register.consilium.europa.eu/pdf/en/11/st15/st15062.en11.pdf>

37 Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism

38 E.R. Hertzberger, *Counter-terrorism Intelligence Cooperation* ..., p. 61

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V. Mitsilegas, *EU Criminal Law*, Hart Publishing 2009, p. 293: “In parallel with these internal developments, the EU demonstrated a clear willingness to strengthen channels of cooperation with the United States on counter-terrorism”

40 „Since 9/11, intelligence has been viewed as an integral part of a controversial „war on terror” - R.J. Aldrich, *US-European Intelligence Co-operation and Counter-Terrorism: Low Politics and Compulsion*, The British Journal of Politics and international Relations 1/2009, p. 122-139.

cooperate with the United States in bringing to justice and punishing the perpetrators, sponsors and accomplices of such barbaric acts.”<sup>41</sup>

It is commonly underlined that such criminal cooperation between EU and U.S. was something new (apart from so called Trevi Group in 1970s)<sup>42</sup>. What is interesting and noteworthy “prior to 9-11, there is no indication that the possibility of the EU concluding agreements with the US in the areas of extradition or mutual legal assistance was under serious contemplation”<sup>43</sup>, because of deep differences between the EU and U.S. in approaches to death penalty and to establishment of International Criminal Court.<sup>44</sup> For international relationships scholars, transatlantic cooperation between U.S. and EU is seen as a part of “progressively enhanced cooperation in the field of security”.<sup>45</sup> Rationale for this cooperation was also that „networked threats” such as terrorism “require a networked response”<sup>46</sup>

The first step in this cooperation was U.S.- EU Ministerial Statement on Combating Terrorism issued on 20 September 2001. It stated that U.S. and EU “will vigorously pursue cooperation (...) in order to reduce vulnerabilities in our societies” in areas of, *inter alia*, aviation and other transport security, police and judicial cooperation, including extradition, denial of financing of terrorism, including financial sanctions<sup>47</sup>.

Three years later, after signing first bilateral agreements on cooperation in counter-terrorism, in June 2004, U.S. and EU announced a joint Declaration on Combating

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41 Conclusions and Plan of Action of the extraordinary European Council meeting on 21 September 2001; available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/140.en.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140.en.pdf) [accessed on: 29 March 2012]

42 M. Fletcher, R. Löff, B. Gilmore, *EU Criminal Law and Justice*, Edwar Elgar 2008, p. 158; D. Casale, *EU Institutional and Legal Counter-terrorism Framework*, Defence Against Terrorism Review no. 1/2008, p. 50

43 M. Fletcher, R. Löff, B. Gilmore, *EU Criminal Law and Justice*, p. 159

44 *Ibidem*, p. 160

45 P. Pawlak, *Introduction: Issues for the Euro-Atlantic Area of Freedom, Security and Justice* [in:] *The EU-US Security and Justice Agenda in Action*, European Union Institute for Security, Chaillot Papers December 2011, p. 15; available at: [http://www.iss.europa.eu/uploads/media/cp127\\_EU-US\\_security\\_justice\\_agenda.pdf](http://www.iss.europa.eu/uploads/media/cp127_EU-US_security_justice_agenda.pdf)

46 *Ibidem*, p. 31

47 The text of the Statement is available at: [http://avalon.law.yale.edu/sept11/state\\_dept\\_brief009.asp](http://avalon.law.yale.edu/sept11/state_dept_brief009.asp)

Terrorism<sup>48</sup>. It was based on seven objectives, including preventing access by terrorists to financial and other economic resources, deepening cooperation in prosecuting terrorists and preventing terrorist attacks. It also mentioned coordinated external policy (“external relations actions”) in relation to states “where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced”.

The second EU-U.S. counter-terrorism declaration was announced in 2010. What was interesting in this declaration (official name was “EU-U.S. and Member States 2010 Declaration on Counterterrorism”<sup>49</sup>), and at the same time different from the previous one, was visibly underlined that the EU-U.S. “efforts against terrorism are to be in accord with our fundamental values and (..) the rule of law”.

Apart from nice wording of political documents and declaration, the core element of the transatlantic cooperation in the field of counter-terrorism after 9/11 were international agreements negotiated and signed between European Union and United States. Negotiating and signing international agreements between European Union and the third countries was itself a source of series of legal questions concerning lack of legal personality of EU or issue on whom those agreements would be negotiated - on Union or on Member States.<sup>50</sup>

Among agreements between EU and U.S. there is a subcategory of counter-terrorism agreements negotiated and signed between the United States and EU bodies, such as Europol. In contrary to EU, secondary EU law establishing those bodies “gave” them a legal personality<sup>51</sup>. In fact such agreement was one of the first signed after 9/11. Agreement between the United States of America and the European Police Office<sup>52</sup> was signed in

48 Available at: [http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU\\_US26.06.04.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf) [accessed on 29 March 2012]

49 Official text is available at: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/jha/114874.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/114874.pdf) [accessed on 29 March 2012]

50 V. Mitsilegas, *EU Criminal Law*, p. 292

51 *Ibidem*, p. 308

52 Available at: <http://www.state.gov/documents/organization/170982.pdf> [accessed on 29 March 2012]



December 2001 and then supplemented in December 2002. Similar agreement was signed by Eurojust in 2006<sup>53</sup>.

When it comes to agreements between the EU (not its internal bodies) and U.S., the first major step in enhancing cooperation between EU and U.S. in counter-terrorism were two agreements signed in 2003 on extradition and legal assistance. Negotiations “took place in the strictest secrecy.”<sup>54</sup> Council in its decision concerning the signature of these agreements stated that their aim is to improve the effectiveness of bilateral cooperation between U.S. and Member States in combating transnational crimes such as terrorism<sup>55</sup>. The agreement on mutual legal assistance entered into force in February 2010. During a discussion about SWIFT agreement, whether its adoption was necessary, it was argued that the agreement on mutual legal assistance already “increase[d] the possibilities for exchanging financial transaction information between EU Member States and the U.S. in the context of criminal investigations”.<sup>56</sup>

## Passenger Name Records agreements

However, the agreements which raised the most legal and human rights concerns were so called PNR and SWIFT agreements. Chronologically, PNR agreement was signed as a first one. In contrast to the agreements on extradition and legal assistance, which were a consequence of common (EU and U.S.) will to develop further counter-terrorism cooperation, PNR agreement resulted from the post-9/11 U.S. legislation introduced in November 2001<sup>57</sup>.

53 Available at: <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20Eurojust-USA%20%282006%29/Eurojust-USA-2006-11-06-EN.pdf> [accessed on 29 March 2012]

54 M. Fletcher, R. Löff, B. Gilmore, *EU Criminal Law and Justice*, p. 160

55 Council Decision 2003/516/EC of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0516:EN:NOT> [accessed on 29 March 2012]

56 J. Monar, *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A historic Vote and Its Implications [Editorial Comment]*, *European Foreign Affairs Review* 2010, p. 149

57 V. Mitsilegas, *EU Criminal Law*, p. 298

It imposed on the air flights operators an obligation to provide to U.S. Customs data on passengers of flight to, from and through the U.S. Infringement of these rules may result even in prohibition of landing in U.S. The problem was however, that the scope of these data was very broad, thus might infringe the EU rules on data protection. European Parliament in its resolution adopted on 13 March 2003<sup>58</sup> stated that airlines were “caught between a rock (if they follow Community law, they are liable to US sanctions) and a hard place (if they give in to the US authorities' demands, they fall foul of the data protection authorities)” and that such a situation “affect between 10 and 11 million passengers a year”.

Since now, there were three PNR agreements signed. The negotiations on the first one was the most urgent and least transparent. During negotiations with U.S., European Parliament adopted two resolutions. In the first one, already mentioned adopted on 13 March 2003, European Parliament, first of all, mentioned problems of EU data protection standards involved in signing such agreement with US and secondly, expressed that it wanted to have greater impact on pending negotiations<sup>59</sup>. In the second resolution<sup>60</sup> European Parliament called on to “evaluate the EU-US police cooperation in the fight against terrorism (...) with regard to its efficacy and its respect for fundamental rights” and expressed a need to establish a joint “contact group” consisting of MEPs and Members of the US Congress “in order to exchange information and discuss the strategy on ongoing and upcoming issues”.

Before signing the first agreement, EU institutions presented strong arguments opposing adoption of PNR agreement in a shape which was proposed. When it comes to issue

58 European Parliament resolution on transfer of personal data by airlines in the case of transatlantic flights, P5\_TA(2003)0097, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2003-0097+0+DOC+XML+V0//EN&language=PL> [accessed on 29 March 2012]

59 Point 6 of the resolution states that European Parliament „reserves the right to examine the action taken before the next EU-US summit.”

60 European Parliament resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA, adopted on 9 October 2003, P5\_TA(2003)0429, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P5-TA-2003-0429&language=ET> [accessed on 29 March 2012]

of data protection, so called Article 29 Working Party issued an opinion in June 2003<sup>61</sup>. In March 2004 European Parliament adopted a third chronologically resolution on PNR which found that the agreement “exceeded the powers conferred on the Commission by Article 25 of the Directive”<sup>62</sup>.

Notwithstanding those steps and clear opinions, PNR agreement was signed on 28 May 2004.<sup>63</sup> European Parliament decided however to initiate a proceedings before ECJ to annul the agreement. ECJ found that the agreement was adopted on wrong legal basis and invalidated the agreement.<sup>64</sup> Because of the ECJ judgement, new negotiations were opened. It is argued that since ECJ did not rule on the merits of the Parliament's applications and just on legal basis, European Commission and U.S. were quite optimistic about the results of new negotiations<sup>65</sup>.

The second PNR agreement was adopted in October 2006 on the basis of Articles 24 and 38 TEU<sup>66</sup> and it was signed in July 2007<sup>67</sup>. It did not however resolve the previous doubts concerning human rights and data protection issues.<sup>68</sup> For instance, because of the fact that

61 Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers' Data, available at: [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp78\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp78_en.pdf) [accessed on 29 March 2012]

62 European Parliament resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the US Bureau of Customs and Border Protection (2004/2011(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0245> [accessed on 29 March 2012]

63 The official text of the agreement is available at: [http://ec.europa.eu/justice/policies/privacy/docs/adequacy/pnr/2004-05-28-agreement\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/adequacy/pnr/2004-05-28-agreement_en.pdf); Council decision on adoption of the agreement is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:183:0083:0083:EN:PDF> [accessed on 29 March 2012]

64 ECJ judgement on PNR agreement will be discussed in details in the third sub-chapter.

65 R. Rasmussen, *Is International Travel Per Se Suspicion of Terrorism? The Dispute between the United States and European Union over Passenger Name Data Transfers*, Wisconsin International Law Journal 2008, p. 583

66 Council decision 2006/729/CFSP/JHA 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 (PNR) data by air carriers to the United States Department of Homeland Security - Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:298:0027:01:EN:HTML> [accessed on 29 March 2012]

67 Text of the agreement is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:204:0018:0025:EN:PDF> [accessed on 29 March 2012]

68 V. Papakonstantinou, P. de Hert, *The PNR Agreement and Transatlantic Anti-terrorism Co-operation: No*

new agreement was negotiated under the Third Pillar legal framework, the “adequacy check” requirement was not applicable<sup>69</sup>. Since the second PNR agreement was signed for next four years, in 2010 European Commission and other EU institutions took steps for preparation of the next agreement<sup>70</sup>, which also from the very beginning raised many doubts. In January 2010 European Data Protection Supervisor presented its comments on PNR and TFTP agreements to the Committee on Civil Liberties, Justice and Home Affairs of European Parliament<sup>71</sup>. It underlined that the aim of the agreement and data transferring is broad and not just limited to fighting terrorism. He argued that scope of data itself is extensive and includes sensitive data. The same concerns duration of storage - 15 years. Moreover, according to EDPS collection of this data is not focused on persons presenting a risk, which raises questions about legitimacy and proportionality issues, especially in the light of the ECHR judgement *S. and Marper v. United Kingdom*.<sup>72</sup> Furthermore, possibility of redress for individuals in case of maladministration of the data might appear to be challenging.

In May 2010 European Parliament issued a resolution<sup>73</sup>, in which it asked the European Commission to provide all the relevant information and background documents. What is important in the light of subject of this thesis, the European Parliament stated that it “believes that appropriate mechanisms for independent review and judicial oversight and democratic control must be provided for in any new agreement”.

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*firm Human Rights Framework on Either Side of the Atlantic*, Common Market Law Review no. .../2009, p. 916-917

69 E. De Busser, *EU data protection in transatlantic cooperation in criminal matters. Will the EU be serving its citizens an American meal?*, Utrecht Law Review no. 1/2010, p. 99

70 In September 2010 European Commission issued a communication - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0492:FIN:EN:PDF> [accessed on 29 March 2012]

71 The scan of the opinion is available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/p10\\_edps/p10\\_edpsen.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p10_edps/p10_edpsen.pdf) [accessed on 29 March 2012]

72 *S. and Marper v The United Kingdom*, judgement of 4 December 2008, applications no. 30562/04 and 30566/04

73 European Parliament resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0144+0+DOC+XML+V0//EN> [accessed on 29 March 2012]

In December 2011, Council decided on signing of the EU-US PNR agreement<sup>74</sup>. Now the agreement awaits consents from the European Parliament. Voting is scheduled on 19 April 2012, however as far as now, Committee on Civil Liberties, Justice and Home Affairs adopted in February 2012 a Draft Recommendation on the new PNR agreement. Rapporteur Sophia in 't Veld recommended to decline to consent to the agreement.<sup>75</sup> It is argued that „PNR instruments have been adopted by the European Union without fully taking into account the recommendations of the European Parliament”<sup>76</sup> and that “PNR agreement exemplifies the imbalance inherent in this partnership”<sup>77</sup> as result of unilateral pressure from the U.S. to adopt such a piece of legislation.<sup>78</sup>

## SWIFT agreements

The second agreement concerning information sharing with the U.S. aimed at fight against terrorism, which similarly to PNR agreements was heavily discussed in the EU institutions, was so called SWIFT agreement. It was a consequence of establishing in the U.S. “Terrorism Finance Tracking Program” (TFTP) to suppress terrorist financing - “to identify, track, and pursue terrorists”.<sup>79</sup> In June 2006, New York Times informed about existence of such program and that the world's largest financial communication network, a Belgian

74 Text of the agreement is available at: <http://register.consilium.europa.eu/pdf/en/11/st17/st17434.en11.pdf> [accessed on 29 March 2012]

75 Draft Recommendation on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (17433/2011 – C7-0511/2011 – 2011/0382(NLE)); available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-480.773&format=PDF&language=EN&secondRef=01>

76 M. Nino, *The protection of personal data in the fight against terrorism. New perspectives of PNR European Union instruments in the light of the Treaty Lisbon*, Utrecht Law Review no. 1/2010, p. 74, p. 85

77 S. Pleshinger, *Allied Against Terror: Transatlantic Intelligence Cooperation*, Yale Journal of International Affairs Fall/Winter 2005, p. 59

78 “The most significant EU measures in recent years in the field of border management have come as a result of direct U.S. pressure or unilateral decision” - J. Argomaniz, *When the EU is the „Norm-taker”: The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms*, European Integration no. 1/2009, p. 133

79 Terrorist Finance Tracking Program Fact Sheet, available at: <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Documents/TFTP%20Fact%20Sheet%20revised%20-%20%282-15-11%29%20%282%29.pdf>

company SWIFT (the Society for the Worldwide Interbank Financial Telecommunication) passed on data on financial activities to U.S. Department of Treasury<sup>80</sup>.

In 2006, just after press news that such program exists and that SWIFT data were being transferred to U.S., European Parliament in its resolution<sup>81</sup> demanded to explain “the extent to which they [Commission, the Council and the European Central Bank – B.G.] were aware of the secret agreement between SWIFT and the US government”. *European Parliament underlined also different levels of data protection in the first and third pillar, that should be overcome*. Doubts whether such secret agreements were compatible with EU data protection standards were raised also by Article 29 Working Group<sup>82</sup> and European Data Protection Supervisor.<sup>83</sup> and again by the European Parliament<sup>84</sup>

In July 2009 Council authorized the EU presidency to initiate a negotiation of SWIFT agreement with U.S., and on 30 November 2009 Council made a decision on signing SWIFT agreement<sup>85</sup>. The next day, the Lisbon Treaty came into force, which provided that European Parliament's consent for adoption of the SWIFT agreement was necessary.

80 M.R. VanWasshova, *Data protection conflicts between the United States and the European Union in the war on terror: lessons learned from the existing system of financial information exchange*, Case Western Reserve Journal of International Law 2007-2008, p.839-840

81 European Parliament resolution on the interception of bank transfer data from the SWIFT system by the US secret services, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0317+0+DOC+XML+V0//EN> [accessed on 29 March 2012]

82 Opinion of 22 November 2006 [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp128\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp128_en.pdf) [accessed on 29 March 2012]

83 Opinion of 1 February 2007 [http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Supervision/Inquiries/2007/07-02-01\\_Opinion\\_ECB\\_role\\_SWIFT\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Supervision/Inquiries/2007/07-02-01_Opinion_ECB_role_SWIFT_EN.pdf) [accessed on 29 March 2012]

84 European Parliament 2007 resolution on SWIFT, the PNR agreement and the transatlantic dialogue on these issues <http://www.europarl.europa.eu/us/ressource/static/files/resolutions/20100427ATT73592EN.pdf> and European Parliament resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing - <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2009-0016&language=EN> [accessed on 29 March 2012]

85 Council Decision of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program – <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:008:0009:0010:EN:PDF>; Text of the Agreement announced in January 2010 and is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:008:0011:0016:EN:PDF> [accessed on 29 March 2012]

In February 2010 European Parliament, after recommendations from the Committee on Civil Liberties, Justice and Home Affairs, made a resolution stating that it “withholds its consent to the conclusion of the Agreement”<sup>86</sup> The main arguments and reservations concerned a possible transfer of bulk data or transfer of EU data to the third country as well as long retention periods<sup>87</sup>. European Parliament requested European Commission to „submit recommendations to the Council with a view to a long-term agreement with the United States dealing with the prevention of terrorism financing”<sup>88</sup>.

Rejection of the SWIFT agreement was also an important political “event” in the EU architecture of power (relation between the Commission, Council and the Parliament) and that it will have implications on further EU counter-terrorism policy and legislation. Commentators argue that the Council and Commission “will (...) have to give more consideration to the principles of necessity and proportionality as regards the use of personal data for international law enforcement cooperation purposes.”<sup>89</sup>

In June 2010 European Commission issued new proposal.<sup>90</sup> In July 2010 European

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86 European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)) - <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-29> [accessed on 29 March 2012]

87 J. Monar, *The Rejection ...*, p. 144

88 Such recommendation was adopted in March 2010. In May 2010 European Parliament issued a resolution on this recommendation - European Parliament resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorise the opening of negotiations for an agreement between the European Union and the United States of America to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0143+0+DOC+XML+V0//EN&language=EN> [accessed on 29 March 2012]

89 J. Monar, *The Rejection...*, p. 149

90 Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0316:FIN:EN:PDF> [accessed on 29 March 2012]



Parliament consented for the agreement<sup>91</sup>, which came into force on 1 August 2010<sup>92</sup>. The legal basis of the agreement is Article 87 (2)(a) and 88(2) in conjunction with Article 218(5) of the Treaty on the Functioning of the European Union. The agreement is aimed at ensuring that financial payment messages are provided to the U.S. Treasury Department “for the exclusive purpose of the prevention, investigation, detection or prosecution of terrorism and terrorist financing” (Article 1 of SWIFT agreement). Article 2 is an attempt to describe situations which may be considered as a threat of terrorism. Society for Worldwide Interbank Financial Telecommunication (SWIFT) is as “Designated Provider” according to Article 3 of the Agreement in conjunction with the Annex to the Agreement. Main responsibility for sharing SWIFT data at the EU level was imposed on Europol – it is obliged to verify the U.S. requests for such data, which a precondition of its providing by Designated Provider (SWIFT). As far as now, it is difficult to predict whether standard of data protection established in the SWIFT agreement is compatible with the EU law, particularly with the Charter of Fundamental Rights.<sup>93</sup> Those who support EU-U.S. counter-terrorism cooperation argue that “the protection of the interests and the legal status of the citizens go far beyond what was set out in the SWIFT-I agreement”<sup>94</sup>, however there opinions that “in order to strike delicate balance [between fight against terrorism and protection of privacy rights, U.S. should terminate the TFTP immediately”<sup>95</sup>

There is a set of challenges concerning EU-U.S. cooperation in counter-terrorism. U.S.

91 European Parliament legislative resolution of 8 July 2010 on the draft Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (11222/1/2010/REV 1 and COR 1 – C7-0158/2010 – 2010/0178(NLE)) - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0279+0+DOC+XML+V0//EN&language=EN> [accessed on 29 March 2012]

92 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.

93 V. Pfisterer, *The Second SWIFT Agreement Between the European Union and the United States of America – An Overview*, German Law Journal no. 10/2010, p. 1188

94 *Ibidem*, p. 1187

95 M.R. VanWasshnva, *Data Protection...*, p. 865



researchers underline that EU lacks a coherent foreign policy dimension.<sup>96</sup> It is also argued that “transatlantic intelligence cooperation must (...) be transformed from an array of bilateral relationships between the U.S. and single EU member states into a transatlantic intelligence network at the EU-U.S. level.”<sup>97</sup> PNR and SWIFT agreements were supposed to play such a role. The major challenge is however the argument that “US relations with supranational European institutions are not perceived as a legitimate channel for cooperation on foreign and security policy, including intelligence sharing.”<sup>98</sup>

### **1.3. Judicial review of the Court of Justice of EU over the transatlantic cooperation after 9/11.**

In this sub-chapter, I would like to make a brief analysis of a judicial response to the transatlantic counter-terrorism cooperation at the EU level. There is not many Court's judgements on this issue thus it is difficult to talk about “judicialization” of the transatlantic counter-terrorism cooperation. One of the reason of such situation is that “Court of Justice has had only limited involvement in this area so far and little opportunity to review the increasingly “high politics” dimension of this EU-US juridicial relationship”<sup>99</sup> Apart from this obstacles, the Court of Justice by reviewing such cases as *Kadi*, which is one of the milestone in the development of EU law, managed to establish a strong EU legal autonomy in the field of counter-terrorism. However, since *Kadi* case did not strictly concern the issue of transatlantic EU-U.S. cooperation, it will not be the main point of analysis in this subchapter. Nevertheless, I find *Kadi* as a fundamental in the EU counter-terrorism law and policy<sup>100</sup>.

96 R.J. Aldrich, *US-European Intelligence Co-operation...*, p. 123

97 S. Pleshinger, *Allied Against Terror...*, p. 58

98 *Ibidem*

99 E. Fahey, *Challenging EU-US PNR and SWIFT law before the Court of Justice of the European Union* [in:] *The EU-US Security and Justice Agenda in Action*, Chaillot Papers 127, December 2011, p. 55

100 E. Fahley calls the Kadi judgement even as „explosive” - E. Fahey, *Challenging EU-US ...*, p. 66

The case that I would like to concentrate on is a judgement of the Court of Justice of 30 May 2006 *European Parliament v Council* (C-317/04, C-318/04), commonly known as a PNR case. The Court dealt with two applications on annulment of – first, the Council decision 2004/496/EC on conclusion of PNR agreement and second, the Commission decision 2004/535/EC on adequate protection of personal data in PNR agreement.

European Parliament after adoption in March 2004 a “negative” resolution on proposal of PNR agreement and following it Council decision's on signing the PNR agreement with U.S., European Parliament decided to initiate annulment proceedings before the Court of Justice. Its arguments were varied. Some were strictly formal such as breach of the rules of the Directive 95/46/EC and principle of proportionality, the others however concerned the alleged breach of fundamental rights. The Court found that PNR data in the agreement with U.S. are “processing regarded as necessary for safeguarding public security and for law-enforcement purposes”<sup>101</sup>. Because of that, the Commission's “adequacy decision” does not fall within the scope of the Directive 95/46/EC.

When it comes to the Council's decision on the conclusion of PNR agreement, European Parliament argued that the legal basis chosen for adoption of this decision (Article 95 EC<sup>102</sup>) was not correct, however it also upheld that PNR agreements violated Article 8 of the European Convention on Human Rights. Court of Justice adopted the same approach as it did with adequacy decision and found that “Article 95 EC (...) cannot justify Community competence to conclude the Agreement”.<sup>103</sup> Because of that the Court decided not to analyze the other Parliament's arguments.<sup>104</sup>

101 Paragraph 57 of the judgement

102 Article 114 TFEU

103 Paragraph 67 of the judgement

104 C.C. Murphy, *Fundamental Rights and Security: The Difficult Place of the European Judiciary* (2010); paper available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1513611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513611) (accessed on 29 March 2012); By accepting such approach, the Court of Justice applied the solution suggested by Advocate General Léger.

However, the “cautious” approach of ECJ in the PNR case caused important critique on ECJ judgement – that it created a legal uncertainty when it comes to future unavoidable negotiations with U.S. on next PNR agreements.<sup>105</sup> In the light of the future negotiations this judgements appears to be “substantially” useless.

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105 M. Nino, *The protection of personal data ...*, p. 74

## Chapter 2. – The European standards of the democratic oversight over intelligence agencies and security services.

The issue whether the European Union intelligence cooperation (internal and external) requires oversight mechanisms is a part of a broader analogous questions addressed to every “typical” nation state – why intelligence agencies need to be accountable? It is also argued that such an effective “oversight is necessary to preserve the right balance between the efficiency and the legitimacy of the intelligence and security services”<sup>106</sup> Accountability should be also seen as a source and a part of the legitimacy of all counter-terrorism policies since „if states are to bring their anti-terrorism campaigns under the rule of law, [...] this will require us to think about how to bring security services themselves under more precise legal regulation.”<sup>107</sup> Discussion over the transatlantic counter-terrorism intelligence cooperation is a good opportunity to formulate such questions and to try to answer them.

In this chapter I will present an optimal standard of control of intelligence services in relation to “typical” national state. It will be divided into four sub-chapters briefly describing the main kinds of the oversight mechanisms over security services in general and intelligence agencies in particular. In the fifth sub-chapter I will concentrate on the specific aspects of democratic control over international intelligence cooperation, such as the transatlantic one (EU-U.S. but also bilateral – between the EU Member States and U.S.) after 9/11.

However, before coming into details it should be underlined that the issue of democratic accountability of intelligence agencies or any other state's authority is not just a

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106 P. Hayez, *National oversight of international intelligence cooperation* [in:] *International Intelligence Cooperation and Accountability*, (ed.) H. Born, I. Leigh, A. Willis, Routledge 2009, p. 162

107 K.L. Scheppelle, *Bringing Security under the Rule of Law in the Global Anti-Terror Campaign* [in:] *European and United States Counter-terrorism Policies, The Rule of Law and Human Rights* (organised by M. Scheinin), RSCAS Policy Papers 2011/03, p. 44

legal problem. As H. Born noted, “democratic accountability mechanisms include procedures and institutions, as well as political culture.”<sup>108</sup>

The experts of the functioning intelligence services as the aims of the oversight of intelligence point two things: first, “determine the efficacy of the intelligence service or its capacity to successfully fulfill its mandate”<sup>109</sup> and second, “to identify the propriety of the intelligence service.”<sup>110</sup> It is suggested that in the ideal and well balanced democratic oversight of intelligence services, the main position should be played by the parliament, awareness of the human rights standards must be secured and intelligence services need to remain politically neutral, as well as oversight itself.<sup>111</sup>

There are three kinds of accountability of intelligence agencies and security services mentioned in the literature: horizontal, vertical and so called third dimension.<sup>112</sup> Horizontal accountability results from the relations between hierarchically equal actors which provide different kinds of restraints, such as those between three branches of the government. Vertical accountability concerns unequal actors described by M. Caparini as “principals” and “agents”, between who exists hierarchical relationship within an institution (intelligence agency).<sup>113</sup> Such a vertical oversight exists also between the state (public) institutions and civil society, including media and non-governmental organizations. In regard of the direct in which such accountability works, the first the vertical oversight is called top-down, and the second one – initiated by the citizens – bottom-up.<sup>114</sup> According to M. Caparini, so called “third dimension” in oversight of intelligence agencies is mostly played by international actors, such as European Court of Human Rights.

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108 H. Born, *Parliamentary and External Oversight* ..., p. 174

109 M. Caparini, *Controlling and Overseeing*..., p. 9

110 *Ibidem*

111 H. Born, T. Wetzling, *Intelligence accountability. Challenges for parliaments and intelligence services* [in:] *Handbook of Intelligence Studies*, (ed.) L.K. Johnson, Routledge 2009, p. 316

112 M. Caparini, *Controlling and Overseeing*..., p. 10;

113 *Ibidem*

114 *Ibidem*

However, every theoretical study over intelligence functioning and its oversight meets several fundamental problems and obstacles. First of all, secret services, as almost every public authority is given a certain degree of discretion in fulfilling their statutory functions, which may cause difficulties with objective evaluation of their work. Second thing is omnipresent requirement of secrecy, which may lead to hiding illegal conduct of the security services. Third issue is the fundamental role of the notion of national security – main goal of everyday functioning of the security services. The consequences of irresponsible (e.g. politically biased) oversight and disclosure of secret documents may heavily undermine the national security. Thus balancing human rights and transparency with this value need to be more than just careful. Fourthly, there is a problem of so called “plausible denial”.<sup>115</sup>

Discussing the oversight of intelligence cooperation in the European Union, especially its external dimension, requires establishing relevant factors that provides the standard, which EU intelligence cooperation shall be compared with. Due to the EU's commitment to democracy, rule of law and human rights protection<sup>116</sup>, I think that it shall be compared with the standards proposed by the comprehensive studies of academic scholars and primarily with the democratic standards established by the Council of Europe – judgements of the European Court of Human Rights and recommendations established by so called Venice Commission<sup>117</sup> in its “expert reports”.<sup>118</sup>

One of the specific of the “war on terror” is that security services and intelligence agencies play a crucial role in it, especially cooperation between them is seemed to be a tool used very broadly. International intelligence cooperation is at the same time much more difficult and demanding when it comes to oversight of it. Venice Commission's main study

115 *Ibidem*, p. 17-18.

116 Art. 6 TEU

117 European Commission for Democracy Through Law

118 I will mostly base on the Report on the democratic oversight of security services, adopted in 2007, CDL-AD(2007)016 [hereinafter: Venice Commission Report 2007], available at: <http://www.venice.coe.int/docs/2007/CDL-AD%282007%29016-e.asp> [accessed on 30 March 2012].

on oversight of security services<sup>119</sup> uses different terms to describe and name this oversight. As a main term it uses “accountability” but also it mentions oversight, control, review<sup>120</sup>, however it limits to give a definition only of the first one. It explains that by “accountability” Venice Commission understands “being liable to be required to give an account or explanation of actions and where appropriate, to suffer the consequences, take the blame or undertake to put matters right, if it should appear that errors have been made.”<sup>121</sup> Such accountability mechanisms may function before (*ex ante*) or after (*ex post*) steps/operations were taken.<sup>122</sup> Apart from that, both, Venice Commission and academic scholars identify at least four types of accountability. These are: parliamentary accountability, judicial accountability, expert accountability and complaints mechanisms. In this chapter I will concentrate on three of them – parliamentary and judicial accountability and on complaints mechanisms. However, in my opinion the additional form of accountability should be distinguished – the governmental (executive) control, which is the most specific but also the most fundamental one.<sup>123</sup>

## 2.1. Executive oversight

As I mentioned before, it is the fundamental element in all kinds of oversight of security services, since it is “the closest one”, meaning that according to general rules of separation of powers, issues of foreign and defense policy are reserved for the executive branch. As a part of the government, the “principals” (according to M. Caparini division) not only should, but they must to know how their “agents” (intelligence agencies) are acting. They are the first who are responsible that intelligence agencies and security services will not

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119 Venice Commission Report 2007

120 *Ibidem*, paragraph 73

121 *Ibidem*, paragraph 69

122 *Ibidem*, paragraph 72

123 Similarly H. Born and T. Wetzling, *Intelligence accountability* ..., p. 317. However the authors additionally mention new element – external review by independent civil society organizations.

become “a state within a state.”<sup>124</sup>

By the “governmental” or “executive” control I understand mechanisms of control exercised by the agency itself (internal control)<sup>125</sup> and by the hierarchically higher authorities within the structure of public administration. Even though the governmental oversight is the internal one, meaning it is the closest to intelligence agencies everyday work, it may happen that it will not be efficient enough, because of “necessary secrecy which surrounds the area of security”.<sup>126</sup>

To make the executive oversight effective, there are some basic requirements need to be met, such as existence of the formal procedures for functioning of intelligence agencies which will be expressed in the text of law, as a part of the rule of law.<sup>127</sup> Furthermore, the factor which will make the governmental control more effective is a well organized system of administrative control in any sphere of public administration.<sup>128</sup> This “well organized system” often requires that the head of the internal security agency is to be appointed by the head of the government<sup>129</sup> and is responsible before him/her, however the institution of the “tenure” is a thing which is aimed at defending the intelligence agencies from too big political impact. Another means of executive control is a financial auditing<sup>130</sup>, which guarantees that the spending of the intelligence agencies' budget is lawful. Moreover, in order to secure the expertise and independent control of the intelligence actions, which would be however a part of the government hierarchy, some states establish a special office of Inspectors General, who deals exclusively with the everyday oversight of the concrete security service.

124 I. Leigh, *The accountability of security ...*, p. 68

125 Venice Commission Report 2007, paragraph 131.

126 *Ibidem*, paragraph 83

127 *Ibidem*, paragraph 132; judgement of European Court of Human Rights in the case *Makaratzis v. Greece* of 20 December 2004, application no. 50385/99

128 The Venice Commission stated that governmental control will “not function when the executive itself lacks control”, paragraph 84; One of the element of it is that “there must be clear chains of responsibility, so that senior ranks know exactly what junior ranks are doing”, paragraph 132.

129 I. Leigh, *The accountability of security ...*, p. 68

130 Venice Commission Report 2007, paragraph 145



When looking at the executive oversight of intelligence agencies, its role is so fundamental since, according to Venice Commission, “external controls are essentially to buttress the internal [governmental] controls”<sup>131</sup> and “a strong executive control over the security agency is a precondition for adequate parliamentary accountability, given that access by parliament to intelligence usually depends on the executive.”<sup>132</sup>

## 2.2. Parliamentary oversight.

The parliamentary oversight of intelligence agencies is the basic one in the broad group of “external” oversight mechanisms, however it is underlined that “there is no inherent conflict between effective executive control and parliamentary oversight.”<sup>133</sup> As it was mentioned before, the effectiveness of the parliamentary control is dependent on the effectiveness of executive oversight.<sup>134</sup> Moreover, in my opinion efficiency of the parliament's oversight depends also on the parliament's position itself in the broader system of separation of powers and on general effectiveness of the instruments of checks and balances system.<sup>135</sup> There are however also some political factors which determine the effectiveness of the parliamentary oversight of security services such as “authority, ability, courage and willingness”<sup>136</sup> which generally speaking create a “political culture”.

Similarly, to the executive control, one of the basic instrument of oversight is financial auditing, since it is a parliament who votes the budget arrangement for intelligence services. Moreover, comparative analysis show that parliaments often have power to establish special committees dealing with the issue of the oversight of functioning of intelligence agencies. The

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131 *Ibidem*, paragraph 130

132 P. Hayez, *National oversight...*, p. 152

133 I. Leigh, *The accountability of security ...*, p. 71

134 *Ibidem*

135 “Having legislature that is powerful enough to counterbalance the executive is necessary in a liberal democracy” [in:] H. Born, *Parliamentary and External...*, p. 174

136 *Ibidem*, p.175

scope of the powers delegated to such a committee will affect its effectiveness. Such powers, apart from the minimal scope - “scrutinizing the policy, administration and finance of the agencies”<sup>137</sup> may include also a right to investigate and right to access to documents.<sup>138</sup> The latter may be however complicated, since often a decision to give the access to such documents is a privilege of the security services itself as those who are responsible for the protection of the classified information. However, the experts underline that “if parliament has limited access to classified documents, it is parliament itself who is to blame”<sup>139</sup>, because it is a parliament who passed such a law.

Parliamentary mechanisms of oversight are so crucial also from the political reasons – parliament, through its legislative powers, is a source of legitimacy of security services' functioning.<sup>140</sup> It should be however strongly underlined, that the main threat related to this kind of control is risk of politicization of the whole process of control, since the members of those special parliamentary committees are active politicians who probably would like to use the knowledge they receive during their work for particular political purposes.

## 2.3. Judicial oversight (review)

The third kind of oversight mechanism should be played by independent courts which first of all verify the legitimacy of actions undertaken by the security services.<sup>141</sup> However scope of the actions, which negatively affect individual and may be brought before the court, is rather limited. However, we should bare in mind that the issues of the security is a kind of matters that courts are not content to scrutinize, especially in the question of necessity,

137 Venice Commission Report 2007, paragraph 159

138 Ibidem, paragraph 163

139 H. Born, *Parliamentary and External ...*, p. 173; I. Leigh, *The accountability of security ...*, p. 72

140 Venice Commission Report 2007, paragraph 150, I. Leigh, *The accountability of security ...*, p. 71; H. Born, *Parliamentary and External...*, p. 164

141 M. Caparini, *Controlling and Overseeing...*, p. 9; F. Manget, *Intelligence and the rise of judicial intervention* [in:] *Handbook of Intelligence Studies*, (ed.) L.K. Johnson, Routledge 2009, p. 339

because of the lack of precise criteria and sufficient knowledge in a domain, which I mentioned before, is traditionally reserved for executive branch. That is why “courts may find it difficult to fulfill this function properly”<sup>142</sup>.

The most characteristic feature of judicial review of intelligence agencies actions is that, comparing to other types of intelligence oversight, its existence and proper functioning results directly from the requirements of the Article 6 of the European Convention of Human Rights. As a consequence of a right to fair trial, judicial review is usually required as a prior authorization for some special investigative measures, e.g. wiretapping<sup>143</sup>. However, usually judicial review as a mechanisms of oversight of intelligence functioning applies in cases pending before the court and concerning security issues - criminal trials, as well as in proceedings concerning civil, constitutional, administrative claims.<sup>144</sup> Usually accepted precondition for initiating of judicial review is a existence of personal individual interest in this respect.

The requirements of proper judicial review was a background also in cases pending before the European Court of Human Rights which concerned the issue of so called special advocates. Their main role was located somewhere between Inspector General (who guarantees the protection of the classified information relevant in the trial or administrative case) and defender who rendered that information relevant for defender's (petitioner's) case will be available to him.<sup>145</sup> In the light of Article 6 and 7 of European Convention of Human Rights, it seems that particularly crucial such information and access to them is criminal cases.

Moreover, there are examples when judges were given a role of members of

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142 Venice Commission Report 2007, paragraph 85

143 *Ibidem*, paragraph. 195

144 *Ibidem*, Paragraph 196

145 Judgement of the European Court of Human Rights of 15 November 1996 in the case *Chahal v. UK*, application no. 22414/93.

commissions of inquiry usually established in cases of some alleged maladministration.<sup>146</sup> The example from the European Union of Judge Jean-Louis Bruguiere, who ask to review the implementation of SWIFT agreement may be a good example.

In the light of exceptional counter-terrorism legislation, commentators underline a crucial role of judiciary in as a element of defensive (fighting) democracy: *“It may be sufficient to stress that the aims which are used to justify these violations of the principle of legality may be achieved also through full respect of the rule of law, of fundamental rights and of the guarantees of legality of the criminal trial and of the prison system.”*<sup>147</sup> Such a rule was established already by the European Court of Human Rights in famous case *Klass v Germany*:

“The rule of law implies, inter alia that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.”<sup>148</sup>

## 2.4. Complaint mechanisms

In my opinion, the next control method – complaint mechanisms a oversight tools are a consequence of Article 13 of the European Convention of Human Rights, which requires establishing in the domestic legal order an effective remedy in case of alleged violation of human rights. It may take a form of a action for damages<sup>149</sup> or possibility to file such claim to ombudsman, data protection supervisor or special office – Inspector General, that I mentioned previously.

Even though there is no one optimal model applicable in the same way in every country, some guidelines can be found in the case-law of the European Court of Human

146 Venice Commission Report 2007, paragraph 198

147 Round table on “Fight against terrorism: challenges for the judiciary”, Report by G.Neppi Modona, 15 September 2009, CDL(2009)142

148 *Klass v. Germany*, judgement of 6 September 1978, application no. 5029/71, Venice Commission Report 2007, paragraph 56

149 *Ibidem*, paragraph 243

Rights, which always underlines that national mechanisms implementing the requirements of the Convention need to be effective in practice.<sup>150</sup> Such complaint mechanisms may have judicial character, but also non-judicial independent organs, such as data protection supervisor. The main requirement which may be addressed to such institutions is it has real competences to accept the complaint of the individual seeking for protection of his or her rights.<sup>151</sup>

## 2.5. International intelligence cooperation and accountability

Before going into details of the EU legal framework of oversight of intelligence cooperation within EU, I would like to concentrate in the last sub-chapter of the second chapter on the specific features of the intelligence cooperation which strongly affect the oversight of such cooperation. According to I. Leigh “international cooperation between national security and intelligence services presents the most significant oversight challenge in the field of national security today.”<sup>152</sup>

The main threat is so called “accountability gap”<sup>153</sup> which means that because of the “transnational element” the authorities of one state may not use their power and use oversight mechanisms which would be applicable in a clearly domestic situation. “While both the threats to national security and the responses to these threats have become increasingly “globalised”, accountability mechanisms have remained territorially bounded.”<sup>154</sup> Thus “intelligence cooperation is a test for national accountability systems”.<sup>155</sup>

150 Judgement of European Court of Human Rights of 4 May 2000 in the case *Rotaru v. Romania*, application no. 28341/95; Judgement in the case *Wille v. Liechtenstein*, application no. 28396/95

151 Judgement in the case *Segerstedt-Wiberg and Others v. Sweden* of 6 June 2006, application no. 62332/00

152 I. Leigh, *Accountability and Intelligence* ..., p. 3

153 C. Forcese, *The consequences for* ..., p. 90

154 I. Leigh, *Accountability and Intelligence* ..., p. 4

155 P. Hayez, *National oversight* ..., p. 158

It is often explained that intelligence cooperation is quite a new element in the international relations and “national systems of oversight or accountability were designed for a different era and to guard against different dangers of abuse”.<sup>156</sup> One of the rare example<sup>157</sup> is the case of alleged secret CIA flight renditions of people captured in Afghanistan to secret detentions in the European countries, where they were tortured. Prosecution of CIA officials who may have taken part in this process by the European countries involved in these flights is almost impossible as well as receiving classified documents from the U.S. government.

Since there is not many cases because of lack of reliable evidence of abuse caused by two or more intelligence agencies, such cases very rarely may be heard by international courts such as European Court of Human Rights:

*“The case-law of the ECtHR is still developing in the area of the extent to which a State can, and should, bear responsibility for acts with an extraterritorial dimension. It is, however, already evident that a vacuum of accountability is not acceptable.”*<sup>158</sup>

Small number of cases causes that “there are relatively few known examples of rules, agreements or best practices.”<sup>159</sup>

As well as in case of general oversight of domestic intelligence agencies, also in case of international cooperation, the main element of its control is a proper legal framework, which for instance requires a prior authorization of e.g. Prime Minister. Such a regulation exists in the Polish law, however, case of the secret CIA detentions raises a question whether also a parliament should be involved in process of the prior authorization.<sup>160</sup> To facilitate such authorization, agreements on intelligence cooperation should be adopted in writing.

However, even adoption of the above general rules do not eliminate a series of

156 Venice Commission Report 2007, paragraph 116.

157 I. Leight, *Accountability and Intelligence* ..., p. 4.

158 Venice Commission Report 2007, paragraph, 121; decision in the case *Bankovic and Others v. Belgium* and 16 other Contracting States of 12 December 2001, application no. 52207/99

159 Venice Commission Report 2007, Paragraph 178.

160 *Ibidem*, paragraph 180; The Venice Commission, as a minimal standard proposes there needs to exist afterward a “full governmental accountability (...) for all such decisions”.

challenges which are usually met in exercising the oversight of the international intelligence cooperation. The crucial is a “dependence on the good faith of the security and intelligence agency and in the final instance on careful review by independent bodies”<sup>161</sup> Because of the complex nature of the intelligence cooperation, creation of effective and comprehensive system of oversight “requires a holistic perspective of the accountability of intelligence and security services.”<sup>162</sup>

Apart from those challenges, the experts proposed detailed principles which may provide effective oversight of intelligence international cooperation, such as a rule that specialized standing committees of parliaments should be given full jurisdiction to know and appreciate *ex post facto* the operations of the services and their foreign content.<sup>163</sup>

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161 C. Forcese, *The consequences for ...*, p. 89

162 Venice Commission Report, paragraph 158

163 P. Hayez, *National oversight...*, 162-163

# Chapter 3. The oversight of the intelligence cooperation in the European Union.

The aim of the third chapter is to analyze the oversight mechanisms of security services, particularly intelligence agencies existing in the European Union legal order with the standards described in the second chapter. Such a comparison however requires few general comments and reservations.

First of all, the standards presented above are addressed to the nation states. It raises a question whether they can be directly applicable to European Union framework. Since it is not necessarily sure, what European Union is (a *sui generis* entity, association of the states [*in German...*]) a further modification of the above standard is probably needed. Second of all, above standards were described as “democratic oversight over security services.” The analysis of the German Federal Constitutional Court judgement in the Lisbon Treaty case<sup>164</sup> gives an impression that the European Union is not a democracy. This raises a question can we even talk about democratic oversight at all.<sup>165</sup> Thirdly, above standard is a consequence and a reflection of the separation of powers, which is also a concept addressed to a nation state. For sure, division of powers in the European Union is not a “classic” application of the separation of powers.

Bearing those in mind, the above standards of democratic control need to be slightly modified, since for instance when discussing the parliamentary oversight over intelligence services, we have to keep in mind that European Parliament cannot be simply compared with the national parliaments – because of its legitimacy, powers and because of the whole structure of the government in the EU institutions. The main feature of this structure is a

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164 Judgement of the German Federal Constitutional Court of 30 June 2009

165 G. Bono, *Challenges of Democratic Oversight of EU Security Policies*, European Security no. 4/2006, p. 446



dominant position of the executive (primarily of the European Commission). This raises a question whether stronger executive branch under EU prejudices or should prejudice the stronger executive oversight mechanisms.

As it was mentioned in the first chapter, the intelligence cooperation between Member States is divided between the second and the previous third pillar of the European Union. Since the Lisbon Treaty entered into force the cooperation in the criminal matter was moved to the first pillar and now is ruled by the community method with the strong position of the European Commission. At the same time, the second pillar – common foreign, security and defense policy is governed with the intergovernmental mechanisms and dominant position of Member States.

Moreover, there are several challenges to intelligence cooperation in the European Union, mostly concerning its efficiency. “Intelligence in this policy area is the best shared bilaterally or within informal networks outside of EU structures, such as Club of Bern where trust has been accumulated over time”<sup>166</sup> However, the terrorists attacks in the New York caused a discussion about enhanced cooperation between Member States in this area.<sup>167</sup> One of the main reason was that EU in the intelligence cooperation with the U.S. shall be treated as an equal strong partner with a strong intelligence agency - “European Institute of Intelligence”.<sup>168</sup>

The first sub-chapter will deal with the general EU legal framework on institutions' whose main tasks are aimed at counter-terrorism and using intelligence as a part their working methods. The second sub-chapter will be an analysis of the oversight mechanisms applicable to the PNR and SWIFT agreements – general and particular (applicable only to those two)

166 B. Fägersten, *European Intelligence Cooperation: Drivers, Interests and Institutions*, SIIA Papers No. 6, p. 71

167 S. Pleshinger, *Allied Against Terror...*, p. 59

168 Such a name was proposed by the Member of the European Parliament - Mario Borghesio to the Commission in 2002. The question and the answer are available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:92002E0620:EN:NOT> [accessed on 29 March 2012]

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### **3.1. Oversight of the “European Intelligence Community” - general comments.**

„European Intelligence Community” is defined by the scholars as consisting of national intelligence and security services and of the European information agencies, such as Europol or SitCen, which are not seen as “intelligence services in the traditional sense of the word”.<sup>169</sup> The oversight of these mechanisms are becoming even more complicated when we realize that some the intelligence institutions are part of supranational legal order (e.g. Europol) with a strong position of the executive branch – the Commission, the others however are result of traditional international cooperation under so called Second Pillar (e.g. SitCen).

European Commission in 2004 issued a Communication “Towards enhancing access to information by law enforcement agencies”<sup>170</sup> in which it proposed creating “EU Information Policy for Law Enforcement” (based on exchange of the information, producing high quality EU criminal intelligence and enhancing trust between enforcement services) and “European Criminal Intelligence Model”. It would be aimed at making “necessary information available to an EU criminal intelligence network”. What I find interesting, the communication underlined that today “EU law enforcement authorities are not guided by criminal intelligence that targets the security of the EU as whole”<sup>171</sup>.

#### **Parliamentary oversight in the European Union**

According to Article 4 para. 2 (i) TFEU, the area of freedom, security and justice is a part of so called shared competences between the Union and the Member States, thus an

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169 R. Hertzberger, *Counter-terrorism Intelligence* ..., p. 2-3

170 Communication of 16 June 2004, COM (2004) 429 final; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0429:FIN:EN:PDF>

171 *Ibidem*, p. 11

oversight of the agencies established under previous “third pillar” seems to be a “shared responsibility” of both - the European Parliament and national parliaments.<sup>172</sup>

## European Parliament

When it comes to the European Parliament, the most important bodies empowered for controlling the EU security and intelligence agencies are relevant committees such as Committee on Civil Liberties Justice and Home Affairs (when it comes to oversight of Europol and Eurojust) or Committee on foreign affairs (controlling SitCen which is established under Second Pillar). Moreover, according to Rule 48 of the Rules of Procedure of the European Parliament<sup>173</sup> each committee in the European Parliament may also prepare “own initiative reports” which falls within the scope of the competence of the committee. For instance in 2003 Committee on Citizens' Freedoms and Rights, Justice and Home Affairs adopted a report on the future development of Europol.<sup>174</sup>

Depending on the EU regulation establishing the particular agency, its heads and representatives are expected to appear before the European Parliament at its requests<sup>175</sup>. When it comes, to the oversight of the securities agencies established as a part of the common foreign and security policy (CFSP), such as SitCen, main oversight mechanisms are directed at the High Representative for Foreign Affairs. According to Article 36 TEU, the High Representative

“shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in

172 *Parliamentary oversight of Security and Intelligence Agencies in the European Union*, European Parliament Study [2011], p. 60;

173 The last version of the Rules was issued in March 2012 and is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20120312+0+DOC+PDF+V0//EN&language=EN> [accessed on 29 March 2012]

174 Recommendation to the Council of 7 April 2003 on the future development of Europol (2003/2070(INI)); available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0116+0+DOC+PDF+V0//EN>

175 Article 48 of the Europol Decision

briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.”

One of the requirement of the effective oversight - possibility of the financial audit – is fulfilled by the EU regulation on the adoption of the budget for security and intelligence agencies, which European Parliament participates in (Article 310 TFEU), as well as in its evaluation (Article 318-319 TFEU).<sup>176</sup> Moreover, European Parliament and each of its Members can ask questions to the Commission and Council, also those regarding “third pillar” agencies.

According to Rule 184 of the EP Rules of Procedure, European Parliament is also entitled to establish **special committees** “whose powers, composition and term of office shall be defined at the same time as the decision to set them up is taken; their term of office may not exceed 12 months, except where Parliament extends that term on its expiry.” Such a committee was established in 2006 for the case of CIA secret flight renditions in Europe.<sup>177</sup>

Moreover, Article 226 of TFEU allows European Parliament for setting up committees of inquiry “to investigate (...) alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.” After completing its investigation, the committee shall prepare the report.

Thing which may cause problems in effective oversight of security and intelligence agencies exercised by the European Parliament is access to classified information.<sup>178</sup> Because of this issue, it is argued that:

“The EU is lacking a systematic framework governing the parliamentary oversight of

176 *Parliamentary oversight of Security and Intelligence Agencies in the European Union*, p. 76

177 Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP); *Ibidem*, p. 78

178 *Principles and procedures for dealing with European Union Classified Information in the light of the Lisbon Treaty*, Note prepared by Henri Layle on the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, PE 425.616; *Ibidem*, p. 68-74; 363-365, 405-407

intelligence activity. There are significant gaps in EP access to classified information held by Europol and Eurojust. EP is also lacking a systematic internal framework for the oversight of classified information.<sup>179</sup>

## National parliaments

Powers of national parliaments in the field of oversight of functioning intelligence agencies and intelligence cooperation within EU vary in each Member States depending on domestic constitutional arrangements. However, at the EU level, the Lisbon Treaty introduced some interesting amendments. Article 12 (c) TEU concerning position of national parliaments in the EU, allows them to take part in the evaluation mechanisms for the implementation of the Union policies in the area of freedom, security and justice. It directly empowers national parliaments to participate “in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 88 and 85 of that Treaty”.

The authors of the recent European Parliament study on the oversight of intelligence and security agencies underline two major roles of national parliaments in scrutinizing those agencies: protection of the principles of subsidiarity and proportionality and holding national governments and national agencies (which also create European Intelligence Community) accountable according to domestic rules.<sup>180</sup>

The position of the national parliaments within the EU legal framework is also regulated by Protocol no. 1 to the Lisbon Treaty on the role of national parliaments in the European Union. It gives guidelines for interparliamentary cooperation within the Conference of National parliaments' European Affairs Committees (Article 10 of Protocol no. 10), which for instance during its meeting held in October 2010 prepared a bi-annual report concerning, e.g. monitoring of Europol and evaluation of Eurojust in the light of Treaty of

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179 S. Peers, *The European Union's Area of Freedom...*, p. 409-410

180 *Parliamentary oversight of Security and Intelligence Agencies in the European Union*, p.64

## **Executive oversight and complaints mechanism**

Apart from parliamentary oversight of intelligence agencies and cooperation within EU, a crucial role plays non-parliamentary bodies – Joint Supervisory Bodies (JSBs) for Europol and Eurojust. They are internal components of Europol and Eurojust. Their aim is to ensure a proper storage, processing and use of data held by Europol and Eurojust. In case of concluding the agreement with the third state concerning the exchange of information, opinion of the Joint Supervisory Body is required (Article 23 (2) of Europol Decision). It then monitors its implementation (Article 34 (3) of Europol Decision).

Moreover, Europol and Eurojust decisions provides also a detailed complaint mechanisms with a main role of Joint Supervisory Bodies. According to Article 30 (7) of Europol decision:

“Any person shall have the right to request the Joint Supervisory Body, at reasonable intervals, to check whether the manner in which his or her personal data have been collected, stored, processed and used by Europol is in compliance with the provisions of this Decision concerning the processing of personal data. The Joint Supervisory Body shall notify the person concerned that it has carried out checks, without giving any information which might reveal to him or her whether or not personal data concerning him or her are processed by Europol.”

The appeal procedure is provided in the Article 32 of Europol Decision. In the Eurojust Decision, a similar provision may be found in the Article 19 (8):

“If the applicant is not satisfied with the reply given to his request, he may appeal against that decision before the joint supervisory body. The joint supervisory body shall examine whether or not the decision taken by Eurojust is in conformity with this Decision.”

## **Judicial review**

The judicial review of the intelligence agencies and security services under EU law is specific. As it was stated before, European Intelligence Community consists also of the

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181 14th Bi-annual Report on EU Practices and Procedures (October 2010), available at: <http://www.cosac.eu/en/documents/biannual/14br.pdf/>

national intelligence agencies. In this sense and in the light of the rule of subsidiarity, the role of the Court of Justice can be considered only as a secondary one. The size of the last subchapter in the first chapter, shows that the Court of Justice is not particularly active in this field.

Apart from the above mentioned reason, it can be also justified by construction of the annulment proceedings before the Court of Justice. According to Article 263 TFEU (previous Article 230 TEC):

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. **It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.**

(...)

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

This provision was a legal basis for annulment action in a famous *Kadi* case. However, annulment proceedings are still not easily available because of the standing criteria which need to be fulfilled. Their interpretation in *Plaumann* case<sup>182</sup>, may raise question whether such regulation meets standards of access to court established under Article 6 of the European Convention on Human Rights.

The major number of cases brought before the Court of Justice are those concerning preliminary ruling under Article 267 TFEU with less strict standing criteria. In my opinion, it is very unlikely that under these procedure judicial oversight of intelligence actions can be effectively held. However, interpretation of Europol and Eurojust decisions within preliminary ruling seem to be probable.

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<sup>182</sup>Judgment of the Court of 15 July 1963, *Plaumann & Co. v Commission*, Case 25-62.

## **3.2. Oversight of the intelligence sharing under the PNR and SWIFT agreements.**

As it was analyzed in the first chapter, transatlantic cooperation plays a vital role in the EU legal framework in the field of counter-terrorism. PNR and SWIFT agreements are the most famous examples of such cooperation. Since they are a part of the EU legal order, the general oversight measures described above are applicable to them. Moreover, I would like to analyze particular provisions of those agreements which create special oversight mechanisms. The analysis concerns SWIFT agreement of 2010 and the PNR agreement. The second one is still not legally binding (voting in EP is scheduled at April 2012). Nevertheless, I think that analysis of its oversight provisions may be a kind of guidelines, whether EP will consent its adoption.

SWIFT agreement provides a special role for Europol which is responsible for verifying the U.S. request for financial payment messages (Article 4 (4) of SWIFT agreement). It means that also Joint Supervisory Body of Europol takes part in oversight of SWIFT implementation (Article 34 of Europol Decision) especially in the field of data protection. In March 2011 Joint Supervisory Body issued a “Report on the inspection of Europol's implementation of the TFTP Agreement”<sup>183</sup> and found that the U.S. requests concerned “broad types of data” and were of “abstract nature”. Moreover, also Europol itself prepared in April 2011 a report - “Europol Activities in Relation to the TFTP Agreement - Information Note to the European Parliament”<sup>184</sup>, in which it found that “substantial information has been released publicly in this note beyond a level normally applied to

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183Available at: <http://www.idpc.gov.mt/dbfile.aspx/TFTP2.pdf> [accessed on 29 March 2012]

184Available at: [www.statewatch.org/news/2011/apr/eu-europol-report-on-implementation-tftp-agreement.pdf](http://www.statewatch.org/news/2011/apr/eu-europol-report-on-implementation-tftp-agreement.pdf) [accessed on 29 March 2012]



Europol's operational activities”<sup>185</sup>, which would confirm the statement that “the SWIFT affair demonstrated forcefully the institutional challenges [and] innovations produced in governing practice”<sup>186</sup>

Before that, it was argued that “the mechanisms of review and procedural safeguard that were achieved by the EP in its negotiations over the SWIFT affair still show substantial shortcomings”,<sup>187</sup> which was a main reason for designating independent “eminent person” who would verify data processing between EU and U.S. within TFTP. Such reports were prepared by Judge Jean-Louis Bruguere in 2008 and in 2010.<sup>188</sup> The relevant report on implementation SWIFT agreement and TFTP program was also issued by EU Counter-terrorism Coordinator<sup>189</sup> and by the European Commission<sup>190</sup>.

Article 12 of the SWIFT agreement provides that the agreement (especially “compliance with the strict counter terrorism purpose limitation and other safeguards”) shall be subject to “monitoring and oversight by independent overseers”. Additionally, Article 13 states that the agreement shall be jointly review at the request of one of the parties and every 6 months.

What is interesting SWIFT agreements establishes special procedures for individuals, whose data were transferred on the ground of SWIFT agreement – it expresses that any person has the right to obtain a confirmation whether data have been respected in compliance with the agreement (Article 15) and that any person has the right to seek the rectification, erasure or blocking of his or her personal data processed by the U.S. Finally, according to Article 18 of

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185 *Ibidem*, p. 11

186 M. de Goede, *The SWIFT Affair and the Global Politics of European Security*, JMCS no. 1/2011, p. 13

187 *Ibidem*

188 The first one is available at: <http://www.statewatch.org/news/2011/apr/eu-usa-tftp-swift-1st-report-2008-judge-bruguere.pdf> and the second one at: <http://www.statewatch.org/news/2010/aug/eu-usa-swift-2nd-bruguere-report.pdf> [accessed on 29 March 2012]

189 Report on the implementation of the revised Strategy on Terrorist Financing, available at: - <http://register.consilium.europa.eu/pdf/en/11/st15/st15062.en11.pdf> [accessed on 29 March 2012]

190 Commission Working Document [SEC(2011)438], available at: <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1579.pdf> [accessed on 30 March 2012]

the SWIFT agreement, any person who considers his or her personal data have been processed in breach of the agreement is entitled to seek effective administrative and judicial redress in accordance with the laws of the European Union, its Member States and the United States respectively. Such provisions seem to meet the requirements of complaint mechanisms as a part of the oversight system. It is however not sure how those provisions will be applicable in practice.

The purpose of the third PNR agreement is much broader than in the SWIFT agreement and very general – its purpose is “to ensure security and to protect the life and safety of the public” (Article 1 of PNR agreement). It shall apply to carriers operating passengers flights between EU and the U.S. Also a scope of use PNR data is much broader than in SWIFT agreement and does not cover only terrorist offenses (Article 4). The main obligations concerning data security were imposed on the U.S. authorities which may retain PNR data up to five years (Article 5 and 8).

PNR agreement contains also a specific provision on the oversight which states that “compliance with the privacy safeguards shall be subject to independent review and oversight by Department Privacy Officers” (Article 14). Moreover, Article 23 regulates annual review of the agreement and further evaluation every four years. The third PNR agreement contains also provisions on individual requests for his or her PNR (Article 11), right to seek the correction or rectification (Article 12) and right to effective administrative and judicial redress (Article 13).

Sophia in 't Veld, who prepared a draft recommendation of Committee on Civil Liberties, Justice and Home Affairs to the European Parliament which will be discussed in April 2012, states those provisions raise many practical questions, especially in the light of Article 21 of the agreement which states that agreement “shall not create of confer, under US

law, any right or benefit on any person”. Additionally, we can read in the the draft recommendation that “the EDPS regrets this in its opinion, concluding from Article 21 that “[the right to judicial redress] may not be equivalent to the right to effective judicial redress in the EU”. Another negative remark is that Article 14 „lacks independent oversight as required under the jurisprudence of the European Court of Justice and the Charter of Fundamental Rights”.

## Conclusions

One of the intelligence expert, Philippe Hayez, stated that “intelligence and security services are not only tigers to be tamed but thoroughbred horses to be bred”.<sup>191</sup> This demanding expectation is for sure addressed to each nation state, since probably every of them has specialized authority dealing with intelligence functions. One of the main question of this thesis was whether it should be also applicable to the intelligence cooperation within a supranational organization.

It appeared that the requirements of an effective accountability is only one kind of challenges that can be met when discussing intelligence cooperation in the field of counter-terrorism between the European Union and United States, apart from such basic ones as inequality between the main actors of the cooperation. Another kind of the obstacles in the guaranteeing proper standard of accountability at the EU level is so called “democratic deficit” in the European Union. On the other hand, such a proper (optimal) standard is even not unilateral among nation states – it can be built using different best practices, expert opinions and bind and non-binding international documents. Such a democratic standard of oversight of security services (including intelligence agencies) seems to be a reflection of common feature of today constitutional orders – separation of powers. However, both, prior-Lisbon and post-Lisbon institutional arrangements in the European Union shows that the separation of powers within the EU is also specific, hardly comparable to the traditional one.

The analysis of two main agreements between the EU and U.S. aimed at fight against terrorism shows that they seem to be arranged in a way that meets the main requirements of the optimal oversight standard. However, the general EU arrangements such as, different level of “communitarization” within the “first” pillar and common security and defense policy,

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<sup>191</sup>P. Hayez, *National oversight ...*, p. 162

which affects the scope of oversight mechanisms that can be applied by the Commission, may undermine the whole effectiveness of the specific arrangements in the agreements.

One of the results of the comparison between the EU oversight mechanisms and those “classic” one addressed primarily to the states, shows that the specific European Union law mechanisms of control have to face a common problems that appear in the national legal orders. The example of this is a today main obstacle of the effective European Parliament's oversight of the EU security services – access to classified information.

Apart from these shortcomings, it is argued that the “transatlantic co-operation will continue to deepen, despite the complex problems that it entails”.<sup>192</sup> It should be however noticed that the future re-arrangements of the EU in the light of the international law, such as access to the European Court of Human Rights will cause a further discussion and new questions to be asked, e.g. whether international agreements on cooperation between the EU and U.S. meet the standards of the Convention such as fair trial, access to court and right to effective remedy. As it was presented in the third chapter, providing the answers for those questions on the basis of abstract and general provisions of the agreements, may not be easy. Only concrete individual allegations may facilitate the proper answer. In my opinion a case of secret CIA flight renditions, analyzed and “quasi-investigated” by *inter alia* European Parliament may be a litmus paper for the question of effective accountability of the intelligence cooperation with the U.S., even though it concerns bilateral cooperation between the EU Member States and the U.S.

Gijs de Vries, the former EU counter-terrorism coordinator said that:

It is time for European governments to respond to the three key recommendations issued by the Secretary-General of the Council of Europe: to improve safeguards against the operations of foreign intelligence services operating in EU Member States; to improve controls over transiting aircraft, and to establish clear exceptions to State immunity in cases of serious human rights abuses.<sup>193</sup>

<sup>192</sup>R.J. Aldrich, *US-European Intelligence...*, p. 122

<sup>193</sup>G. de Vries, *Accountability at the level of the European Union*, p. 3, available at:

It shows that probably all those above mentioned issues and shortcomings are in fact addressed to the EU Member States, since they decide on the scope of powers transferred to the supranational level. The more powers are transferred at the supranational level, the more democratic the oversight of their exercising should be. It is however very unlikely that the EU will become a national state in a traditional sense, with its own unilateral security policy. This would be a moment when the oversight requirements of the EU would have to be really democratic. As far as now, any shortcomings, such as those related to the powers of the European Parliament (which in comparison to national parliaments is deprived of a strong impact on the executive branch), have to be relatively accommodate to the supranational specific.

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