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## Editorial Comment

# The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications

Jörg Monar

## I The Transatlantic SWIFT Saga

If one looks at the participation in European elections – only 43% in 2009 – one can get the impression that European citizens do not consider the European Parliament as all that relevant. Since 11 February 2010, they have one more reason to reconsider their view: On that day the Parliament refused to give its consent to an EU-US agreement on the sharing of financial data that had already been signed and provisionally entered into force. It did so against appeals from the Commission and the EU Presidency, against significant pressure from several Member States and against an unprecedented direct lobbying from the US side, and it did so both on grounds of protecting citizens' safeguards regarding the transfer and use of personal financial data and for affirming its own prerogatives. The rejection of the so-called Society for Worldwide Interbank Financial Telecommunications (SWIFT) Interim Agreement can be considered as one of the so far not so many historic votes of the Parliament on an EU external relations issue – with significant implications for EU external relations. Before looking at these, it may be useful to recall the main facts of the transatlantic SWIFT saga.

After the 9/11 terrorist attacks, the US Treasury introduced a secret 'Terrorist Finance Tracking Programme' (TFTP), which allows to request the SWIFT, global leader of financial messaging services, by way of administrative subpoenas to transfer financial transaction data for counter-terrorism purposes. A large percentage of these originate in the EU, and when press leakages in the United States revealed in 2006 that US authorities had been widely accessing and using also European data, this generated widespread concern and criticism inside the EU and led Belgium – where SWIFT is based – to conclude on a breach of Belgian and European data protection rules. In response, the United States gave in 2007 a number of unilateral reassurances to the EU regarding data protection and SWIFT moved to a two-zone architecture consisting of a European and a Transatlantic Messaging Zone in order to keep the European data under European jurisdiction. While the US reassurances were not considered fully satisfactory, the changed

SWIFT architecture (completed on 1 January 2010) would eventually deprive the US authorities of any access to transaction data originating in Europe. In order to satisfy US demands for a continuation of access to SWIFT data beyond 1 January 2010, the Council agreed in July 2009 on the negotiation of an agreement with the United States. Such an agreement continuing access to European SWIFT data had strong support among the majority of the EU Member States, not only because of its contribution to transatlantic counter-terrorism cooperation but also because some TFTP-provided intelligence would continue to be available for counter-terrorism investigations within the EU.

It is during the negotiations on the SWIFT Interim Agreement that the Parliament started to affirm its own role, conscious that after the (at that time still uncertain) entry into force of the Treaty of Lisbon the entry into force of the agreement would be subject to its consent. On 17 September 2009, the Parliament, which had only been provided with very limited information about the negotiations, adopted a Resolution defining a number of minimum conditions the agreement should satisfy in terms of EU data protection standards, procedural rights of EU citizens, proportionality, and reciprocity.[1] After it had become clear that the Treaty of Lisbon would enter into force in 1 December, the Council tried to reduce opposition in the Parliament by conceding that the agreement would only have an 'interim' status and would be replaced by a longer term agreement fully negotiated under the new treaty provisions during 2010, but many of the substantive requests made by the Parliament were not taken into account. To the fury of all major groups in the Parliament, the Council then took in 30 November – that is, one day before the entry into force of the Treaty of Lisbon – the decision to conclude the SWIFT Interim Agreement with provisional application as from 1 February 2010.[2] It did not help that the Agreement was afterwards formally forwarded to the Parliament for consent – apparently because of delays with its translation – only in 25 January, that is, less than a week before the provisional entry into force. This forced the responsible LIBE Committee[3] of the European Parliament to come up with a report in a very short time for a vote in the next plenary session in February. This report, drawn up by Dutch Members of the European Parliament (MEP) Jeanine Hennis-Plasschaert and approved by the LIBE Committee in 4 February, generally acknowledged the usefulness on SWIFT data cooperation with the United States but recommended a rejection of the agreement because of a number of concerns, including the possible transfer of bulk data, uncertainties regarding necessary judicial authorizations, possible transfers of EU data to other third countries, and retention periods as well as lack of adequate

[1] European Parliament document P7_TA(2009)0016.

[2] Decision and text of the 'Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for Purposes of the Terrorist Finance Tracking Program', OJ L8/9 and L8/11 (13 Jan. 2010).

[3] Committee on Civil Liberties, Justice and Home Affairs.

reciprocity.[4] Well before the approval of this Report by the LIBE Committee, the US Administration had been alarmed by the prospect of the Interim Agreement being rejected by the Parliament and had launched an unprecedented lobbying effort that involved a phone call from Secretary of State Hilary Clinton to EP President Jerzy Buzek, a joint letter of her and Treasury Secretary Timothy Geithner to the same of 5 February, which even offered the LIBE Committee an in-depth briefing on the TFTP, a warning of Treasury Undersecretary Stuart Levey about a potentially 'tragic mistake', and threats of US Ambassador William Kennard about a potential bypassing of the EU via bilateral agreements with Member States.[5] However, all this was ultimately as ineffective to turn around the prevailing critical view in the Parliament as an offer of Spanish Prime Minister José Luis Rodrigues Zapatero to give Parliament access to classified information during the negotiation of the permanent agreement in exchange for passing the Interim Agreement[6] and last minute appeals of Council President-in-Office Alfredo Pérez Rubalcaba and Home Affairs Commissioner Cecilia Malmström during the Parliament's plenary session in 10 February: In 11 February, the Resolution rejecting the Agreement was approved overwhelmingly by 378 votes to 196, with 31 abstentions.[7]

## II Implications for EU Decision-Making on International Agreements

The repudiation of the SWIFT Interim Agreement has shown – and very rapidly indeed – how significantly the Lisbon Treaty has changed the internal balance of power between the EU institutions: According to the new Article 218(6) of the Treaty on the Functioning of the European Union (TFEU), the European Parliament must now give its consent to all international agreements that cover fields to which internally either the 'ordinary' (formerly 'co-decision') legislative procedure applies or the special legislative procedure requiring consent by the European Parliament (formerly 'assent' procedure). The extension of the ordinary legislative procedure to forty new treaty articles[8] previously not subject to co-decision amounts to a major extension of the Parliament's power in the sphere of EU external relations. This comes on top of the revised procedures for negotiating and concluding trade agreements (Article 207 TFEU), which has extended the

[4] 'Recommendation 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', Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Jeanine Hennis-Plaschaert, European Parliament document A7-0013/2010 (5 Feb. 2010).

[5] 'Clinton Presses European Parliament to Back Terror Data Deal', *AFP*, 9 Feb. 2009.

[6] 'New Offer to Save EU-US Data Deal', *European Voice*, 9 Feb. 2010.

[7] The European People's Party group was the only major political group voting in favour of the agreement.

[8] See the useful list provided in Fondation Robert Schuman, 'The Lisbon Treaty. Ten Easy-to-Read Fact Sheets' (Paris, 2009), 39–46, <www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf>.

Parliament's powers also to trade agreements that were formerly only subject to the consultation procedure.

In the case of the SWIFT Interim Agreement, the Council has disregarded the risks of trying to present a soon to be empowered Parliament with a *fait accompli*, and this in spite of the clear warning the EP had issued, especially through its Resolution of 17 September 2009, had indicated a number of major concerns. In doing so, the Council not only showed a lack of respect for the EP as the representative of the EU citizens' interests and a failure to appreciate the strength of the critical opinion within the EP but also put the international credibility of the Union at risk as it proceeded with the signing of an agreement whose ratification was not any longer in its hands.

The responsibility for this lies mainly with those Member States willing to put counter-terrorism cooperation with the United States above everything else. The United Kingdom appeared again in the forefront of those, although one would have thought that the experience of following the United States more or less blindly into the Iraq disaster would have been good for a lesson about the pitfalls of the 'special relationship'. However, the Swedish Presidency must bear part of the blame: It did little to make sure that a majority of the Parliament would be behind the signing of the agreement in 30 November. The letter of the Swedish Prime Minister Fredrik Reinfeldt to EP President Jerzy Buzek of 28 November 2009 with its claim that this would serve best 'the interests of the citizens of the European Union',[9] whose written version incidentally arrived only after the agreement had already been approved by the Council, demonstrated an arrogance vis-à-vis the one and only assembly directly elected by the European citizens, which was hardly prone to increase goodwill among the MEPs. However, those Member States that had serious misgivings about the agreement – Austria, Germany, Greece, and Hungary – did not also cover themselves with glory: Rather than taking a clear stand on the issues of principle involved they preferred in the end – no doubt under quite some pressure from the other Member States and the United States – to just wash their hands of the agreement by abstaining in the crucial vote in the Council in 30 November. This abstention was most remarkable in the case of the German Government as the upper German chamber, the *Bundesrat*, had adopted a resolution in 27 November expressing strong support for the concerns of the European Parliament,[10] and as the German Federal Crime Office (*BKA*) appeared to have doubts about the usefulness of the projected extensive use of the SWIFT data.[11] However, the German Government may simply have been too divided over the SWIFT question – as currently on other internal issues: Whereas German Minister of Justice Sabine Leutheusser-Schnarrenberger from the liberal coalition partner

[9] Text of the letter, European Parliament document no. EP_PEL_LTA(2009)013019.

[10] 'Entschließung des Bundesrates zu dem Geplanten Abkommen Zwischen der Europäischen Union und den Vereinigten Staaten von Amerika über die Verarbeitung von Zahlungsverkehrsdaten […]', *Bundesrat Drucksache* 788/09 (27 Nov. 2009).

[11] 'BKA Widerspricht Innenminister', *Frankfurter Rundschau*, 2 Jan. 2010.

strongly welcomed the rejection of the Agreement in 11 February, the German Ministry of Interior, headed by Thomas de Maizière from the Christian-democratic coalition partner, issued a statement regretting the outcome.[12]

For the future of EU external relations, the Lisbon Treaty empowerment of the European Parliament and the SWIFT case mean that the Council and Commission will have to reckon much more with the Parliament's interests and position in the case of nearly all international agreements, and this is not only at the conclusion stage but already at the negotiation stage. There were some hesitancies in the Parliament over the full use of its powers in the given case – shown by the closeness of an earlier vote in 11 February on a proposal to postpone the vote[13] – and there was certainly no lack of pressure from the Council and from the US Administration (see below) on the Parliament to pass the Agreement. However, as the Parliament has now taken the plunge, and this with quite a bit of applause from various sides, it might do it more readily again. A precedent has been set, and the light or shadow of the Parliament will therefore in the future loom much larger over the Council when defining EU negotiating mandates and deciding on the conclusion of agreements, and as well over the Commission when acting as the EU's chief negotiator.

Unlike in the case of national governments, neither Council nor Commission is normally able to take the backing of the European Parliament for granted since the clear link between executive governmental power and a stable parliamentary majority typical for democratic parliamentary systems does not exist in the EU. The Commission and Council will therefore have to invest more into majority building within the Parliament. This will require new or at least upgraded communication and consultation procedures during the negotiation of international agreements. In a Resolution adopted in 9 February, the Parliament requested from the Commission as part of the revised Framework Agreement between the European Parliament and the Commission for the 2009–2014 parliamentary term a commitment to provide it with 'immediate and full information […] at every stage of negotiations on international agreements (including the definition of the negotiation directives), in particular on trade matters and other negotiations involving the consent procedure'.[14] In the SWIFT case, the Commission followed rather uncritically the Council's line, and it did not help that the Director General in charge, Jonathan Faull, reacted rather late and not very covincingly to the Parliament's concerns. The Commission may have to resist any direct oversight of the Parliament of EU negotiating mandates as this could impair the effectiveness of EU negotiation positions. Yet some concessions will clearly need to be made to take into account the new post-Lisbon powers of the Parliament and help build a new relationship of trust between

[12] 'Ministerin zu SWIFT-Entscheidung des Europäischen Parlamentes', *FDP-Bayern Aktuell*; 'Innenministerium bedauert Votum gegen Swift', *DPA-Europaticker*, both 11 Feb. 2010.

[13] Proposed by the European People's Party and European Conservatives and Reformists Groups, it was only defeated by 305 against 290 votes (with 14 abstentions).

[14] European Parliament document B7-0091/2010, para. 3(h).

the institutions. Without those, the Commission and Council could be faced with other and potentially more damaging conflicts with the Parliament regarding EU international agreements.

## III Implications for EU as an International Actor

For the EU as an international actor, the vote of 11 February may at first sight appear as purely negative: A signed agreement with a major international partner that had already provisionally entered into force had to be rescinded – which hardly adds to the Union's international credibility. Not only the United States but also other third countries might ask themselves more than in the past whether the Union will be able to deliver on negotiation results. They will also have to take into account European Parliament positions more as one of the determining factors on the EU side, something they may have to struggle with if being used to negotiate with governments being backed by stable parliamentary majorities.

However, the implications are not only negative: On the positive side, the negotiation and conclusion of international agreements by the EU will gain in direct democratic legitimacy – surely not a bad thing for an actor that has always written the promotion of democratic values on its flag. As the Parliament has been generally much more in favour of common action than the Member States in the Council, the Commission could use the Parliament as an ally to put pressure on Member States with minimalist aspirations on certain external relations issues. In certain cases, the positions of the European Parliament can also strengthen the hand of EU negotiators. Fundamental rights protection appears as a case in point: Knowing all too well the flexibility of certain Member States in this respect, third countries might occasionally regard EU affirmations of fundamental rights issues as having a rhetorical side to them – but if the Parliament would link those to a potential refusal of consent at the end those countries might well need to give more weight to EU positions on these issues right from the start.

## IV Implications for EU International Counter-Terrorism Cooperation

There has been no lack of dire predictions for the effects of the rejection of the SWIFT Interim Agreement might have on EU international counter-terrorism cooperation. In the run-up to the 11 February vote, US Treasury Undersecretary Stuart Levey probably went furthest by stating that the loss of the TFTP 'would be a deeply regrettable and potentially tragic mistake' allowing 'undetected and undeterred' terrorists 'to abuse the integrity and openness of the world's financial system'.[15] For two reasons, the consequences of the discontinuation of the SWIFT Interim Agreement should not be exaggerated.

[15] S. Levey, 'Loss of Terrorist Finance Tracking Programme Would Be a Tragic Mistake', *Europolitics*, 2 Feb. 2010.

The first is that the US authorities – whose tracking of international financial transactions seems indeed to have provided some valuable, though in no case decisive, counter-terrorism intelligence, both in the United States and in Europe – are far from being completely cut-off from financial transaction data as a result of the discontinuation of the SWIFT Interim Agreement. The EU-US agreement on mutual legal assistance,[16] which entered into force on 1 February 2010 after a ratification process of more than six years, increases the possibilities for exchanging financial transaction information between EU Member States and the United States in the context of criminal investigations. Under certain conditions, parties can ask, to a larger extent than was previously the case, whether a suspect holds a bank account in the other country and to request details of his financial transactions. The possibilities to do so are less extensive and the procedures are more cumbersome than under the SWIFT Interim Agreement, but this pathway for US requests definitely exists, and this in addition to the existing bilateral legal assistance agreements between the United States and individual Member States, which the EU-US agreement does not replace.

The second reason is that the Parliament has by no means closed the door to the use of European SWIFT data for international counter-terrorism purposes. On the contrary, the LIBE Committee's Hennis-Plasschaert Report fully endorsed the necessity of the targeted exchange and use of financial messaging data and of a comprehensive agreement with the United States on its modalities, this obviously subject additional safeguards.[17] In its legislative resolution of 11 February rejecting the SWIFT Interim Agreement, the Parliament explicitly requested the Commission 'to immediately submit recommendations to the Council with a view to a long-term agreement with the United States dealing with the prevention of terrorism financing'.[18]

The Council and Commission have therefore been given an immediate green light for further negotiations on this matter, so that the Union's capacity to act seems hardly impaired. What has changed in matters of EU international counter-terrorism action, however, is that the Council and Commission will from now on 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. While additional possibilities for the targeted exchange and use of data on identified suspects are clearly in the interest of the security of citizens, the possible transfer of bulk data and uncertainties regarding, *inter alia*, necessary judicial authorizations, possible transfers of EU data to other third countries, and retention periods seem neither of proven necessity nor proportional to the likely counter-terrorism results. The collection and use of personal data belongs to the most invasive

[16] 'Agreement on Mutual Legal Assistance in Criminal Matters between the European Union and the United States of America', OJ L181/34 (19 Jul. 2003).

[17] *Hennis-Plaschaert Report*, 7 and 11.

[18] European Parliament document P7_TA(2010)0029, para. 2.

forms of state action of our times – and as such it must be subject to safeguards that reflect the fundamental values of European societies. Article 8 of the Charter of Fundamental Rights of the European Union – made legally binding with the entry into force of the Lisbon Treaty – recognizes the protection of personal data in even stronger terms than the European Convention of Human Rights. Adequate safeguards are all the more important in the cooperation with third countries as the Union inevitably has only very limited possibilities to effectively control the use of personal data once these have been transmitted to third countries.

## V Implications for EU-US Relations

No major political figure on either side of the Atlantic has remotely suggested before or after the 11 February votes that a rejection of the SWIFT Interim Agreement would cause a crisis for transatlantic relations. With good reason: As already indicated, the way to the negotiation of a new and longer term agreement on the sharing of financial transaction data remains wide open, and both sides have wider cooperation interests – including in the counter-terrorism domain – which even the US Administration is unlikely to want to put at risk because of a temporarily reduced access to financial transaction data. It is therefore not surprising that first reactions from Washington were limited to describing the repudiation of the agreement only as a setback for counter-terrorism cooperation and not for EU-US relations.[19] The aforementioned threat of US Ambassador William Kennard regarding a potential bypassing of the EU via bilateral agreements with Member States should also not be taken too seriously as it is simply much more efficient for the United States to seek an agreement with the EU as a whole rather than with individual Member States whose different legal frameworks and interests might require different deals and lengthy ratification procedures.

Yet there is one aspect that the US Administration should consider doing to minimize the risk of further similar incidents in transatlantic relations – and this is simply to try to better understand how the EU works and to assess each institution at its own weight. The European Parliament's concerns about the SWIFT issue were no secret. Just a few more concessions on the US side may have been enough to tip the balance in the Parliament in favour of acceptance of the Interim Agreement. The US Administration surely has enough experience at home with a parliamentary chamber needing to be placated when it comes to the ratification of international agreements. The almost frantic – and quite high-level – last minute lobbying efforts of the Administration to get the Parliament to agree to the interim SWIFT arrangement also betrayed its limited appreciation of the fact that this is a Parliament that has come of age and has to be taken seriously. How would US Senators have reacted to efforts of EU politicians and ambassadors to

[19] 'U.S. Criticizes E.U. Rejection of Agreement that Would Help Track Suspected Terrorists', *The Washington Post*, 12 Feb. 2010.

convince them with a similar mixture of lecturing and threats to change their minds on an international agreement of some significance for the rights of US citizens? At the very least, one can identify here a certain lack of understanding and tact, something that also came out of President Barak Obama's unilateral withdrawal from the EU-US summit scheduled for May 2010, incidentally (and unhelpfully) announced just a few days before the 11 February vote. In the longer term, such a lack of understanding and tact could be much more damaging to EU-US relations than the rejection of the SWIFT Interim Agreement.