



# City Research Online

## City, University of London Institutional Repository

---

**Citation:** Fahey, E. (2017). Between One-Shotters and Repeat Hitters: A Retrospective on the role of the European Parliament in the EU-US PNR Litigation. In: Nicol, F. and Davies, B. (Eds.), *EU Law Stories*. (pp. 528-550). Cambridge: Cambridge University Press. ISBN 978-1107545038

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/11848/>

**Link to published version:**

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

---

---

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---

# OF ONE SHOTTERS AND REPEAT-HITTERS: A RETROSPECTIVE ON THE ROLE OF THE EUROPEAN PARLIAMENT IN THE EU-US PNR LITIGATION

Elaine Fahey\*

*This is a draft of a chapter forthcoming in B. Davies and F. Nicola (eds.) EU Law Stories (Cambridge: CUP, 2015). Please consult the book for the final version.*

## Overview

The EU-US Passenger Name Records (PNR) Agreement litigation (hereafter EU-US PNR),<sup>1</sup> remains a famously sour memory for many. It is universally depicted in legal scholarship for its delivery of a so-called ‘Pyrrhic’ victory.<sup>2</sup> It is a victory which was secured first and foremost by the European Parliament (hereafter EP) as its lead actor to strike down an agreement that was perceived to harbor many adverse effects upon the EU citizens’ data protection rights. It is a sour memory and even ‘notorious’ as a decision because the European Court of Justice granted in few words an ostensible victory to the EP, albeit a hollow and technical one, i.e. de facto and de jure, on validity grounds alone. Furthermore, the litigation is also sour and ‘notorious’ for its failure to provoke fundamental rights analysis from the Court on a highly controversial Agreement that had many repercussions for the civil liberties of EU citizens and is even more ‘notorious’ for its political aftermath, where the victory of the EP is perceived as having generated an even *worse* subsequent agreement than that originally entered into with the US. For an entity (i.e. the EP) that does not litigate frequently,

---

\* Senior Lecturer in Law, the City Law School, City University London. Email: Elaine.fahey.1@city.ac.uk. For the purposes of this paper, the author has interviewed various politicians, lawyers and officials of diverse EU institutions and agencies involved in the litigation and/or currently in political office. Nearly all officials interviewed, past and present, have asked for their identity not to be revealed and the paper refers to those individuals as ‘they’ rather than in the masculine or feminine and purports to mask their identity where appropriate. All notes are on file with the author. I am grateful to Raluca Sterian and Justin Wong for their assistance. The usual disclaimer applies.

<sup>1</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v Council and Commission*, Judgment of the Grand Chamber of 30 May 2006, [2006] ECR I-4721. On the Agreement and its predecessors: Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security (DHS), Bureau of Customs and Border Protection ([2004] OJ L 183/ 83, and corrigendum at [2005] OJ L 255/168); 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 (DHS) (2007 PNR Agreement) OJ 2007 L 204/18; ‘Communication from the Commission on the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries COM (2010) 492’; Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security of 17 November 2011; OJ L 215/5, 11 August 2012. On the latest proposals for (internal) EU law: Commission, ‘Proposal For a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime’ COM (2011) 32; EU-PNR Commission Staff Working Paper Impact Assessment COM (2011) 32 final

<sup>2</sup> Derived from the Greek *Pyrrikos* after a remark attributed by Plutarch to Pyrrhus, who declared, after a great victory over the Romans, that another similar victory would ruin him. See G Gilmore and J Rijpma, ‘Annotation of Joined Cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*’ (2007) 44 *Common Market Law Review* 1081, at 1081 (‘Rijpma and Gilmore’); M Mendez, ‘Passenger Name Record agreement - European Court of Justice - Annulment of Commission Adequacy Decision and Council Decision Concerning Conclusion of Passenger Name Record Agreement with US Grand Chamber Judgment of 30 May 2006, joined cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*’ (2007) 3 *European Constitutional Law Review* 127. For a vast selection of the commentaries available on the case see <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0317&lang=en&type=NOT&ancre=> .

numerically at least, yet has an increasing fundamental rights mandate, including a foreign affairs portfolio, a retrospective on the litigation taken by the EP is easily blind-sided by new powers, themes and developments. Nonetheless, the litigation took place at a moment or juncture immediately *after* which the EP gained further foreign affairs powers and further political stature in civil liberties. Then more recently than in the recent NSA saga, the EP appeared to be leveraging much political weight over civil liberties in transatlantic relations- even on both sides of the Atlantic. However, litigation by the EP still remains a rare act in this newer context, largely conducted individually and less so *collectively*. This thus remains an understudied story in scholarship.

Galanter's leading work on litigation and its actors through the deployment of a law and society perspective, is used here rather loosely and distantly, as a backdrop for this work to examine the practices of the EP as a litigator within the particular context of transatlantic security because of its factual and theoretical appeal. According to Galanter, examining US litigation practices over an extended time-period, repeat-players (RP) were generally institutions, wealthy ones, with advance intelligence and the ability to employ the system so as to become an 'insider'. More fundamentally, RP had an ability to both manipulate and develop rules. One-shooters (OS), by contrast, tended to be individuals with few resources and tended to litigate for immediate outcomes.<sup>3</sup> Galanter's theorization arguably provides both a useful and possibly insightful lens through which to understand the nature and effects of the judicial process, even outside of the US context and its particular actors. It is argued to provide a model of some value for those considering litigation by actors in a changing institutional landscape, as both the subjects and objects of that litigation.

One feature of contemporary transatlantic relations is the place of individual versus collective litigation initiated in the public interest. In this regard, public interest is a means to assess the impact and relevance of the litigation of the EP. Individual parliamentarians in the EU and one in particular, Sophie in't veld, the chair of the EP Civil Liberties Committee, has been litigating civil liberties issues in transatlantic security agreements with much frequency in the public interest, but not supported by the EP en masse in litigation.<sup>4</sup> A retrospective analysis of EU-US PNR litigation involves appreciating these developments as much as the legal and political context prevailing at the time of the litigation. This retrospective focusses upon the EP as a litigator here and the evolving nature of the EP's foreign affairs powers. Nonetheless, this account also reflects to some degree at least how

---

<sup>3</sup> Galanter also distinguished between the 'special' and 'general' effects of litigation. In this regard, he sought to distinguish between the effects produced by the impact of litigation, e.g. full-blown effects, attenuated or threatened and the general effects of litigation, including its communication and the responses to that information. See M Galanter, 'Why the haves come out ahead: Speculation on the limits of legal change' 9 (1974) *Law & Society Rev* 95; M Galanter, 'The Day after the Litigation Explosion' 46 (1986) *Md. L. Rev* 3, 32.

<sup>4</sup> See E Fahey, 'Law and Governance as checks and balances in Transatlantic Security' 32 (2013) *Yearbook of European Law* 1-21. See also on transatlantic rule-making, E Fahey and D Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge: Cambridge University Press, 2014).

this litigation would be assessed were it to arise in the *present* circumstances in all of its political and legal complexity, as much as its more recent counterparts, involving largely the actions of one parliamentarian alone.

This account develops and re-envisages this story as a retrospective and takes as a starting point in *Section I* the powers of the EP and its (non-)litigious nature as an institutional actor and examines what can be achieved through litigation in EU law. In *Section II*, the account reexamines what the Court decided in EU-US PNR and its effects, followed in *Section III* by the account of the proceedings that the author has uncovered through interviewing participants in the litigation, predominantly related to or from the perspective of the EP. *Section IV* reflects upon retelling the story and how it might be decided were it to arise today.

## **SECTION I: THE INSTITUTIONAL BACKDROP TO THE EU-US PNR LITIGATION**

### **(A) The European Parliament and Foreign Affairs: law and practice**

The history of the powers and competences of the EP pursuant to EU law is an evolution of modest empowerment steps, expanded gradually, and only sometimes through judicial review. Moreover, historically, the EP has used its legislative ‘consent’ powers as delay powers and such powers have evolved through the treaties into more substantive legal powers.<sup>5</sup> More recently, its veto power generates lesser litigation, least of all as to foreign affairs. It nonetheless generated the most significant example of so-called ‘judicial activism’ on the part of the Court in the infamous *Les Verts* litigation with respect to the contours of *locus standi* under EU law, which it benefited from by means of the subsequently altered wording of what is now Article 263 TFEU.<sup>6</sup> Prior to the Treaty of Lisbon at least, repeated calls for an enhancement of parliamentary involvement in EU foreign affairs had largely ‘fallen on deaf ears’.<sup>7</sup> Any powers of involvement in negotiations for the EU were couched in soft law agreements or rules of procedures (for example, so-called Lun 1, Westerterp expansion and the Stuttgart Declaration).<sup>8</sup> Yet still overall, some such as Thym asserted that the EP enjoyed even pre-Lisbon more comparative autonomy than the US Congress.<sup>9</sup> Currently, the foreign affairs powers of the EP in the treaties may be viewed as modest, largely limited to information and

---

<sup>5</sup> See R Kardasheva, ‘The Power to Delay: The European Parliament’s Influence in the Consultation Procedure’ 47 (2009) *Journal of Common Market Studies* 385, 399.

<sup>6</sup> Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339. See A Alemanno ‘What has Been, and What Could be Thirty Years after *Les Verts*/European Parliament: Individual Access to EU Justice’ in M Maduro and L Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, (Oxford: Hart Publishing, 2008) pp. 324-332

<sup>7</sup> D Thym, ‘Parliamentary Involvement in European International Relations’ in M Cremona and B De Witte (eds.), *EU Foreign Relations Law: Constitutional Foundations* (Oxford: Hart Publishing, 2008) pp. 201-231.

<sup>8</sup> *Ibid.*, pp. 204-205.

<sup>9</sup> *Ibid.*, p. 210.

veto rights only. Such modesty is supplemented by Inter-institutional agreements to take 'due account' of their comments during negotiations. Post-Lisbon, the EP has powers of consent to approve international agreements in a wide variety of circumstances, pursuant to Article 218(6)(a) TFEU.<sup>10</sup> And pursuant to the Inter-Institutional Framework Agreement, the Commission shall take due account of the Parliament's comments throughout the negotiations.<sup>11</sup> The EP thus possesses a right of veto as to international agreements which is linked to information at all stages—pre negotiations, ongoing negotiations and final outcome, beyond rights given traditionally in CFSP.<sup>12</sup>

As regards the critical stage of the *opening* of negotiations on external relations agreements, European Parliament is still excluded: pursuant to Article 218(3) TFEU, the Council shall authorize the opening of international relations negotiations, adopt negotiating directives and may authorize the signing and conclusion of agreements. As Eeckhout states, this process excludes the European Parliament.<sup>13</sup> Similarly, as Schutze states, Council is not *primus inter pares* with the Parliament but instead is *primus* in relation to the negotiation of international agreements, and is thus executive-dominant. This state of affairs reflects an uneven constellation of constitutional powers in the EU, comprising the mutating executive, 'front and back stage' executives, many agencies and actors in the shadows.<sup>14</sup> As Advocate General Sharpston has stated in her recent Opinion in the *In't veld* decision, the EU's executive spans such a vast array of fields, practices, policies and areas.<sup>15</sup> Nonetheless, the extensive external relations powers of executive actors post-Lisbon contrasts still strikingly with those of the EP.

More specifically as to EU-US, the European Parliament has been regularly participating in a Transatlantic Legislators Dialogue with the US. However, the extent of the impact and legal effects of this soft diplomacy remain to be seen in contemporary times, in the era of the Transatlantic Trade and Investment Partnership and the NSA Surveillance saga.<sup>16</sup> Some suggest that there are limits to the Parliament's empowerment in foreign affairs, relying upon the acceptance by the Parliament of the latest EU-U.S. Passenger Name Records Agreement despite its shortcomings in the area of civil

---

<sup>10</sup> See Treaty of the Functioning of the European Union (TFEU) art. 218(6)(a)(v).

<sup>11</sup> See Framework Agreement on Relations between the European Parliament and Commission, Annex III.

<sup>12</sup> See Thym, above n 7.

<sup>13</sup> See P Eeckhout *External Relations of the European Union* (Oxford: Oxford University Press, 2011), 199.

<sup>14</sup> See D Curtin, 'Official Secrets and the Negotiation of International Agreements: is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423; D Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009); D Curtin and I Dekker 'The European Union from Maastricht to Lisbon: Institutional and Legal unity out of the shadows' in P Craig and G de Búrca (eds), *The evolution of EU law* (2nd ed., Oxford, Oxford University Press, 2011) pp. 155-186.

<sup>15</sup> See *In 't veld v. Department of Homeland Security* Case No 1:08-cv-0115-RMC, District Judge Collyer presiding (D.C.C, 15 December 2008); See Case T-529/09 *In 't veld v. Council*, Judgment of the General Court of 4 May 2012 [2012] ECR II-000; Case C-350/12 P, *Council v. In 't Veld* [2014] ECR I-000, judgment of 3 July 2014.

<sup>16</sup> See D Jancic, 'The European Parliament and EU-US Relations: Revamping Institutional Cooperation?' and M Bartl and E Fahey, 'A Post National marketplace? Negotiating the Transatlantic Trade and Investment Partnership in E Fahey and D Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge: Cambridge University Press, 2014).

liberties.<sup>17</sup> Such conclusions warrant some revision in light of the Parliament's rejection of the TFTP (Swift) Agreement and the Anti-Counterfeiting Trade Agreement (ACTA) on the grounds of inadequacy of information rights and, of course, not least its stance in the NSA affair and are not explored here, save as to raise the general context.<sup>18</sup>

## **(B) The EP as litigator**

More concretely, for the purposes of the present discussion, reflecting upon the EP's role in the PNR litigation involves considering its role as a litigator within the history of EU. From a numerical perspective, the European Parliament is not a repeat player or frequent litigator. It takes approximately 10 cases a year, according to officials from its Legal Service.<sup>19</sup> The advent of co-decision as the default or ordinary legislative procedure in EU law-making, which places the EP and Council as co-litigators, has arguably operated to *reduce* the incentive for the EP to litigate autonomously qua institution. It also operates to complicate analysis as the EP and Council are jointly sued in many cases and when one of them is sued it tends to raise the likelihood that the other is joined in the proceedings. Nonetheless, as a very general proposition, the EP is not found as a frequent 'first-place' plaintiff or litigator in many proceedings (ie annulment actions). For example, between 1985 and 1990, ie shortly after the inception of the Single European Act and the advent of gradual legislative empowerment and institutional autonomy, there were only 4 cases initiated by it alone.<sup>20</sup> Also, the research of the author indicates that the EP is first named plaintiff qua litigator (alone) in 14 cases since the Treaty of Lisbon.<sup>21</sup> And from the time of the institution of the EU-US PNR litigation or shortly before it up until the Treaty of Lisbon, there were approximately 14 cases taken by the EP.<sup>22</sup> Whatever about the precise calculation of its total impact or effects, it still pales in comparison with other institutional actors in terms of litigation.<sup>23</sup>

---

<sup>17</sup> See A Ripoll Servent and A MacKenzie, 'The European Parliament as Norm Taker? EU-US Relations After the SWIFT Agreement' 17 (2012) *European Foreign Affairs Review* pp. 71-86.

<sup>18</sup> European Parliament, first reading, (EP-PE\_TC1-COD(2005)0127), European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA) (P7\_TA(2010)0432). See above Curtin, n 14.

<sup>19</sup> Interviews of the author, notes on file.

<sup>20</sup> On a search of Eur-lex and Curia Databases, searching for 'Parliament' alone: Case T-42/89 (122) *Parliament v Yorck von Wartenburg* [1990] ECR II-00025; Case C-377/87 *Parliament v Council* [Case closed, [1988] ECR 4017]; C-302/87 *Parliament v Council* ('Comitology') [Case closed, [1988] ECR 5615]; Case 13/83 *Parliament v Council* ('Transport') [Case closed, [1985] ECR 1513].

<sup>21</sup> See Case C-566/08 *Parliament v Council Order* (removed from the register [2010] OJ C234/30); Case C-130/10 *Parliament v Council* [Case closed]; Case C-355/10 *Parliament v Council*; [Case closed, (Judgment of the Grand Chamber), 5 September 2012]; Case C-490/10 *Parliament v Council* [Case closed, ECLI:EU:C:2012:525 (Judgment of the Court - Second Chamber), 6 September 2012]; Case C-658/11 *Parliament v Council* [Case closed, Judgment of the Court (Grand Chamber), 24 June 2014]; C-103/12 *Parliament v Council* [Case in progress]; Case C-402/12 P *Parliament v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [Case in progress]; Case C-65/13 *Parliament v Commission* [Case in progress]; Case C-124/13 *Parliament v Council* [Case in progress]; Case C-317/13 *Parliament v Council* [Case in progress]; Case C-540/13 *Parliament v Council* [Case in progress]; Case C-679/13 *Parliament v Council* [Case in progress, 2014/C 52/56]; Case C-48/14 *Parliament v Council* [Case in progress 2013/C 102/30].

<sup>22</sup> Case C-436/03 *Parliament v Council* (Judgment of 2 May 2006) [2006] ECR I-3733; Case C-540/03 *Parliament v Council* (Judgment of 27 June 2006) [2006] ECR I-5769; Case C-548/03 *Parliament v Council* (Removed from the register on 16 December 2004); Case C-317/04

More importantly, significant contemporary cases on civil liberties and transparency in the EU have been litigated by an individual parliamentarian, Sophie in't veld MEP, who has not been able to muster adequate support for an intervention before the Court of Justice. And her recent attempts to *individually* litigate institutional balance are less than successful or only partially so, but are still high-profile. This litigation draws attention to the EP's litigation in EU-US PNR and its role qua mass assembly as guardian of fundamental rights and transparency or as a watchdog thereof and an understanding of 'one-shotters'.<sup>24</sup>

Briefly, it is worth recalling the types of judicial review mechanism open to the EP as a litigator in EU law in the area of foreign affairs, both prior to and after the Treaty of Lisbon changes.

### **(C) *Ex Ante v. Ex Post* Judicial Review and EU Foreign Affairs**

The EU-US PNR decision remains a highly prominent example of *ex post facto* judicial review, where *ex ante* review did not materialize and it is perhaps useful to consider the difference between the two forms of procedure, prior to assessing the actual case itself. Any EU institution or Member State is entitled to challenge the constitutionality of a draft international agreement prior to its conclusion through *ex-ante* review. Thus such a procedure accords power across a range of institutions- not just to the European Parliament- by providing pursuant to Article 218(11) TFEU that the European Court of Justice can seek an opinion of the Court on legality. The politicians amongst the interviewees of the current author outlined below further, indicated the challenge of mustering appropriate numbers within the EP so as to seek an Opinion of the Court of Justice. Yet, paradoxically, *ex post facto* litigation by way of the annulment procedure was more viable despite ostensible *political* benefits of *ex ante* review. *Ex ante* power to review such agreements gives to the Court of Justice powers that many national courts lack in foreign affairs and is rooted in a traditional or conventional understanding of the operation of international law, whereby legal certainty precludes such challenges contrary to the contracting parties agreement. The Court has delivered 15 opinions at the last count, not all of which may be said to constitute the leading decisions of EU law.<sup>25</sup> In the last

---

*Parliament v Council* (Order of 17 March 2005) [2006] ECR I-2457 ; Case C-318/04 *Parliament v Commission* (Order of 17 March 2005) [2006] ECR I-2467 ; Case C-413/04 *Parliament v Council* (Judgment of 28 November 2006) [2006] ECR I-11221; Case C-403/05 *Parliament v Commission* (Judgment of 23 October 2007) [2007] ECR I-9045; Case C-133/06 *Parliament v Council* (Judgment of 6 May 2008) [2008] ECR I-3189; Case C-155/07 *Parliament v Council* (Judgment of 6 November 2008) [2008] ECR I-8103; Case C-166/07 *Parliament v Council* (Judgment of 3 September 2009) [2009] ECR I-7135; Case C-474/07 *Parliament v Commission* (Removed from the register on 17 December 2008); Joined Cases C-512/07 P(R), C-15/08 P(R)), C-15/08 P(R) *Ochetto and European Parliament v Donnici* [2009] ECR I-00001.

<sup>23</sup> This account does not explore the empirics of this on grounds of space and the limits of the present research question but it on a cursory glance of a search of the curia.eu website appear to be self-evident as a proposition.

<sup>24</sup> On one-shotters, see the litigation of In't veld n 15 above.

<sup>25</sup> R Schütze *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), 209. The 15 opinions are: Opinion 1/75 (Local Cost Standard), [1975] ECR 1355; Opinion 1/76 (Laying-Up Fund), [1977] ECR 741; Opinion 1/78 (Natural Rubber Agreement), [1979] ECR 2871; Opinion 1/91 (EEA Draft Agreement), [1991] ECR I-6079; Opinion 2/91 (ILO Convention 170), [1993] ECR I-1061; Opinion 1/92 (EFTA



decade there were 2 opinions in 2000, 1 in 2003, 1 in 2008 and 1 in 2009 and so the period under discussion of the EU-US PNR Agreement represent perhaps a distinctive ‘lapse’ in this time period.<sup>26</sup> Looking more broadly as its use since the 1970s, its use often coincides with major Treaty changes. However, the practical results between either procedure may not necessarily be so vast, yet warrant analysis further below, after the details of the EU-US PNR decision are considered. There, political turmoil resulted from the EP’s request for *ex ante* review being rendered moot by an agreement reached.

Thus substantively, the paper next turns to consider the legal backdrop to the PNR litigation, by providing a concise overview of legal mechanisms through which the case arose and its findings.

## **SECTION II: THE EU-US PNR DECISION OF THE COURT OF JUSTICE**

Controversy and high politics undoubtedly taints EU-US PNR in its law and politics and the decision arguably stands as a reminder of the uncomfortable- and often intractable- nexus between the two. It remains of political and legal relevance that the EU-US PNR has its origins in US legislation passed in the wake of the 9/11 atrocities, requiring airline carriers to provide US authorities with passenger data under threat of sanction. Thus the US Aviation and Transportation Security Act of 2001 required all airlines flying into the US to supply PNR data to the US Customs and Border Control (CBP), operating within the US Department of Homeland Security (DHS). Such an obligation did not appear compatible with EU law as it then was, given that Article 25 of the Data Protection Directive provided that personal information originating from within EU Member States may be transferred to a third country only if that country ‘ensures an adequate level of protection,’<sup>27</sup> a level of protection which had not formally been established between the EU and US. Thus in December 2003, the EU launched negotiations with the US on an Agreement concerning the transfer of PNR data and a draft Agreement was reached in 2004. Thereafter, undertakings as to the use of the PNR data were given by the US CBP, the US Agency receiving PNR data transferred.<sup>28</sup> The Commission meanwhile adopted an Adequacy Decision, amounting to a formal finding that, for the purposes of Article 26(5) of the Directive, the undertakings offered by the CBP provided adequate protection for the data of

---

Agreement II), [1992] ECR I-2821; Opinion 2/92 (Third Revised OECD Decision), [1995] ECR I-521; Opinion 1/94 (WTO Agreement), [1994] ECR I-5267; Opinion 2/94 (Accession to ECHR), [1996] ECR I-1759; Opinion 3/94 (Banana Framework Agreement), [1995] ECR I-4577; Opinion 1/00 (European Common Aviation Area), [2002] ECR I-3493; Opinion 2/00 (Cartagena Protocol) [2002] ECR I-9713; Opinion 1/03 (Lugano Convention), [2006] ECR I-1145; Opinion 1/08 (GATS), ([2009] ECR I-11129); Opinion 1/09 (European Patent Court), [2011] ECR I-1137.

<sup>26</sup> See Schutze, (n. 25) 209.

<sup>27</sup> Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 No. L281, 23 November 1995, p 31.

<sup>28</sup> Undertakings of US CBP issued on 11 May 2004, OJ [2004] L 1235/11.

passengers flying to or from the United States.<sup>29</sup> On 21 April 2004, the European Parliament voted to take the European Commission to the Court of Justice over the proposed EU-US deal to exchange passenger name records (PNR).<sup>30</sup> However, the adoption of a so-called 'light' international agreement thereafter operated to render its proceedings for ex ante review, by means of a Council decision for an Agreement and Commission adequacy decisions. Thus an Agreement between the EU and US was signed between the representative of the EU Presidency and the US DHS and entered into force in 2004, but much disquiet remained concerning the impact of the Agreement on fundamental rights, even after the issuing of the US undertakings. As the House of Lords European Union Committee has stated, there was much uncertainty in Member State Parliaments about the legal purpose of the Agreement entered into. The Committee outlined that:

'[the Agreement] was not intended to authorise the transfer of PNR data by the airlines to the US authorities... Its purpose was to legalise the 'pulling' by CBP of PNR data ... if and only if this took place in accordance with the Commission Adequacy Decision, and hence in accordance with the Undertakings ...'<sup>31</sup>

The EP in particular continued to voice its concerns and eventually sought in two sets of proceedings initiated in 2004 before the Court of Justice against the Council and Commission the annulment both of the Commission Adequacy Decision and of the Council Decision authorising the signature of the Agreement.<sup>32</sup> The EP was supported by the European Data Protection Supervisor, while the Commission and Council in the two sets of proceedings was supported by the UK. The hearing took place on 18 October 2005 and Advocate General Léger gave his Opinion on 22 November 2005.

---

<sup>29</sup> Adequacy Decision of 14 May 2004. See House of Lords European Union Committee: *The EU/US Passenger Name Records (PNR) Agreement* (21st Report of Session 2006-07, 5 June 2007), para 38 (*House of Lords*). See the EP's objections to the Adequacy decisions as expressed in a resolution: <http://www.statewatch.org/news/2004/mar/EP-PNR-Adequacy31-03-04.pdf>

<sup>30</sup> 276 voted in favour, 260 against, 13 abstentions to refer the PNR agreement to the ECJ for opinion under ex Article 300(6). Three MEPs circulated a letter calling on colleagues to back the recommendation to go to the court. 'Dear Colleague, Today the European Parliament will vote on whether to ask the European Court of Justice to rule on the legality of the EU/US agreement on the transfer of PNR data on air travellers to the USA. This step has become necessary to resolve a conflict between Parliament and Commission, which has at its heart fundamental questions of privacy and security. The Court will be asked to act as a lawyer would, advising a client who is preparing to sign an important contract. The recommendation from the Legal Affairs Committee to refer this matter to the ECJ is neither obstructionist nor frivolous. ... the Commission and the Council have gone out of their way to avoid effective parliamentary scrutiny at both the national and European level. ... For this reason we have supported, and invite you to support, the call by Parliament's JURI committee for recourse to the European Court of Justice as a precautionary measure.' <http://www.statewatch.org/news/2004/apr/13ep-vote-pnr-court.htm>. Cf subsequently, European Parliament resolution on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the EU-US Agreement on the use and transfer of Passenger Name Records to the US Department of Homeland Security (2012/2615(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2012-0200&language=EN> .

<sup>31</sup> House of Lords, para. 40 (see n. 29)

<sup>32</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v Council and Commission* (Judgment of the Grand Chamber of 30 May 2006), [2006] ECR I-4721. The Council adopted Decision 2004/496/EC on the basis of ex Article 95 EC in conjunction with ex Article 300(2) EC. Commission Decision 2004/535/EC was adopted pursuant to Directive 95/46/EC.

Advocate General Léger held that Directive 95/46, could not constitute an appropriate basis for the adoption by the Commission of an implementing measure such as a decision on the adequate protection of personal data that are subjected to processing operations expressly excluded from its scope. Rather, to authorise transfers of such data on the basis of that directive would amount to extending its scope in an indirect manner. He held that:

‘It is true that the processing constituted by the collection and recording of air passenger data by airlines has, in general, a commercial purpose in so far as it is connected with the operation of the flight by the air carrier. ...namely the sale of an aeroplane ticket which provides entitlement to a supply of services. However, the data processing which is taken into account in the decision on adequacy is quite different in nature, since it covers a stage subsequent to the initial collection of the data. ....

... In actual fact, the decision on adequacy does not concern a data processing operation necessary for a supply of services, but one regarded as necessary to safeguard public security and for law-enforcement purposes. That is certainly the purpose of the transfer and the processing of PNR data. Consequently, the fact that personal data have been collected in the course of a business activity cannot, in my view, justify the application of Directive 95/46, and in particular Article 25 of that directive, in an area excluded from its scope.’<sup>33</sup>

The Court (agreeing with the Advocate General) in its decision given on 30 May 2006 held *inter alia* that ex Article 95 EC (now Article 114 TFEU), as the legal basis of the Council Decision read in conjunction with the Data Protection Directive, did not provide an adequate legal basis. The Court held that:

‘Article 95 EC, read in conjunction with Article 25 of the Directive, cannot justify Community competence to conclude the Agreement. ... The Agreement relates to the same transfer of data as the decision on adequacy and therefore to data processing operations which, as has been stated above, are excluded from the scope of the Directive. ... Consequently, Decision 2004/496 cannot have been validly adopted on the basis of Article 95 EC. ... That decision must therefore be annulled and it is not necessary to consider the other pleas relied upon by the Parliament.’<sup>34</sup>

---

<sup>33</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v Council and Commission* (Opinion of Advocate-General Leger), [2006] ECR I-4721 (paras 102-103)

<sup>34</sup> *Ibid*, para 67-70.

It accordingly annulled both Decisions, and concluded that it was unnecessary to consider the Parliament's other arguments. Given the consequences of its judgment for the EU-US Agreement, the Court preserved the effect of the Adequacy Decision until 30 September 2006 to allow time for a new Agreement to be negotiated. The First Generation EU-US PNR was thus struck down by the Court of Justice solely on legal basis grounds in 2006 and not wider grounds in respect of the protection of fundamental rights, despite their analysis by the Advocate General, the parsimonious nature of the Court's reasoning giving sustenance to the view that their omission arose from a deeply divided Court.<sup>35</sup> There are, according to Docksey, three 'camps' as to how to depict and analyze the decision, falling between the 'internal market', 'fundamental rights' and 'data protection' schools,<sup>36</sup> although one many surmise that there are even more, as the current analysis might suggest. Arguably, the latter camp is the most commonplace solely because of the minimal reasoning as to the former grounds by the Court.

The specific aftermath of the decision is then worth recalling. A provisional seven-year Agreement was then concluded in 2007 to replace the Agreement struck down, which De Witte notes amounted to a significantly worse legal bargain for the EU, wherein the US took advantage of the renegotiation to extend data retention periods considerably.<sup>37</sup> The EP sought to postpone its approval vote on the 2007 Agreement, deploying its approval powers accorded to it by the Treaty of Lisbon (Article 218(6)(a) TFEU). The Parliament pressed the Commission for a global strategy on external PNR with the US, Canada and Australia which emphasised better redress and effective legal safeguards.<sup>38</sup> Thereafter, negotiation of a revised Agreement followed suit and a 'Second Generation' Agreement was agreed in 2011. It has been described by the European Commission as an 'improved' one, enhancing data protection mechanisms therein, limiting the use of data, purporting to fight crime more effectively, placing obligations on the US to share data with the EU and setting out a detailed description for the circumstances when PRN can be used.<sup>39</sup> A fuller analysis of its provisions and its governance provisions has been conducted by the author elsewhere.<sup>40</sup>

---

<sup>35</sup> See Rijpma and Gilmore, above n 2.

<sup>36</sup> See C Docksey, 'The European Court of Justice and the decade of surveillance' in Hijmans and Hielke (eds) 'Data protection anno 2014: how to restore trust? Contributions in honour of Peter Hustinx, data protection supervisor' *Liber Amicorum Peter Hustinx*. (Cambridge: Cambridge University Press 2014, Forthcoming). See

<sup>37</sup> See B De Witte, 'Too much constitutional law in the European Union's Foreign Relations?' in B De Witte and M Cremona (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing, 2008), p. 11.

<sup>38</sup> Resulting in the *Communication from the Commission on the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries*, COM (2010) 492.

<sup>39</sup> European Commission Press Release 'New EU-US Agreements on PNR improves data protection and fights crime and terrorism' IP/11/1368 (17 November 2011, [http://europa.eu/rapid/press-release\\_IP-11-1368\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1368_en.htm)).

<sup>40</sup> See Fahey (2013) (n 4). See also the contributions of J Vara, 'Transatlantic Counter-Terrorism Cooperation Agreements on the Transfer of Personal Data: A Test For Democratic Accountability in the EU', V Mitsilegas, 'Transatlantic Counter-Terrorism Cooperation and European Values. The Elusive Quest For Coherence' and S in't Veld, 'Transatlantic Relations and security - Reflections from a Politician, Practitioner and Litigator' in Fahey and Curtin (see n 16).

The relevance of the place of individuals and officials in the EU-US PNR decision is paramount in a retrospective storytale and it is this context to which the account next turns. Accordingly, the context and actual proceedings of the litigation are accounted for, through the insiders perspective.

### **III. LOOKING BEYOND THE LAW: KEY FIGURES IN, AROUND AND OF THE EU-US PNR LITIGATION OF 2004**

#### **(A) The stories**

What follows here is an account of the interviews of the author with key figures of the EU-US PNR litigation pertaining to its context and aftermath. On the grounds that many of the interviewees were involved in diverse aspects of the negotiation and litigation of the agreement, the interviews are not readily separated. Most if not all of the officials have asked for some measure of anonymity and so they are not identified here.

An official interviewed by the author described the role of the President of the EP, Pat Cox MEP, who was at the end of the 2004 EP seeking appointment as member of the European Commission, to be significant in the official's perception of how the leader of the Parliament was seen to be '*respecting*' and following the position of the European Commission - and thus less so following the line of the EP. The official noted that a common 'joke' in legal circles concerning the EU-US PNR litigation was not that it was a 'pyrrhic victory' but that it was a 'Pyris' victory, so called after Jean-Claude Pyris, the Head of the Legal Service of the Council and later to be a lead drafter of the Treaty of Lisbon text.<sup>41</sup> Another official, who did not wish to be identified, described the EU-US PNR litigation as formally viewed a victory (but also a 'pyrrhic' one), which was in fact politically useful and in fact even a big legal victory for its Parliament and its Legal Service. They described the views of the Court of Justice and Advocate General as disappointing, with split views which provided evidence of much debate in the Court. Nonetheless, it was politically useful as a decision because the European Parliament and its Legal Service became involved in subsequent agreements and the case became a mere first step towards other more significant changes. They suggested that there was a tendency to overlook agreements with Argentina and Japan and their similarities with the US Agreement as a model. They also suggested that the EP would increasingly litigate well beyond its 10 cases a year in future times, now as joint legislator, but also as individual politicians, representing an increasing number of Member States. They said that it was a complicated procedure to get a mandate for litigation in the

---

<sup>41</sup> The official quoted a Congress official, who he had heard stating that there was no real need for PNR data, which was theatrical and useless: 'it was all' just games...'

first place- never mind to intervene in litigation and it had a policy of not intervening in support of the litigation of individual members.

Another former official, who did not wish to be named, recalled how the hearing of EU-US PNR decision was expected to take two days before the Court of Justice, with two cases, one against Council, other against Commission. The official described the hearing as ‘terrible’, whereby the pleadings were ‘hurried up’ and rolled into one morning by the President much to the dismay and surprise of many EU institutions, even refusing the second agent of the EP the possibility to speak. The official described how the Courtroom of the ECJ was coincidentally full of national superior court judges on a visit to the Court of Justice, somewhat skewing the dynamic of the hearing- and possibly also explaining the rush by the Court to stop the hearing at lunchtime. They stated that the EP did not accept that the PNR decision was a disaster. Their request for an Opinion had become moot and the EP legal service appeared to go further than their political representatives in ‘sticking’ to a validity hearing. The EP Legal Service appeared also to take the events as an ‘insult’. The official expressed dismay at their delight with victory of the Court, as a historic finding of invalidity. Their request for an Opinion had not halted the negotiations, as it had had no suspensory effect. The threat of the US fining airlines had entailed that the negotiations on an Agreement had proceeded with expedition. In response to a question as to the nature of the interactions between the institutions, the official responses that in retrospect there should have been more interactions between the legal services. Moreover, the original negotiator of the 1st agreement from DG Market was eventually fired. As to the impact of the judgment, on the day of the judgment a teleconference had been scheduled at 5pm with the US as to how to follow up and reopen negotiations so as to respect the judgment- which was called off on account of the ‘validity’ judgment, with the effect that there no longer was an agreement to be discussed. Another former official, who did not wish to be named, maintained that the decision harbored particularly bad memories for them, which they labelled as one of the ‘stupidest’ ever taken by the EP and ever accepted by the Court.

Another interviewee, a former member of the EP, emphasized the political dynamic of the PNR context, as explosive and tense, internally within the EU and externally also. One specific feature of the time period under analysis of the EU-US PNR decision, i.e. circa 2004-2006, is the constant agitation of the Parliament against the status quo and its dissatisfaction on civil liberties grounds with the manner in which the US was acting on European soil/ requiring the EU to act. Former MEP Johanna Boogerd-Quaak for the Netherlands described her role as LIBE committee rapporteur and her efforts via many votes and resolutions to seek an international agreement with the US as an ameliorating technique through law. She described the Parliament’s ‘temporary’ successful votes

being met with a 'light' agreement from the US with 39 undertakings, in a context superseded constantly by new events, for example the Madrid bombings. She referred to the new MEPS from Central and Eastern European joining in May 2003 and being asked to vote on the resolution against the conduct of the US as worse than that experienced during Soviet Times.<sup>42</sup> In response to a question concerning how high-profile she perceived that her actions at European level might be seen in domestic (Dutch) politics, she described it as having had little impact at national level, despite being interviewed and cited extensively in international media, for example, the International Herald Tribune. As to the perspective of the Commission on the mounting disquiet in the European Parliament, she described her interactions with the Dutch Commissioner, who she described as a 'sympathetic' member of the Commission (Fritz Bolkenstein), whose viewpoint was that inevitably defeat would result from European opposition to US action, although the latter assertion of sympathy was contradicted by another official interviewed, but not an official of her nationality.

Turning finally to a current member of the EP since 2004, and the last two parliaments, Sophie In't veld was interviewed by the author extensively as a highly relevant actor in contemporary transatlantic relations. In't veld was vice-chair of the European Parliament committee for civil liberties, justice and home affairs, a member of the Transatlantic Legislators Dialogue and was a member of the committee investigating the CIA renditions and black sites. She was a member of the parliamentary inquiry into mass surveillance by the NSA, and programmes like Prism and Tempora and rapporteur for the evaluation of EU counter terrorism policies and for the international agreements for the exchange of Passenger Name Records. She has been involved in the discussions on the so-called 'SWIFT' agreement on the transfer of bank data,<sup>43</sup> as well as the Anti-Counterfeiting Trade Agreement (ACTA) and the current review of the EU Data Protection framework. In addition to her parliamentary work, she has pursued some of these matters in court, both in the US and in the EU, and also have taken some cases before the European Ombudsman.<sup>44</sup> One of her main observations on contemporary transatlantic relations was that the EU needed to shape up in the Transatlantic relationship. In the area of law enforcement, security and counter terrorism, the relationship is very unequal. A second observation was that the parliamentary dimension of the transatlantic cooperation needed to be strengthened urgently. Most transatlantic contacts were between civil servants, diplomats and Government officials. According to her, the so-called Transatlantic Legislators Dialogue (TLD), a joint committee composed of Members of the European

---

<sup>42</sup> She was no longer in office at the time of that the litigation went to the Court of Justice, given the transition of parliamentarians into the new parliamentary term but had impressed upon her successor, Sophie In't veld, this portfolio and actively supported her successors work and efforts.

<sup>43</sup> 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, OJ 2010 No. L195, 27 July 2010.

<sup>44</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v. Council and Commission* [2006] ECR I-4721; T-301/10 *In't Veld v. European Commission* [2013] ECR II-000, judgment of the General Court of 19 March 2013.

Parliament and Members of US Congress, hadn't worked very well in practice. She summed up the state of EU-US Passenger Name Record (PNR) data pithily: after 9 years of negotiations, re-negotiations and court cases, Parliament ended up in 2012 endorsing an agreement that was worse than the one challenged in the Court of Justice in 2004.

Looking forward, In't veld referred to the recent and high-profile Data Retention litigation challenge as a changing context for EU-US relations.<sup>45</sup> She emphasized how she was battling to challenge the strong 'Sir Humphrey' character of the Commission and Council with respect to transparency and international relations. She described the challenges of getting the EP to intervene in litigation:- for example, an intervention by the EP in support of her litigation had been 'thwarted' in the ACTA case. She described how there was much resistance of Legal Service of the EP to intervention and also described the EP as very 'empty handed' in transatlantic security, even after mass-surveillance inquiry.

The account next turns to her litigation in greater detail.

### **(B) What Sophie Did Next: The Litigation of In't Veld MEP**

What followed after the PNR litigation was further individual litigation, conducted without intervention by the European Parliament en masse- i.e. many small-scale efforts to procure freedom of information or procure PNR data through administrative rather than wholly judicial procedures, as is provided for in the PNR regime. This litigation has been conducted by in't Veld MEP. Her story is considered here briefly in order to place the EU-US PNR litigation in perspective. Her account is argued here to be of relevance to the analysis of the public interest in transatlantic security and the 'separation' of one-shotters and repeat-hitters.

In't veld's story begins with her efforts, albeit unsuccessful, to obtain her own Passenger Name Record data under the US Freedom of Information (FOI) legislation through litigation which was dismissed for 'erroneously' maintaining that the airlines carriers data and the Department of Homeland Security data were equivalent or similar.<sup>46</sup> Yet In't veld has played and continues to play a significant role in litigating aspects of other major EU-US security agreements. The SWIFT Agreement finally reached in 2009 was vetoed by the European Parliament in 2010, again exercising its powers

---

<sup>45</sup> *Digital Rights Ireland and Seitlinger and Others* Joined Cases (C-293/12 and C-594/12) [2014] ECR I-000..

<sup>46</sup> See above n 15. For more on the roles of the respective actors involved in PNR transfer, see Fahey (2013), above n 4.



of approval accorded by the Treaty of Lisbon, pursuant to Article 218 TFEU.<sup>47</sup> Judicial remedies and fears of bulk transfers were reported to be the basis of the concerns warranting the rejection of the Agreement.<sup>48</sup> A second SWIFT agreement was reached in 2010 and entered into force also in 2010. The legal basis of that Agreement is in Articles 87(2)(a) and 88(2) TFEU,<sup>49</sup> the former providing for competence in police cooperation in the area of the collection, storage, processing, analysis and exchange of relevant information and the latter, to regulate the tasks and operation of Europol. Also, the new provision of the Treaty of Lisbon protecting the privacy of the personal data of EU citizens, Article 16 TFEU, is explicitly invoked in a recital to the Agreement, presumably to enhance its apparent commitment to respecting fundamental rights in the Agreement. A request by MEP in't veld to disclose a classified Council Service Legal Opinion suggesting that the *earlier* legal basis of the Agreement was flawed<sup>50</sup> succeeded in part before the General Court recently, on the basis that the public interest did not require its suppression. Advocate General Sharpston ruled in her favour on 12 February 2014 in a much more forceful vindication of transparency in the negotiation of international agreements by the EU. Thereafter, the Court of Justice delivered a resounding victory in her favour later in 2014, weighing in against blanket institutional secrecy in the area of international relations.<sup>51</sup>

Her litigation must surely be regarded as most notable and institutionally unsupported at least officially by the wider body politic of the European Parliament. In this regard, her story or her part of it must be seen in a broader context, where Passenger Name Records is still under development within in the EU legislative process, a context which is considered here next.

#### **SECTION IV: RETELLING THE STORY: HOW MIGHT EU-US PNR BE DECIDED TODAY?**

The success and effectiveness of transatlantic rule-making, specifically the EU-US Passenger Name Records (EU-US PNR) Agreements and EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreements respectively has spurred the EU to engage in 'replica' rule-making inspired by the EU-US PNR and EU-US TFTP.<sup>52</sup> The recent outbreak of the NSA surveillance saga has operated to place EU

---

<sup>47</sup> See A Ripoll Servent, and A MacKenzie, 'The European Parliament as norm-taker? EU-US relations after the SWIFT Agreement' (2012) 17 *European Foreign Affairs Review* 71.

<sup>48</sup> 'MEPS hail Historic rejection of SWIFT deal,' *Agence Europe*, 13 February 2010.

<sup>49</sup> In conjunction with Article 218(5) TFEU, providing the Council with competence to enter the Agreement.

<sup>50</sup> Which was Articles 82(1)(d) and 87(2)(a) TFEU, the former providing competence for judicial cooperation between the States in criminal matters.

<sup>51</sup> See above n 15.

<sup>52</sup> For example, Proposal For a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime, COM (2011) 32 , Commission Communication, 'A *European terrorist finance tracking system available options*,' COM (2011) 429 final, although their precise future is far from certain. The Directive was rejected by the European Parliament in 2013: 'MEPs vote down air passenger data scheme' *EUObserver.com* (24 April 2013, < <http://www.euobserver.com/justice/119926>>).

citizens fundamental rights and data protection centrally in *all* rule-making of the EU with the US. It also caused the EP to vociferously call into question a range of existing EU-US security agreements, i.e. external EU security.<sup>53</sup> The NSA surveillance has also re-ignited EU-US negotiations on a data protection framework.<sup>54</sup> While the EP has voted to suspect all EU-US data transfer agreements on foot of its inquiry on mass surveillance by the US, by contrast, the EU-US Justice and Home Affairs Ministerial meeting in late 2013 stressed the importance of developing the EU-US negotiations on a data protection agreement, referencing the work of the EU-US ad hoc working group on the NSA surveillance saga.<sup>55</sup> It raises the question as to the role of the EP in either setting or (merely) defending the public interest in EU foreign affairs and its effectiveness- and the acceptance by the Court of the need for institutional balance in foreign affairs. At this point in time, a complete or final analysis remains impossible. Yet one official interviewed described how the recent Advocate General Opinion on the Data Retention Directive was extremely strong, arguably unduly opposed to bulk retention. They adverted to the question of how the PNR case might be litigated today as one that was increasingly interesting to judge.<sup>56</sup> Another interviewee emphasized how the Data Retention Directive expressly excluded police activity on account of the PNR decision. As a result, they said that its impact could in no way be seen as an EU-US 'PNR II'.

But what would litigation of PNR by the EP do in the current context? What benefit could it generate? Would the EP be able to procure a victory with substance to it? First and foremost, the EP does not per se enjoy any special powers to litigate the 'governance' provisions or functioning of EU-US Agreements in security. The likelihood of litigation is small. The governance of such agreements has generated many challenges as to the rule of law.<sup>57</sup> But their justiciability remains problematic. The EP enjoys no special oversight role in the latest PNR agreement and has been attempting to procure transparency and information as a collective body but without litigating it. Nonetheless, *ex ante review* of the 2011 PNR agreement was sought by the EP, which again fell into mootness. Second, the political gains of such litigation could be minimal, just as EU-US PNR indicates. The development of institutional balance in foreign affairs may be an embryonic one, involving many competence questions to be evolved *ex ante* and *ex post facto* questions as to the negotiations of

---

<sup>53</sup> European Parliament Resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency (NSA) surveillance (2013/2831 (RSP)).

<sup>54</sup> See Joint Press Statement following EU-US Justice and Home Affairs Ministerial Meeting of 18 November 2013, Council of the European Union statement 16418/13, 18 November, 2013 ([http://europa.eu/rapid/press-release\\_MEMO-13-1010\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1010_en.htm))

<sup>55</sup> See 'Report on the Findings by the EU Co-chairs of the Ad Hoc EU-US Working Group on Data Protection', Council statement 16987/13, 27 November, 2013 and 'Rebuilding Trust in EU-US Data Flows' COM(2013) 846 final. Moreover, there are on-going negotiations on an EU-US Data Protection Framework Regulation and an EU Data Protection Regulation and the NSA surveillance affair has enhanced the controversy surrounding a draft provision of Article 42 of the draft Regulation which would give an EU court authority over surveillance of EU citizen data pursuant to a foreign court order or other body: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 Final.

<sup>56</sup> See above n 45.

<sup>57</sup> See further Elaine Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program' (2013) 32 *Yearbook of European Law* 1.

international agreements. Thirdly, the PNR decision now acts as an increasingly awkward precedent for the Court in the era of the NSA surveillance saga and a multiplicity of fundamental rights instruments (for example, the Charter of Fundamental Rights). The recent Data Retention decision demonstrates that the Court is not afraid to put EU fundamental rights centrally in this context. Fourth and finally, the high profile nature of In't Veld's work, even if often done initially through conducting 'low level' action (e.g. FOI procedures) and then transparency laws, raises the issue as to the shifting public interest in transatlantic relations, to be developed by one-shotters in repeat-hitters clothes, rather than repeat-hitters themselves.

In this regard, this retrospective has engaged only to some extent in the 'bigger picture' of transatlantic relations, looking beyond small-scale story of the institutional context the actions of the EP as litigator. It must be recalled that the US Attorney General has claimed before the European Parliament that no human rights violations have *ever* resulted from transatlantic justice and home affairs cooperation.<sup>58</sup> By contrast, certain Members of the European Parliament, most audibly In't Veld, have claimed that the secrecy surrounding the transmission of data under certain transatlantic Agreements makes it virtually impossible to assess their operation, even if couched in an extensive network of governance mechanisms.<sup>59</sup> These issues are of much significance in considering their potential litigation. While it is a gloomy way to conclude, there are reasons to suggest that their complexity may never be properly the subject of *ex post facto* judicial review and that the EU-US PNR decision is neither replicable nor likely.

## Conclusions

The formulation of one-shot hitters and repeat-players as to EU-US PNR has some obvious resonance to it here as an underexplored story on the evolution of an institutional player in EU law. It serves to show how one-shotters and repeat-players may not always be so readily separable or may alter depending on the law and politics of the situation. Transatlantic relations agreements in security has brought into question the role of individual versus collective litigation and the structures of the EP to sustain a particular type of pattern of litigation in the public interest. It arguably underscores the complexity of formulating the public interest in EU law as its Area of Freedom,

---

<sup>58</sup> Attorney General Eric Holder, Remarks to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, claiming no rights violations had resulted from EU-US legal relations to date (*World News*, 20 September 2011: [http://wn.com/European\\_Parliament\\_Committee\\_on\\_Civil\\_Liberties,\\_Justice\\_and\\_Home\\_Affairs](http://wn.com/European_Parliament_Committee_on_Civil_Liberties,_Justice_and_Home_Affairs). Transcript of the speech can be found here: <[http://useu.usmission.gov/ag\\_libe\\_092011.html](http://useu.usmission.gov/ag_libe_092011.html)>)

<sup>59</sup> See comments cited in 'Terrorist data oversight tainted by potential conflict of interest' *EUObserver.com* (21 December 2012, <http://euobserver.com/justice/118593>).

Security and Justice deepens in scope and breadth. EU-US PNR may deservedly be a leading case of EU law for its place in igniting institutional balance in foreign affairs just as much as any other leading case depicted in this volume, not least *Les Verts*. EU-US PNR generated a process of litigation that would see many changes in EU-US security. In this regard, it offers an important story worth retelling for understanding responses to the NSA affair and the future of EU-US relations in security.