



# U.S.-EU Cooperation Against Terrorism

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## Summary

The September 11, 2001, terrorist attacks on the United States, and subsequent deadly incidents in Europe such as the Madrid and London bombings in 2004 and 2005, gave new momentum to European Union (EU) initiatives to combat terrorism and improve police, judicial, and intelligence cooperation among its current 27 member states. Over the last decade, the EU has sought to speed up its efforts to harmonize national laws and bring down barriers among member states' law enforcement authorities so that information can be meaningfully shared and suspects apprehended expeditiously. Among other steps, the EU has established a common definition of terrorism and a common list of terrorist groups, an EU arrest warrant, enhanced tools to stem terrorist financing, and new measures to strengthen external EU border controls and improve aviation security.

As part of its drive to bolster its counterterrorism capabilities, the EU has also made promoting cooperation with the United States a top priority. Washington has largely welcomed these efforts, recognizing that they may help root out terrorist cells both in Europe and elsewhere, and prevent future attacks against the United States or its interests abroad. Contacts between U.S. and EU officials on police, judicial, and border control policy matters have increased substantially since 2001. A number of new U.S.-EU agreements have also been reached; these include information-sharing arrangements between the United States and EU police and judicial bodies, two new U.S.-EU treaties on extradition and mutual legal assistance, and accords on container security and airline passenger data. In addition, the United States and the EU have been working together to clamp down on terrorist financing and to strengthen aviation and transport security. Despite the death of Al Qaeda leader Osama bin Laden in May 2011, both the United States and the EU maintain that continued vigilance against terrorism remains essential. Some observers note that the July 2012 terrorist attack on Israeli tourists in EU member Bulgaria serves as a stark reminder that Europe remains vulnerable to terrorist activity.

U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Nevertheless, some challenges persist in fostering closer U.S.-EU cooperation in these fields. Among the most prominent are data privacy and data protection concerns. The EU considers the privacy of personal data a basic right and EU rules and regulations strive to keep personal data out of the hands of law enforcement as much as possible. The negotiation of several U.S.-EU information-sharing agreements, from those related to tracking terrorist financial data to sharing airline passenger information, have been complicated by ongoing EU concerns about whether the United States could guarantee a sufficient level of protection for European citizens' personal data. Other issues that have led to periodic tensions include detainee policies, differences in the U.S. and EU terrorist designation lists (especially regarding Hezbollah), and balancing measures to improve border controls and border security with the need to facilitate legitimate transatlantic travel and commerce.

Congressional decisions related to improving border controls and transport security, in particular, may affect how future U.S.-EU cooperation evolves. In addition, given the European Parliament's growing influence in many of these policy areas, Members of Congress may be able to help shape Parliament's views and responses through ongoing contacts and the existing Transatlantic Legislators' Dialogue (TLD). This report examines the evolution of U.S.-EU counterterrorism cooperation and the ongoing challenges that may be of interest in the 112<sup>th</sup> Congress.

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## Background on European Union Efforts Against Terrorism

The September 11, 2001, terrorist attacks on the United States and the subsequent revelation of Al Qaeda cells in Europe gave new momentum to European Union (EU) initiatives to combat terrorism and improve police, judicial, and intelligence cooperation. The EU is a unique partnership that defines and manages economic and political cooperation among its current 27 member states.<sup>1</sup> The EU is the latest stage in a process of European integration begun in the 1950s to promote peace and economic prosperity throughout the European continent. As part of this drive toward further European integration, the EU has long sought to harmonize policies among its members in the area of “justice and home affairs” (or JHA). Efforts in the JHA field are aimed at fostering common internal security measures while protecting the fundamental rights of EU citizens and promoting the free movement of persons within the EU.

Among other policy areas, JHA encompasses countering terrorism and other cross-border crimes, police and judicial cooperation, border controls, and immigration and asylum issues. For many years, however, EU attempts to forge common JHA policies were hampered by member state concerns that doing so could infringe on their national legal systems and national sovereignty. Insufficient resources and a lack of trust among member state law enforcement agencies also impeded progress in the JHA area.

The 2001 terrorist attacks changed this status quo and served as a wake-up call for EU leaders and member state governments. In the weeks after the attacks, European law enforcement efforts to track down terrorist suspects and freeze financial assets—often in close cooperation with U.S. authorities—produced numerous arrests, especially in Belgium, France, Germany, Italy, Spain, and the United Kingdom. Germany and Spain were identified as key logistical and planning bases for the attacks on the United States. As a result, European leaders recognized that the EU’s largely open borders and Europe’s different legal systems enabled some terrorists and other criminals to move around easily and evade arrest and prosecution. For example, at the time of the 2001 attacks, most EU member states lacked anti-terrorist legislation, or even a legal definition of terrorism. Without strong evidence that a suspect had committed a crime common to all countries, terrorists or their supporters were often able to avoid apprehension in one EU country by fleeing to another with different laws and criminal codes. Moreover, although suspects could travel among EU countries quickly, extradition requests often took months or years to process.

Since the 2001 attacks, the EU has sought to speed up its efforts to harmonize national laws and bring down barriers among member states’ law enforcement authorities so that information can be meaningfully shared and suspects apprehended expeditiously. Among other steps, the EU has established a common definition of terrorism and a list of terrorist groups, an EU arrest warrant, enhanced tools to stem terrorist financing, and new measures to strengthen external EU border controls and improve aviation security. The EU has been working to bolster Europol, its joint

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<sup>1</sup> The 27 members of the EU are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. For more information on the EU, its institutions, and policies, see CRS Report RS21372, *The European Union: Questions and Answers*, by Kristin Archick.

criminal intelligence body, and Eurojust, a unit charged with improving prosecutorial coordination in cross-border crimes in the EU.

The March 2004 terrorist bombings in Madrid and the July 2005 attacks on London's metro system injected a greater sense of urgency into EU counterterrorism efforts, and gave added impetus to EU initiatives aimed at improving transport security, impeding terrorist travel, and combating Islamist extremism. In the wake of the Madrid attacks, the EU created the position of Counterterrorist Coordinator. Key among the Coordinator's responsibilities are enhancing intelligence-sharing among EU members and promoting the implementation of already agreed EU anti-terrorism policies, some of which have bogged down in the legislative processes of individual member states. Following the London attacks, the EU adopted a new counterterrorism strategy outlining EU goals to "prevent, protect, pursue, and respond to the international terrorist threat," as well as a plan to combat radicalization and terrorist recruitment.<sup>2</sup>

Over the last several years, the EU has continued working to strengthen its counterterrorism capabilities and further improve police, judicial, and intelligence cooperation among its member states. In 2008, the EU expanded its common definition of terrorism to include three new offenses: terrorist recruitment, terrorist training, and public provocation to commit terrorism, including via the Internet. Among other recent initiatives, the EU has been seeking to improve the security of explosives and considering the development of an EU-wide system for the exchange of airline passenger data. In February 2010, the EU issued its first-ever internal security strategy, which highlights terrorism as a key threat facing the EU and aims to develop a coherent and comprehensive EU strategy to tackle not only terrorism, but also a wide range of organized crimes, cybercrime, money laundering, and natural and man-made disasters.

Despite the death of Al Qaeda leader Osama bin Laden in Pakistan in early May 2011, many terrorism experts expect that the "Al Qaeda narrative" will likely continue to attract both European and non-European followers. The July 2012 terrorist attack on Israeli tourists in Bulgaria, which some terrorism experts have attributed to the Lebanese Shiite Hezbollah organization, serves as a stark reminder that Europe also remains vulnerable to terrorist activity perpetrated by a number of groups in addition to Al Qaeda. Consequently, EU officials assert that continued vigilance and enhanced cooperation against terrorism remains essential.

Most observers view the EU as having made rapid progress since 2001 on forging political agreements on many counterterrorism initiatives and others in the JHA field that had been languishing for years. Indeed, the pace has been speedy for the EU, a traditionally slow-moving body because of its intergovernmental nature and largely consensus-based decision-making processes. Until recently, most decisions in the JHA field required the unanimous agreement of all 27 member states. However, the EU's new institutional reform treaty—the Lisbon Treaty, which entered into force in December 2009—allows member states to use a qualified majority voting system for most JHA decisions in a bid to strengthen JHA further and speed EU decision-making. In practice, experts say that EU member states will likely still seek consensus as much as possible on sensitive JHA policies, such as those related to countering terrorism. The Lisbon Treaty also

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<sup>2</sup> For more information on EU efforts to counter radicalization, terrorist recruitment, and violent Islamist extremism, see CRS Report RL33166, *Muslims in Europe: Promoting Integration and Countering Extremism*, coordinated by Kristin Archick.

strengthens the role of the European Parliament, a key EU institution, in JHA policy-making by giving it the right to approve or reject most JHA-related legislation.<sup>3</sup>

Despite the political commitment of EU leaders to promote cooperation in the JHA field and to improve the EU's collective ability to better combat terrorism, forging common internal security policies has been challenging. Implementation of EU policies in the JHA field is up to the member states, and considerable lag times may exist between when an agreement is reached in Brussels and when it is implemented at the national level. In addition, EU member states retain national control over their law enforcement and judicial authorities, and some national police and intelligence services remain reluctant to share information with each other. Consequently, efforts to promote greater EU-wide cooperation against terrorism and other cross-border crimes remain works in progress.

## U.S.-EU Counterterrorism Cooperation: Progress to Date and Ongoing Challenges

As part of the EU's efforts to combat terrorism since September 11, 2001, the EU made improving law enforcement cooperation with the United States a top priority. The previous George W. Bush Administration and many Members of Congress largely welcomed this EU initiative in the hopes that it would help root out terrorist cells in Europe and beyond that could be planning other attacks against the United States or its interests. Such growing U.S.-EU cooperation was in line with the 9/11 Commission's recommendations that the United States should develop a "comprehensive coalition strategy" against Islamist terrorism, "exchange terrorist information with trusted allies," and improve border security through better international cooperation. Some measures in the resulting Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) and in the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) mirrored these sentiments and were consistent with U.S.-EU counterterrorism efforts, especially those aimed at improving border controls and transport security.

U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Despite some frictions, most U.S. policymakers and analysts view the developing partnership in these areas as positive. Like its predecessor, the Obama Administration has supported U.S. cooperation with the EU in the areas of counterterrorism, border controls, and transport security. At the November 2009 U.S.-EU Summit in Washington, DC, the two sides reaffirmed their commitment to work together to combat terrorism and enhance cooperation in the broader JHA field. In June 2010, the United States and the EU adopted a new "Declaration on Counterterrorism" aimed at deepening the already close U.S.-EU counterterrorism relationship and highlighting the commitment of both sides to combat terrorism within the rule of law. In June 2011, President Obama's National Strategy for Counterterrorism asserted that in addition to

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<sup>3</sup> The Lisbon Treaty also adds an "emergency brake" that allows any member state to halt certain JHA measures it views as threatening its national legal system, and ultimately, to opt out. Despite these safeguards, the UK and Ireland essentially negotiated the right to choose those JHA policies they want to take part in and to opt out of all others; Denmark extended its existing opt-out in some JHA areas to all JHA issues. The Lisbon Treaty technically renames JHA as the "Area of Freedom, Security, and Justice," although JHA remains the more commonly-used term. For more information on the Lisbon Treaty, see CRS Report RS21618, *The European Union's Reform Process: The Lisbon Treaty*, by Kristin Archick and Derek E. Mix.

working with European allies bilaterally, “the United States will continue to partner with the European Parliament and European Union to maintain and advance CT efforts that provide mutual security and protection to citizens of all nations while also upholding individual rights.”

Nevertheless, some challenges remain in the evolving U.S.-EU counterterrorism relationship. Among the most prominent are data privacy and data protection concerns, which have complicated a range of U.S.-EU information-sharing agreements. Other issues that have led to periodic tensions include detainee policies, differences in the U.S. and EU terrorist designation lists (especially with regard to Hezbollah), and balancing measures to improve border controls and border security with the need to facilitate legitimate transatlantic travel and commerce.

## **Developing U.S.-EU Links**

Contacts between U.S. and EU officials—from the cabinet level to the working level—on police, judicial, and border control policy matters have increased substantially since 2001, and have played a crucial role in developing closer U.S.-EU ties. The U.S. Departments of State, Justice, Homeland Security, and the Treasury have been actively engaged in this process.<sup>4</sup> The Secretary of State, U.S. Attorney General, and Secretary of Homeland Security meet at the ministerial level with their respective EU counterparts at least once a year, and a U.S.-EU working group of senior officials meets once every six months to discuss police and judicial cooperation against terrorism. In addition, the United States and the EU have developed a regular dialogue on terrorist financing and have established a high-level policy dialogue on border and transport security to discuss issues such as passenger data-sharing, cargo security, biometrics, visa policy, and sky marshals. In 2010, U.S. and EU officials began expert-level dialogues on critical infrastructure protection and resilience, and preventing violent extremism.

U.S. and EU agencies have also established reciprocal liaison relationships. Europol has posted two liaison officers in Washington, DC, and the United States has stationed an FBI officer in The Hague, Netherlands, to work with Europol on counterterrorism. A U.S. Secret Service liaison posted in The Hague also works with Europol on counterfeiting issues. In November 2006, a U.S. liaison position was established at Eurojust headquarters in The Hague as part of a wider U.S.-Eurojust agreement to facilitate cooperation between European and U.S. prosecutors on terrorism and other cross-border criminal cases.

## **New Law Enforcement and Intelligence Cooperation Agreements**

U.S.-EU efforts against terrorism have produced a number of new accords that seek to improve police and judicial cooperation. In 2001 and 2002, two U.S.-Europol agreements were concluded to allow U.S. law enforcement authorities and Europol to share both “strategic” information (threat tips, crime patterns, and risk assessments) as well as “personal” information (such as names, addresses, and criminal records). U.S.-EU negotiations on the personal information accord proved especially arduous, as U.S. officials had to overcome worries that the United States did not meet EU data protection standards. The EU considers the privacy of personal data a basic

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<sup>4</sup> On the U.S. side, the State Department has the lead in managing the interagency policymaking process toward enhancing U.S.-EU police, judicial, and border control cooperation, while the Justice and Homeland Security Departments provide the bulk of the legal and technical expertise. The Treasury Department has the lead on efforts to suppress terrorist financing.

right, and EU regulations are written to keep such data out of the hands of law enforcement authorities as much as possible. EU data protection concerns also reportedly slowed negotiations over the 2006 U.S.-Eurojust cooperation agreement noted above. In April 2007, the United States and the EU also signed an agreement that sets common standards for the security of classified information to facilitate the exchange of such information.

In February 2010, two new U.S.-EU-wide treaties on extradition and mutual legal assistance (MLA) entered into force following their approval by the U.S. Senate and the completion of the ratification process in all EU member states.<sup>5</sup> These treaties, signed by U.S. and EU leaders in 2003, seek to harmonize the bilateral accords that already exist between the United States and individual EU members, simplify the extradition process, and promote better information-sharing and prosecutorial cooperation. Washington and Brussels hope that these two agreements will be useful tools in combating not only terrorism, but other transnational crimes such as financial fraud, organized crime, and drug and human trafficking.

In negotiating the extradition and MLA agreements, the U.S. death penalty and the extradition of EU nationals posed particular challenges. Washington effectively agreed to EU demands that suspects extradited from the EU will not face the death penalty, which EU law bans. U.S. officials also relented on initial demands that the treaty guarantee the extradition of any EU national. They stress, however, that the extradition accord modernizes existing bilateral agreements with individual EU members, streamlines the exchange of information and transmission of documents, and sets rules for determining priority in the event of competing extradition requests between the United States and EU member states. The MLA treaty will provide U.S. authorities access to European bank account and financial information in criminal investigations, speed MLA request processing, allow the acquisition of evidence (including testimony) by video conferencing, and permit the participation of U.S. authorities in joint EU investigations.<sup>6</sup>

Despite these growing U.S.-EU ties and agreements in the law enforcement area, some U.S. critics continue to doubt the utility of collaborating with EU-wide bodies given good existing bilateral relations between the FBI and CIA (among other agencies) and national police and intelligence services in EU member states. Many note that Europol lacks enforcement capabilities, and that its effectiveness to assess and analyze terrorist threats and other criminal activity largely depends on the willingness of national services to provide it with information. Meanwhile, European officials complain that the United States expects intelligence from others, but does not readily share its own. Others contend that European opposition to the U.S. death penalty or resistance to handing over their own nationals may still slow or prevent the timely provision of legal assistance and the extradition of terrorist suspects in some cases.

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<sup>5</sup> In September 2006, former U.S. President George W. Bush transmitted the U.S.-EU treaties on extradition and MLA to the Senate for its advice and consent, along with separate bilateral instruments signed by the United States and individual EU member states that reconciled the terms of existing bilateral extradition and MLA treaties with the new EU-wide treaties. The Senate gave its advice and consent in September 2008. All EU member states also had to transpose the terms of the U.S.-EU extradition and MLA accords into their national laws. Following the completion of this process in all EU members, the United States and the EU exchanged the instruments of ratification for both agreements in October 2009, thus allowing them to enter into force in 2010.

<sup>6</sup> U.S. Department of Justice Press Release, "U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force," February 1, 2010.

## Tracking and Suppressing Terrorist Financing

The United States and the EU have been active partners in efforts to track and stem terrorist financing. The two sides cooperate frequently in global forums, such as the United Nations and the intergovernmental Financial Action Task Force, to suppress terrorist financing and to improve international financial investigative tools. The United States and the EU both benefit from an agreement that allows U.S. authorities access to financial data held by a Belgian-based consortium of international banks—known as SWIFT, or the Society for Worldwide Interbank Financial Telecommunications—as part of the U.S. Treasury Department’s Terrorist Finance Tracking Program (TFTP). U.S. authorities have shared over 1,800 leads resulting from the SWIFT data with European governments, and U.S. and EU officials assert that many of these leads have helped in the prevention or investigation of terrorist attacks in Europe.<sup>7</sup> However, the TFTP and the U.S.-EU agreement permitting the sharing of SWIFT data remains controversial in Europe due to ongoing data privacy concerns. The European Parliament has been particularly vocal in defending EU data protection standards and attempting to safeguard the privacy rights of EU citizens. (For more information on the U.S.-EU SWIFT agreement, see “Promoting Information-Sharing and Protecting Data Privacy” below).

## Designating Terrorist Individuals and Groups

U.S. and EU officials have worked together successfully since 2001 to bridge many gaps in their respective lists of individuals and groups that engage in terrorist activities, viewing such efforts as important both in terms of symbolically presenting a united U.S.-EU front, and helping to stem terrorist financing. For all those named on the EU’s “common terrorist list” or “blacklist,” which contains individuals and entities based both in Europe and worldwide, EU member states must provide assistance to each other in related police investigations and legal proceedings. In addition, for those individuals and entities that are based outside EU territory (such as Hamas), all EU member states must freeze the assets of those named and ensure that financial resources are not made available to them.<sup>8</sup>

In order for a person or entity to be added to (or deleted from) the EU’s common terrorist list, there must be unanimous agreement among all EU member states. Over the last decade, the United States and other countries have successfully lobbied the EU to add several organizations—such as the Turkish-based Kurdistan Worker’s Party (PKK), the Revolutionary Armed Forces of Columbia (FARC), and some Palestinian groups—to the EU’s common terrorist list. The United States has also taken some cues from the EU and has included a number of members of the Basque separatist group ETA, among others, to its terrorist designation lists.<sup>9</sup>

Nevertheless, a few differences in the U.S. and EU terrorist designation lists persist. For example, the EU remains hesitant about adding some suspected Hamas-related charities to its common terrorist list because some EU members view them as separate entities engaged in political or

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<sup>7</sup> U.S. Department of the Treasury, “Terrorist Finance Tracking Program: Questions and Answers,” available at <http://www.ustreas.gov>.

<sup>8</sup> Although individuals and groups based within EU territory (such as the Real IRA or the Italian anarchist Red Brigades) are subject only to the common list’s strengthened police cooperation measures, member state governments generally seek to apply their own financial sanctions to such “internal” or “domestic” persons or organizations designated as “terrorist.” Paul Ames, “EU Adopts Anti-terrorist Measures,” Associated Press, December 28, 2001.

<sup>9</sup> “U.S. Takes Action with EU on Expanded Terror List,” *Agence France Presse*, May 3, 2002.

social work.<sup>10</sup> Most notably, EU member states remain divided on whether the Lebanese-based Hezbollah organization should be included on the EU's common terrorist list. The United States considers Hezbollah, which is backed by Syria and Iran, as a Foreign Terrorist Organization and applies financial and other sanctions to the group and its members. While some EU member states, such as the United Kingdom and the Netherlands, support adding Hezbollah to the EU's common list, France and other members have objected in the past.

EU members that have been hesitant about putting Hezbollah on the EU's common list argue that doing so would be counterproductive to managing relations with Lebanon given Hezbollah's role in the Lebanese government and its representation in Lebanon's parliament. Some EU member states have also been reluctant to add Hezbollah to the EU's list because they believe that the group provides needed social services in some of Lebanon's poorest communities; those of this view tend to assert that there is a separation between Hezbollah's political, military, and social welfare wings. On the other hand, critics of Hezbollah's absence from the EU's list contend that Hezbollah is a known terrorist group, responsible for numerous attacks in the Middle East and elsewhere, and that Hezbollah has used Europe as a primary base for fundraising and financial services for years. Those in favor of including Hezbollah on the EU's list also note that Hezbollah leaders themselves have reportedly admitted that if the EU were to blacklist the group, it would have serious negative implications for Hezbollah's financial and moral support in Europe.

Several recent events have led to renewed U.S. (and Israeli) calls for the EU to add Hezbollah to its common terrorist list. These include: the deadly July 2012 terrorist attack on Israeli tourists in Bulgaria, which Israeli officials have publically attributed to Hezbollah; the arrest earlier in July of a suspected Hezbollah operative in Cyprus allegedly planning attacks on Israeli tourists there; and the group's close ties to and support for the Syrian government of Bashar al Assad, despite the regime's increasingly repressive and violent response to the ongoing uprising. In light of these new factors, analysts suggest that at least some EU member states might be more inclined to include Hezbollah on the EU's list; others point out that current prospects for adding Hezbollah to the EU's list are mixed given that several EU members remain reluctant about doing so.<sup>11</sup> Many Members of Congress have long urged the EU to put Hezbollah on its common terrorist list; most recently, following the bombing in Bulgaria this past July, individual Members and groups of Members, in both the House and Senate, have sent letters to EU officials and institutions calling upon the EU to add Hezbollah to its common terrorist list.

## Promoting Information-Sharing and Protecting Data Privacy

Although the United States and the EU both recognize the importance of sharing information in an effort to track and disrupt terrorist activity, data privacy has been and continues to be a key U.S.-EU sticking point. As noted above, the EU considers the privacy of personal data a basic right; EU data privacy regulations set out common rules for public and private entities in the EU that hold or transmit personal data, and prohibit the transfer of such data to countries where legal

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<sup>10</sup> The EU has listed Hamas' military wing on its common terrorist list since 2001, and its political wing since 2003. In 2005, the EU added one charity (Al-Aqsa, e.V., or the Al-Aqsa Foundation) to its common terrorist list that is believed to be related to Hamas.

<sup>11</sup> Steven Weisman, "Allies Resisting as U.S. Pushes Terror Label for Hezbollah," *New York Times*, February 17, 2005; Nicolas Kulich, "Despite U.S. Fear, Hezbollah Moves Openly in Europe," *New York Times*, August 16, 2012; "Israel Renews Call To Put Hezbollah on EU Terror List for its Involvement in Burgas Bombing," *European Jewish Press*, September 7, 2012.

protections are not deemed “adequate.” In the negotiation of several U.S.-EU information-sharing agreements, from those related to Europol to SWIFT to airline passenger data, some EU officials have been concerned about whether the United States could guarantee a sufficient level of protection for European citizens’ personal data. In particular, some Members of the European Parliament (MEPs) and many European civil liberty groups have long argued that elements of U.S.-EU information-sharing agreements violate the privacy rights of EU citizens.

### **The U.S.-EU SWIFT Accord**

Controversy over Europe’s role in the U.S. Terrorist Finance Tracking Program surfaced originally in 2006, following press reports that U.S. authorities had been granted secret access to SWIFT financial data since 2001. In an attempt to assure Europeans that their personal data was being protected, U.S. officials asserted that SWIFT data was used only for counterterrorism purposes, was obtained by the U.S. Treasury Department by administrative subpoena, and that no data mining occurred as part of the TFTP. In June 2007, the United States and the EU reached a deal to allow continued U.S. access to SWIFT data for counterterrorism purposes, but it remained worrisome for some European politicians and privacy groups.<sup>12</sup>

In 2009, changes to SWIFT’s systems architecture—including a reduction in the amount of data stored on U.S. servers and the transfer of a large portion of data critical to the TFTP to a storage location in Europe—necessitated a new U.S.-EU agreement to permit the continued sharing of SWIFT data with the U.S. Treasury Department. In November 2009, the European Commission (the EU’s executive) reached a new accord with the United States on SWIFT. However, under the EU’s new Lisbon Treaty, the 736-member European Parliament (EP) gained the right to approve or reject international agreements such as the SWIFT accord by majority vote. In February 2010, the EP rejected this new version of the U.S.-EU SWIFT agreement by a vote of 378 to 196 (with 31 abstentions); those MEPs who opposed the accord claimed that it did not contain sufficient protections to safeguard the personal data and privacy rights of EU citizens. Given the EP’s long-standing concerns about SWIFT and the TFTP, many observers were not surprised that some MEPs took the opportunity to both assert the Parliament’s new powers and to halt U.S. access to much of the SWIFT data until their views regarding the protection of data privacy and civil liberties were taken on board more fully.

In May 2010, the European Commission and U.S. authorities began negotiating a revised U.S.-EU SWIFT agreement that could garner the necessary EP support for approval. Two key EP concerns related to guaranteeing judicial remedy for European citizens in the United States in the event of possible data abuse, and the use of “bulk data” transfers. Many MEPs wanted more targeted transfers and less data included in any transfer, but U.S. and EU officials contended that such “bulk” transfers were essentially how the SWIFT system worked and had to be maintained for technical reasons. Some MEPs also called for greater supervision by an “appropriate EU-appointed authority” over U.S. access to SWIFT data.<sup>13</sup>

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<sup>12</sup> “Frattini Claims Major Advance in Data Privacy Dispute,” *European Report*, June 29, 2007; David S. Cohen, U.S. Treasury Department Assistant Secretary for Terrorism and Financial Intelligence, Remarks to the Washington Institute for Near East Policy, April 7, 2010.

<sup>13</sup> “MEPs Hail Historic Rejection of SWIFT Deal,” *Agence Europe*, February 13, 2010; “Countering Terrorist Threats—In the Air and on the Ground,” *EU Insight*, April 2010; “SWIFT: Commission To Negotiate Under Pressure from EP,” *Europolitics*, April 23, 2010.

In mid-June 2010, U.S. and EU officials concluded a new draft SWIFT agreement. Among other provisions, the draft provided for the possibility of administrative and legal redress for EU citizens in the United States and gave Europol the authority to approve or reject U.S. Treasury Department requests for SWIFT data. Press reports indicated, however, that some MEPs were still unhappy with several of the draft's provisions. In order to avoid another "no" vote by the EP, EU and U.S. officials reportedly agreed to two additional changes to the draft: effectively guaranteeing that an independent observer appointed by the European Commission would be based in Washington, DC, to oversee, along with SWIFT personnel, the extraction of SWIFT data; and requiring the European Commission to present plans for an EU equivalent to the U.S. TFTP within a year. Such a "European TFTP" would be aimed at enabling the EU to extract SWIFT data on European soil and send the targeted results onward to U.S. authorities, thereby avoiding "bulk data" transfers to the United States in the longer term.<sup>14</sup>

The EP approved the latest iteration of the U.S.-EU SWIFT accord on July 8, 2010, by 484 votes to 109 (with 12 abstentions). The agreement entered into force on August 1, 2010, for a period of five years. Some MEPs, however, continue to be concerned about the EU's role in the U.S. TFTP and whether the SWIFT accord is being properly implemented. Several MEPs, for example, have criticized Europol for too readily approving vague U.S. requests for SWIFT data. As part of a review of the U.S.-EU SWIFT agreement released in March 2011, the European Commission recommended certain measures to help make the TFTP more transparent, including by providing more information to Europol in writing. Europol officials assert that they continue to work with U.S. authorities to improve the agreement's implementation.<sup>15</sup>

As part of the new SWIFT accord, the United States pledged its support and assistance in the event of an EU decision to develop its own terrorist finance tracking program and promised further consultations with the EU to determine whether the existing U.S.-EU SWIFT agreement might need to be adjusted as a result. In mid-July 2011, the European Commission issued a preliminary study with several options for establishing what it has termed a European Terrorist Finance Tracking System (TFTS). According to a Commission press release, a European TFTS would have two main objectives: to limit the amount of personal data transferred to the United States; and to contribute significantly to stemming terrorist financing.<sup>16</sup> U.S. officials will likely be keen to ensure that any eventual European TFTS does not compromise the operational effectiveness of the U.S.-EU SWIFT agreement.

EU development of a European TFTS, however, may face significant challenges. A concrete legislative proposal from the Commission on the TFTS is not expected until late 2012 at the earliest, and any such proposal must ultimately be approved by both the member states and the EP. Some observers point out that member state and EP agreement on a European TFTS may be difficult given the technical complexities involved and differing views between and among the member states and the EP on its purpose and scope. Some member states and MEPs have also expressed concerns about the potential costs of such a system; in its preliminary study, the

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<sup>14</sup> Toby Vogel, "SWIFT Deal on Data Sharing with U.S. Reopened," *European Voice*, June 24, 2010; "SWIFT: Rapporteur Announces Last-Minute Agreement," *Europolitics*, June 25, 2010.

<sup>15</sup> European Parliament Press Release, "Parliament Gives Green Light for SWIFT II," July 8, 2010; James Kanter, "Europe Seeks More Openness from U.S. Anti-terror Program," *International Herald Tribune*, March 18, 2011; Europol Press Release, "Joint Supervisory Body Confirms Progress in Implementation of TFTP Agreement," March 21, 2012.

<sup>16</sup> European Commission Press Release, "Commission Presents Options for Establishing a European System for Tracking Terrorist Financing," July 13, 2011.

Commission estimated that creating a European TFTS would cost €33-47 million (about \$47-67 million) and that annual operating costs would run €7-11 million (roughly \$10-16 million), depending upon the option chosen. Others are skeptical about the implementation of an eventual European TFTS, noting that it would likely entail more intelligence-sharing among EU member states, which some members and national intelligence services have long resisted.<sup>17</sup>

### Passenger Name Record (PNR) Data

In May 2004, the United States and EU reached an initial agreement permitting airlines operating flights to or from the United States to provide U.S. authorities with passenger name record (PNR) data in their reservation and departure control systems within 15 minutes of a flight's departure (in order to comply with provisions in the U.S. Aviation and Transportation Security Act of 2001, P.L. 107-71). This accord was controversial in Europe because of fears that it violated the privacy rights of EU citizens and did not contain sufficient protections to safeguard their personal data. As a result, the European Parliament lodged a case against the PNR agreement in the EU Court of Justice; in May 2006, the Court annulled the PNR accord on grounds that it had not been negotiated on the proper legal basis. EU officials stressed, however, that the Court did not rule that the agreement infringed on European privacy rights.

In July 2007, the United States and the EU concluded negotiations on a new, seven-year agreement to ensure the continued transfer of PNR data. U.S. officials appeared pleased with several provisions of this new deal, such as: allowing the U.S. Department of Homeland Security to share PNR data with other U.S. agencies engaged in the fight against terrorism; extending the length of time that the United States can store such data (from 3½ to 15 years ultimately); and permitting the United States to access sensitive information about a passenger's race, ethnicity, religion, and health in exceptional circumstances. The new accord also required airlines to send data from their reservation systems to U.S. authorities at least 72 hours before a flight departs. The United States agreed, however, to reduce the number of fields from which data would be collected, from 34 to 19.<sup>18</sup>

Although the 2007 U.S.-EU PNR agreement was provisionally in force since its signing, the European Parliament had to approve it in order for the accord to be formally signed and remain in force. Many MEPs, however, objected to key elements of the 2007 agreement, including: the amount of PNR data transferred; the length of time such data could be kept; and what they viewed as an inadequate degree of redress available for European citizens for possible data misuse. Some MEPs also worried that U.S. authorities might use PNR data for "data mining" or "data profiling" purposes. At the same time, many MEPs recognized that rejecting the U.S.-EU PNR agreement would create legal uncertainties and practical difficulties for both travelers and air carriers. As such, in May 2010, the EP agreed to postpone its vote on the 2007 PNR deal, calling instead upon the European Commission to present a "global external PNR strategy" setting out general requirements for all EU PNR agreements with other countries; the EP also essentially expected that the EU PNR deal with the United States (as well as similar EU agreements on PNR data pending with Australia and Canada) would be renegotiated to conform to the new PNR standards put forth by the Commission.<sup>19</sup>

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<sup>17</sup> James Kanter, "Europe Tries To Curb U.S. Role in Tracking Terrorists' Funds," *New York Times*, July 14, 2011.

<sup>18</sup> Paul Lewis and Spencer Hsu, "Travelers Face Greater Use of Personal Data," *Washington Post*, July 27, 2007.

<sup>19</sup> James Kanter, "Europe Acts on Privacy Front," *International Herald Tribune*, April 7, 2010; "EP Suspends Vote on (continued...)"

In September 2010, the European Commission issued its “global external PNR strategy”<sup>20</sup> and called for the renegotiation of the EU’s PNR agreements with the United States, Australia, and Canada. Among other general principles proposed in the “external PNR strategy,” the Commission asserted that PNR data should be used exclusively to combat terrorism and other serious transnational crimes, passengers should be given clear information about the exchange of their PNR data and have the right to effective administrative and judicial redress, and that a decision to deny a passenger the right to board an airplane must not be based solely on the automated processing of PNR data. The Commission also proclaimed that the categories of PNR data exchanged should be as limited as possible and that PNR data should be retained no longer than absolutely necessary. In November 2010, the European Parliament welcomed the Commission’s PNR strategy and endorsed the opening of new PNR negotiations with the United States. The EP emphasized, however, that the exchange of PNR data must be both “necessary” and “proportional,” reiterated that PNR data must not be used for data mining or profiling, and called on the Commission to also explore less intrusive alternatives.<sup>21</sup>

Although many U.S. officials had been wary about reopening negotiations on the PNR accord, the Obama Administration assented to discussing at least some adjustments, largely in recognition of the fact that the EP was unlikely to approve the 2007 agreement. U.S.-EU negotiations on a revised PNR accord were launched in December 2010. U.S. officials continued to maintain that the 2007 accord sufficiently protected both the data collected and individual privacy rights; they noted that two joint reviews conducted by the U.S. Department of Homeland Security (DHS) and the European Commission since 2004 confirmed that the United States had not misused the PNR data. U.S. policymakers asserted that any revised PNR agreement must not degrade the operational effectiveness of the current PNR program and should permit further enhancements. U.S. officials also cautioned that any new PNR agreement with the EU must not invalidate bilateral PNR deals that the United States had concluded with various EU member states.<sup>22</sup> In mid-May 2011, resolutions were introduced in the House (H.Res. 255) and passed in the Senate (S.Res. 174) essentially supporting the existing 2007 U.S.-EU PNR accord and urging DHS to reject any efforts by the EU to modify the agreement in a way that would degrade its usefulness in the fight against terrorism.

In late May 2011, the United States and the European Commission concluded negotiations on a revised PNR agreement, a draft of which was leaked to the press. According to U.S. officials, this draft PNR accord contained new innovations to enhance the protection of passengers’ personal information. For example, regarding the retention of PNR data, the May 2011 agreement introduced a new provision whereby after six months, portions of a passenger’s record would be depersonalized and “masked” (or hidden); it decreased the time that PNR data would be stored in an “active” database; and progressively restricted the number of authorized personnel with access to the data. U.S. officials contended that the draft accord provided greater legal certainty and clarity on a passenger’s rights to redress, and affirmed that the United States would not make a

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PNR,” *Agence Europe*, May 6, 2010.

<sup>20</sup> Communication from the Commission on the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries, COM/2010/0492, September 21, 2010.

<sup>21</sup> EP Resolution P7\_TA-PROV(2010)0397, November 11, 2010.

<sup>22</sup> “Will Napolitano Change 2007 PNR Accord?,” *Europolitics Transport*, October 12, 2010; Edward Cody, “Armed with New Treaty, Europe Amplifies Objections to U.S. Data-sharing Demands,” *Washington Post*, October 26, 2010; “MEPs Assent to Talks on Airline Passenger Information-sharing,” *Agence Europe*, November 13, 2010.

decision to deny boarding based solely on the automated processing of PNR data. In addition, it recognized that should the EU in the future develop its own PNR system, the parties would consult to determine if it necessitated making any changes to the existing accord in order to ensure full reciprocity between the two systems.<sup>23</sup>

Despite these revisions to the U.S.-EU PNR agreement, press reports indicated that some MEPs remained unsatisfied. They pointed out that the May 2011 version of the accord still allowed the United States to retain passenger data ultimately for up to 15 years (albeit in a “dormant” state after five years), did not reduce the amount of data transferred (the 19 categories remained the same as in the 2007 agreement), and increased the requirement that airlines transmit the data to U.S. authorities from 72 hours before a flight departs to at least 96 hours. Furthermore, some MEPs worried that the new deal broadened the use of PNR data to more criminal offenses than contained in the 2007 iteration.<sup>24</sup>

In October 2011, the House Homeland Security Committee’s Subcommittee on Counterterrorism and Intelligence held a hearing on intelligence-sharing and terrorist travel, at which the negotiations on the U.S.-EU PNR agreement figured prominently. U.S. officials testifying at the hearing asserted that the May 2011 draft of the PNR accord was stronger than the 2007 version, preserving and in some cases improving its operational effectiveness. At the same time, they noted, it addressed all concerns raised by the EU, including those pertaining to data security and protection, the scope of offenses covered, and the right of passengers’ to redress.<sup>25</sup>

Nevertheless, in an effort to further assuage European concerns, U.S. and EU negotiators continued to work on revising the PNR accord. In November 2011, the United States and the EU concluded a new draft PNR agreement, which the European Commission asserted contained “real improvements” over the version leaked in May. Although the November 2011 iteration was similar to the May 2011 version and retained many of its same provisions, two further changes were included that were aimed at meeting EU demands: limiting the use of PNR data specifically to terrorist or other serious transnational crimes that could result in three years or more in prison; and varying the retention time depending on the type of crime under investigation (data would still be retained ultimately for 15 years for terrorist investigations, but only 10 years for investigations into other types of crimes).<sup>26</sup>

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<sup>23</sup> Although the European Commission first floated establishing an EU PNR system in November 2007, progress has been slow because of different member state sensitivities about privacy rights and counterterrorism practices. In February 2011, the Commission presented a new proposal for an EU-wide PNR system. In April 2012, EU member states approved creating an EU PNR system that would oblige airlines to transfer the PNR data of passengers on international flights into and out of EU territory to the member state of arrival or departure; member states would be allowed to collect PNR data from intra-European flights but not required to do so (mandating the inclusion of PNR data from intra-European flights was controversial for some EU members because of data privacy concerns). The European Parliament, however, must still approve establishing this EU PNR system. “PNR-EU27 Outline European System,” *Agence Europe*, April 27, 2012.

<sup>24</sup> Alan Travis, “U.S. To Store Passenger Data for 15 Years,” *The Guardian*, May 25, 2011; Statement by U.S. Ambassador to the EU, William Kennard, on the U.S.-EU PNR Agreement, May 26, 2011.

<sup>25</sup> House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligence, “How DHS Addresses the Mission of Providing Security, Facilitating Commerce and Protecting Privacy for Passengers Engaged in International Travel,” October 5, 2011.

<sup>26</sup> “EU-US PNR Agreement,” *Agence Europe*, November 11, 2011; Valentina Pop, “Unhappy MEPs To Approve Passenger Data Deal,” *EUobserver.com*, November 11, 2011.

In December 2011, EU member states approved the new U.S.-EU PNR agreement, although Germany and Austria abstained because they still viewed the data retention and redress provisions in the new accord as insufficient. Some MEPs shared these concerns, maintaining that the additional changes in the November 2011 PNR accord were largely cosmetic and that it should therefore be rejected. Other MEPs backed the new agreement, noting European Commission arguments that the accord contained stronger data protection guarantees than the 2007 version. A number of MEPs asserted they would vote for the 2011 accord despite some misgivings regarding the data privacy safeguards because in their view, it was better to have an agreement providing the airlines with legal certainty than no agreement at all (the Commission contended that should the Parliament reject this latest version of the PNR agreement, the United States had made clear there would be no further negotiations).<sup>27</sup>

On March 27, 2012, the European Parliament's Civil Liberties Committee endorsed the November 2011 U.S.-EU PNR agreement by a vote of 31 to 23. On April 19, 2012, the full Parliament approved the PNR accord by a vote of 409 to 226, with 33 abstentions. The United States has welcomed the Parliament's endorsement of the PNR accord; U.S. officials assert that it reaffirms the shared commitment of the United States and the EU to countering terrorism and other transnational threats while protecting privacy and other civil rights. The new U.S.-EU PNR agreement took effect on June 1, 2012, and will be valid until 2019.<sup>28</sup>

### **U.S.-EU Data Privacy and Protection Agreement**

Many U.S. and EU leaders believe that law enforcement information-sharing agreements such as SWIFT and PNR are vital tools in the fight against terrorism. At the same time, U.S. officials have often been frustrated by the need for painstaking and often time-consuming negotiations with the EU on every individual agreement that involves sharing personal data between the two sides. For many years, Washington has sought to establish an umbrella agreement in which the EU would largely accept U.S. data privacy standards as adequate and thus make the negotiation of future data-sharing accords easier in the law enforcement arena. In the past, EU officials had largely resisted this idea, claiming that only tailored agreements could guarantee an "added level of protection" for EU citizens against possible U.S. infringements of their privacy rights.

In 2009, the European Parliament called for a U.S.-EU framework agreement to help better ensure the protection of personal data exchanged between the two sides in the fight against terrorism and crime. In late May 2010, the European Commission proposed a draft mandate for negotiating such an accord that could apply to all U.S.-EU data-sharing agreements in the law enforcement context. The Commission hopes that an overarching deal on data protection will bridge what it views as U.S.-EU differences in the application of privacy rights and guarantee that all data transferred is subject to high standards of protection on both sides of the Atlantic. The Commission noted, however, that any such framework agreement would not provide the legal basis for the actual transfer of personal data between the EU and the United States, and that

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<sup>27</sup> "In't Veld Says EU-US PNR Agreement Should Be Rejected," *Agence Europe*, February 2, 2012; "PNR Agreement Will Not Be Renegotiated, Warns Malmstrom," *Europolitics Transport*, February 20, 2012; "MEPs Divided Over EU-US PNR; S&D Very Cautious," *Agence Europe*, February 29, 2012.

<sup>28</sup> "Parliamentary Committee Approves EU-US PNR Agreement," *Agence Europe*, March 28, 2012; Statement by U.S. Ambassador to the EU, William Kennard, on the European Parliament's Endorsement of the U.S.-EU PNR Agreement, April 19, 2012; "MEPs Bring an End to PNR Agreements Saga," *Agence Europe*, April 20, 2012.

specific agreements on SWIFT or PNR, for example, would still be required.<sup>29</sup> EU member states approved the Commission's mandate in early December 2010.

In March 2011, the United States and the EU officially launched negotiations on a framework Data Privacy and Protection Agreement (DPPA) to protect personal information exchanged in a law enforcement context. The United States believes that this U.S.-EU accord should be based broadly on the principle of mutual recognition of each other's data protection systems, thus making it clear that while the U.S. and EU regimes may differ, they both protect citizens' rights to privacy and other civil liberties effectively. As such, the United States hopes that the negotiations will ultimately result in an EU finding of "adequacy" for U.S. data protection standards. Many analysts believe that the DPPA will likely build on the common personal data protection principles adopted by the United States and the EU in October 2009.<sup>30</sup>

U.S. and EU officials assert that considerable progress has been made in negotiating a DPPA, including on provisions related to data security, the transparency of data processing, maintaining the quality and integrity of information, and oversight. However, some controversial issues remain, including purpose limitation, retention times, and redress. Many EU officials and MEPs insist that European citizens need the right of judicial redress in the United States; some experts believe that the EU will likely push for the U.S. Privacy Act of 1974 to be amended to extend judicial redress to EU citizens (currently, the U.S. Privacy Act limits judicial redress to U.S. citizens and legal permanent residents). U.S. experts doubt that the Obama Administration would agree to this potential EU demand, given that Congress would probably not be inclined to pass such an amendment to the Privacy Act. The Administration has long maintained that EU citizens may seek redress concerning U.S. government handling of personal information through agency administrative redress or judicial redress through the U.S. Freedom of Information Act.

Another possible point of contention in U.S.-EU negotiations may be whether or not the DPPA should be applied retroactively to previous U.S.-EU data sharing arrangements. Some EU leaders and MEPs support its retroactive application. However, the United States opposes doing so, arguing that it would create unnecessary legal uncertainty. The member states and the European Parliament must ultimately approve any eventual U.S.-EU DPPA for it to take effect.<sup>31</sup>

## Strengthening Border Controls and Transport Security

According to the U.S. Department of Homeland Security, roughly 30,000 passengers arrive daily from Europe at U.S. ports of entry, as do more than 3,000 commercial containers.<sup>32</sup> Over the last decade, the United States and the EU have emphasized cooperation in the areas of border control

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<sup>29</sup> European Commission Press Release, "European Commission Seeks High Privacy Standards in EU-US Data Protection Agreement," May 26, 2010.

<sup>30</sup> For more information, see U.S. Department of State Press Release, "U.S., EU Reach Agreement on Common Personal Data Protection Principles," October 28, 2009.

<sup>31</sup> "Data Protection in Transatlantic Relations: Searching for a Framework Agreement," European Parliament News, October 27, 2010; "Data Protection: EP Debates Adoption of Common Framework," *Europolitics*, October 27, 2010; U.S. Department of Justice Press Release, "Joint Statement on the Negotiation of a EU-U.S. Data Privacy and Protection Agreement by Attorney General Eric Holder and European Commission Vice-President Viviane Reding," June 21, 2012.

<sup>32</sup> Testimony of Mark Koumans, Deputy Assistant Secretary for International Affairs, U.S. Department of Homeland Security, before the House Foreign Affairs Committee, Europe and Eurasia Subcommittee, "Overview of Security Issues in Europe," May 5, 2011.

and aviation and maritime security, and have concluded several agreements on such issues. The two sides have pledged to enhance international information exchanges on lost and stolen passports and to promote travel document security through the use of interoperable biometric identifiers. In 2010, the United States and the EU issued a joint declaration on aviation security, pledging to intensify U.S.-EU efforts to strengthen aviation security measures worldwide, and U.S.-EU collaboration played a key role in forging an International Civil Aviation Organization (ICAO) declaration on aviation security, agreed to by 190 countries. Recently, the United States and the EU have placed considerable emphasis on improving cargo security and strengthening global supply chain security. In a joint statement in June 2011, the United States and the EU reaffirmed their determination to bolster supply chain security and foster greater global cooperation on this issue. At the same time, U.S. and EU officials continue to grapple with finding the appropriate balance between improving border security and facilitating legitimate transatlantic travel and commerce.

### **Aviation and Air Cargo Security**

Since the 2001 terrorist attacks in which airplanes were used as weapons, both the United States and the EU have implemented a range of measures aimed at improving aviation security.<sup>33</sup> Several incidents over the last few years have brought aviation and air cargo security to the forefront of U.S.-EU discussions again, especially the December 2009 attempt by a Nigerian passenger to blow up an airliner en route from Amsterdam to Detroit with a device concealed in his underwear; and the thwarted October 2010 “Yemen bomb plot,” in which two Chicago-bound printer cartridge packages containing explosives were shipped from Yemen on various cargo and passenger flights (one package was transferred in Germany before being intercepted in the UK). The discovery in May 2012 of a plot to down a civilian aircraft using a device similar to the one used in the December 2009 attempt highlights the continuing terrorist threat to aviation.

Many U.S. and EU rules and regulations implemented since 2001 have coincided closely, and the two sides have sought to work together to overcome conflicts and bridge gaps in their respective policies given the significant volume of transatlantic flights (more than 2,500 every week). For example, in 2003, some EU countries objected to new U.S. rules requiring armed air marshals on certain flights to and from the United States; U.S. officials pledged to consider alternative measures for European countries opposed to armed air marshals. Moreover, in 2008, the United States and the EU reached an agreement on coordinating air cargo security measures.<sup>34</sup> Among other provisions, the two sides pledged to institute commensurate systems to ensure the security of all cargo on passenger flights between their respective territories, in part to comply with a provision in the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) that mandates 100% screening of cargo transported on U.S. domestic and U.S.-bound international passenger flights equivalent to the level of security used for checked baggage.<sup>35</sup>

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<sup>33</sup> The EU first adopted common rules on aviation security in 2002, detailing measures regarding access to sensitive airport areas, aircraft security, passenger screening and baggage handling, among others. These measures were revised and updated in 2008 and became fully applicable in April 2010.

<sup>34</sup> Ned Levi, “TSA To Finally Screen Air Cargo on Passenger Flights,” *Consumer Traveler*, November 4, 2008. The text of the 2008 U.S.-EU agreement on air cargo security is available at: [http://www.tsa.gov/assets/pdf/eu\\_us\\_enhancing\\_air\\_cargo\\_security.pdf](http://www.tsa.gov/assets/pdf/eu_us_enhancing_air_cargo_security.pdf).

<sup>35</sup> While not all cargo transported on international passenger flights inbound to the United States is currently being screened as mandated in P.L. 110-53, the U.S. Transportation Security Administration (TSA) maintains that 100% of cargo departing U.S. airports and 100% of identified high-risk international cargo destined for the United States (continued...)

In June 2012, the United States and the EU announced that they had reached an agreement on an air cargo security partnership, in which each side will recognize the other's air cargo security regime, thereby eliminating duplication of security controls and the need to implement different regimes depending on the destination of air cargo. U.S. and EU officials assert that this mutual recognition of air cargo security regimes will enhance cargo security and result in huge savings for U.S. and European cargo operators in terms of both time and money, improving the speed of transatlantic shipments and reducing costs. As part of the agreement, both sides also pledged to exchange information on the evolution and the implementation of their security regimes. According to press reports, EU officials assert that this mutual recognition agreement will enable European operators to meet the U.S. requirement for 100% screening of cargo on passenger planes bound for the United States from abroad contained in the Implementing Recommendations of the 9/11 Commission Act of 2007, noted above.<sup>36</sup>

Despite a shared commitment to promote U.S.-EU cooperation in the areas of aviation and air cargo security, some differences in perspective remain. In the aftermath of the failed 2009 attack, the United States accelerated installation of body scanners at U.S. airports and encouraged the EU to follow suit. Although some EU countries and leaders support installing body scanners at European airports, other EU member states have been hesitant due to concerns that the scanners could compromise privacy rights and pose health dangers. Some European Parliamentarians have also expressed similar worries about body scanners. However, in July 2011, the Parliament backed the use of body scanners at EU airports provided that safeguards are instituted to protect passenger privacy and ensure passenger health; the safeguards recommended by the EP included the requirement that scans only produce stick figure images and not body images, and a ban on x-ray scans (an alternative millimeter wave scan was permitted instead). The EP also asserted that the use of the scanners should be voluntary, with passengers having the right to opt for a manual search instead. In November 2011, the European Commission adopted the EP's conditions in setting common standards for the use of body scanners at EU airports, but member states are not required to deploy such scanners and some are unlikely to do so.<sup>37</sup>

U.S. officials are also concerned about planned changes to EU regulations governing liquids and gels in carry-on baggage on board planes. Following the August 2006 disruption of a plot to use liquid explosives to blow up transatlantic flights, the United States and the EU began prohibiting passengers from carrying most liquids and gels on board planes. The United States has worked with the EU and other countries to harmonize the small amounts of travel-sized liquids and gels that are permitted in carry-on baggage in an effort to minimize inconvenience to international travelers. In 2010, however, the EU announced plans to eliminate all restrictions on liquids in

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currently undergoes screening; TSA has set December 2012 as the deadline by which all inbound cargo on international passenger flights must be screened. For more information, see CRS Report R41515, *Screening and Securing Air Cargo: Background and Issues for Congress*, by Bart Elias.

<sup>36</sup> European Commission Press Release, "EU-US Security Agreement Allows Cheaper and Faster Air Cargo Operations," June 1, 2012; U.S. Transportation and Security Administration (TSA) Press Release, "TSA and EU Achieve Unprecedented Air Cargo Security Through Agreement," June 1, 2012; Nicola Clark, "U.S. and European Union Agree on Air Cargo Security," *New York Times*, June 1, 2012.

<sup>37</sup> For example, the UK, the Netherlands, France, and Italy have been trying out full-body scanners at their airports, but Germany, Spain, and some Nordic countries remain more cautious about using the scanners. "EU Puts Off Reply To U.S. Request for Airport Body Scanners," *Agence France Presse*, January 21, 2010; "Body Scanner Approved by EP, with Conditions," *Agence Europe*, July 7, 2011; "Europe Sets Rules for Airport Body Scanners," *Agence France Presse*, November 14, 2011.

cabin baggage by 2013, following the introduction of liquid screening equipment in all EU airports. Some U.S. policymakers question the effectiveness of current liquid-screening technology and believe it is premature to ease the liquid and gel restrictions. The United States and the EU are reportedly discussing the issue of relaxing EU liquid and gel restrictions in an effort to meet the EU's 2013 goal while maintaining adequate airline security.<sup>38</sup>

## Maritime Cargo Screening

In April 2004, the United States and the European Union signed a customs cooperation accord; among other measures, it calls for extending the U.S. Container Security Initiative (CSI) throughout the EU. CSI stations U.S. customs officers in foreign ports to help pre-screen U.S.-bound maritime cargo containers to ensure that they do not contain dangerous substances such as explosives or other weapons of mass destruction. Ten EU member states currently have ports that participate in CSI.

In May 2012, the United States and the EU agreed to recognize each other's trusted shipper programs in an effort to improve supply chain security and boost trade opportunities. This mutual recognition accord is intended to speed up customs procedures for some 15,000 U.S. and European companies designated as "trusted traders" by either the U.S. Customs-Trade Partnership Against Terrorism (C-TPAT) program or the EU's Authorized Economic Operators (AEO) regime. U.S. and EU officials hope this agreement will not only lower costs and simplify procedures for trusted traders but also allow customs authorities to concentrate limited resources on risky consignments and better facilitate legitimate transatlantic trade.

Recently, U.S.-EU tensions have receded over a provision in the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) that set a five-year goal of scanning at foreign ports of loading all containers bound for the United States for nuclear devices. Although European leaders supported the use of radiation detection and container imaging to increase cargo and freight security in principle, they viewed 100% container scanning as unrealistic, and argued that it could disrupt trade and place a heavy financial burden on EU ports and businesses. U.S. officials in both the Bush and Obama Administrations shared these concerns about the cost and effectiveness of 100% scanning, suggesting that it could result in lower profits and higher transportation costs for U.S. importers; they also pointed out that the United States and Europe already had programs in place to identify high risk cargo shipments and target them for further inspection. In May 2012, the U.S. Department of Homeland Security notified Congress that it was extending the July 2012 100% scanning deadline by two years. Proponents of 100% scanning continue to urge its full implementation, arguing that the manifest data currently used by U.S. and European authorities to determine which containers need closer scrutiny is not an adequate basis for determining risk.<sup>39</sup>

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<sup>38</sup> In April 2011, the European Commission deferred plans to lift EU restrictions on "duty-free" liquids and gels in carry-on baggage (in what had been intended as the first phase of its plan to eliminate all such restrictions by 2013) amid concerns about airline security and flight delays from some EU governments and segments of the airline industry. Nicola Clark, "Europe Postpones Easing Rules on Carrying Liquids on Planes," *New York Times*, April 30, 2011.

<sup>39</sup> "EU Hits at U.S. Plan To Scan Containers," *Financial Times*, August 2, 2007; "U.S. Cargo Scanning Law Unfair," Reuters, March 10, 2008; "Underwear Bomber Could Have Evaded Full Body Scanner," *Europolitics*, March 29, 2010; "New Customs Pact Spells Likely End to 100% Scanning Rule," *Europolitics*, May 7, 2012.

## **Visa Waiver Program (VWP)**

For many years, the United States and the EU were at odds over the U.S. Visa Waiver Program (VWP) and the EU's desire to have it applied equally to all EU members. The VWP allows for short-term visa-free travel for business or pleasure to the United States from 36 countries, most of which are in Europe. New EU members were eager to join the VWP, but most were excluded for years due to problems meeting the program's statutory requirements. Although some Members of Congress had long expressed skepticism about the VWP in general because of security concerns (noting that terrorists with European citizenship have entered the United States on the VWP), other Members were more supportive of extending the VWP to new EU members (especially those in central and eastern Europe) given their roles as U.S. allies in NATO and in the fight against terrorism.

In July 2007, Congress passed the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53), which included changes to the VWP aimed at both strengthening the program's security components and allowing more EU members (and other interested states) to qualify. Among other measures, P.L. 110-53 called on VWP participants to meet certain security and passport standards and to sign on to a number of information-sharing agreements; at the same time, it eased other admission requirements to make it easier for some EU member states to join the VWP. As a result, 23 of the EU's 27 member states now belong to the VWP. The EU, however, continues to encourage the United States to admit the remaining four EU members (Bulgaria, Cyprus, Poland, and Romania) to the VWP as soon as possible.

Some European policymakers also remain irritated by new rules requiring visitors entering the United States under the VWP to submit biographical information to U.S. authorities through the web-based Electronic System for Travel Authorization (ESTA) at least two days before traveling. The creation of ESTA was mandated by Congress in P.L. 110-53 as one way to help increase the security of the VWP; ESTA became operational for all VWP countries in January 2009. ESTA checks the biographical information submitted against relevant law enforcement databases; those individuals not approved under ESTA must obtain a U.S. visa. Some EU officials contend that ESTA essentially comprises a new type of visa requirement, is a hardship for some last-minute business travelers, and infringes on EU privacy and data protection rules; many European policymakers and citizens also bristle at the \$14 fee for ESTA processing imposed since September 2010. U.S. authorities counter that ESTA only requires the same information as that required on the current I-94W paper form that VWP visitors must complete en route to the United States, and that ESTA approval is good for two years and valid for multiple entries.<sup>40</sup>

## **Detainee Issues and Civil Liberties**

U.S. and European officials alike maintain that the imperative to provide freedom and security at home should not come at the cost of sacrificing core principles with respect to civil liberties and upholding common standards on human rights. Nevertheless, the status and treatment of suspected terrorist detainees has often been a key point of U.S.-European tension. Especially during the former George W. Bush Administration, the U.S.-run detention facility at Guantánamo Bay, Cuba; U.S. plans to try enemy combatants before military commissions; and the use of

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<sup>40</sup> For more on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin. Also see, Julia Werdigier, "European Officials Broadly Criticize U.S. Airport Security Methods," *New York Times*, October 28, 2010.

“enhanced interrogation techniques” came under widespread criticism in Europe. The U.S. practice of “extraordinary rendition” (or extrajudicial transfer of individuals from one country to another, often for the purpose of interrogation) and the possible presence of CIA detention facilities in Europe also gripped European media attention and prompted numerous investigations by the European Parliament, national legislatures, and judicial bodies, among others.<sup>41</sup>

Many European leaders and analysts viewed U.S. terrorist detainee, interrogation, and “extraordinary rendition” policies as being in breach of international and European law and as degrading shared values regarding human rights and the treatment of prisoners. Moreover, they feared that such U.S. policies weakened U.S. and EU efforts to win the battle for Muslim “hearts and minds,” considered by many to be a crucial element in countering terrorism. The Bush Administration, however, defended its detainee and rendition policies as important tools in the fight against terrorism, and vehemently denied allegations of violating U.S. human rights commitments, including the prohibition against torture. Bush Administration officials also acknowledged European concerns about Guantánamo and sought agreements with foreign governments to accept some Guantánamo detainees, but maintained that certain prisoners were too dangerous to be released.

U.S.-EU frictions over terrorist detainee policies and practices have subsided to some degree since the start of the Obama Administration. EU and other European officials welcomed President Obama’s announcement in January 2009 that the United States intended to close the detention facility at Guantánamo within a year. They were also pleased with President Obama’s executive order banning torture and his initiative to review Bush Administration legal opinions regarding detention and interrogation methods.

At the same time, the Obama Administration has faced significant challenges in its efforts to close Guantánamo. In March 2009, the U.S. State Department appointed a special envoy tasked with persuading countries in Europe and elsewhere to accept detainees cleared for release but who could not be repatriated to their country of origin for fear of torture or execution. Although some EU members have accepted (or pledged to accept) small numbers of released detainees, others have declined. Some observers contend that U.S. officials are frustrated with European reluctance to take in more detainees. Congressional opposition to some elements of the Administration’s plan for closing Guantánamo has also posed obstacles. As a result of these various difficulties, the Obama Administration’s original one-year deadline for shutting down Guantánamo was not met.

The Administration asserts that it remains committed to closing the detention facility, but in March 2011, President Obama signed an executive order that in effect creates a formal system of indefinite detention for those detainees at Guantánamo not charged or convicted but deemed too dangerous to free. The Administration also announced an end to its two-year freeze on new military commission trials for Guantánamo detainees. European reaction has been largely muted, but some European policymakers worry that as long as Guantánamo remains open, it helps serve as a recruiting tool for Al Qaeda and its affiliates. Meanwhile, some U.S. and European officials remain concerned that allegations of U.S. wrongdoing and rendition-related criminal proceedings

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<sup>41</sup> In September 2012, the European Parliament passed a non-binding resolution (by 568 votes to 34, with 77 abstentions) calling upon EU member states to investigate whether CIA detention facilities had existed on their territory. The resolution urged Lithuania, Poland, and Romania in particular to open or resume independent investigations, and called on several other member states to fully disclose all relevant information related to suspected CIA flights on their territory. See EP Resolution A7-0266/2012, September 11, 2012.

against CIA officers in some EU states (stemming from the Bush era) continue to cast a long shadow and could put vital U.S.-European intelligence cooperation against terrorism at risk.<sup>42</sup>

## U.S. Perspectives and Issues for Congress

Successive U.S. administrations and many Members of Congress have supported efforts to enhance U.S.-EU cooperation against terrorism since the 2001 terrorist attacks. Although some skeptics initially worried that such U.S.-EU collaboration could weaken strong U.S. bilateral law enforcement relationships with EU member states, the George W. Bush Administration essentially determined that the political benefits of engaging the EU as an entity on police and judicial matters outweighed the potential risks given Europe's role as a key U.S. law enforcement partner. They also hoped that improved U.S.-EU cooperation on border controls and transport security would help authorities on both sides keep better track of suspected terrorists and prevent them from entering the United States or finding sanctuary in Europe.

At the same time, some observers note that U.S.-EU counterterrorism cooperation is complicated by different EU and member state competencies, and U.S. policy preferences. An increasing number of policy areas relevant to counterterrorism—including data protection, customs, and visas—fall under the competence of the Union (i.e., EU members adopt a common policy, agree to abide by its terms, and negotiate collectively with other countries). However, at times, the United States continues to prefer to negotiate on some issues—such as the VWP—bilaterally, and observers assert that this disconnect can lead to frictions in the U.S.-EU relationship.

Nevertheless, both the United States and the EU appear committed to fostering closer cooperation in the areas of counterterrorism, law enforcement, border controls, and transport security. As noted above, the Obama Administration has largely continued the Bush Administration's policy of engagement with the EU in these areas. Congressional decisions related to improving U.S. travel security and border controls, in particular, may affect how future U.S.-EU cooperation evolves. Data privacy, aviation and cargo security, and visa policy will continue to be salient issues for Congress in this respect.

In addition, given the European Parliament's growing influence in many of the areas related to counterterrorism and its new role in approving international agreements—such as the U.S.-EU SWIFT and PNR accords—Members of Congress may increasingly be able to help shape Parliament's views and responses. Some Members of Congress have ongoing contacts with their counterparts in the Parliament, and the existing Transatlantic Legislators' Dialogue (TLD) brings members of the European Parliament and the U.S. House of Representatives together twice a year to discuss a wide range of topical political and economic issues. Some Members of Congress and European Parliamentarians have recently expressed interest in strengthening ties and cooperation further. Such exchanges could provide useful opportunities for enhancing transatlantic dialogue on the wide range of counterterrorism issues facing both sides of the Atlantic.<sup>43</sup>

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<sup>42</sup> "EU Investigation of CIA Flights May Threaten Intelligence Cooperation," Associated Press, February 28, 2007; "The Dark Pursuit of the Truth," *The Economist*, July 30, 2009; "Europeans Still Resisting Obama Over Guantanamo Inmates," *Deutsche Welle*, February 17, 2010; Peter Finn and Anne Kornblut, "Obama Creates Indefinite Detention System for Prisoners at Guantánamo Bay," *Washington Post*, March 8, 2011.

<sup>43</sup> For more information, see CRS Report R41552, *The U.S. Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation*, by Kristin Archick and Vincent Morelli.

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