The European fight against terrorism financing: Professional fields and new governing practices
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Citation for published version (APA):
Wesseling, M. (2013). The European fight against terrorism financing: Professional fields and new governing practices

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Chapter 4.

Transatlantic Perspectives on the ‘SWIFT Affair’

4.1 ‘Bank Data Is Sifted by U.S. in Secret to Block Terror’

On 23 June 2006, the New York Times showed the headline “Bank Data Is Sifted by U.S. in Secret to Block Terror,” disclosing the existence of the Terrorist Financing Tracking Program (TFTP). That same day the Los Angeles Times, the Washington Post and the Wall Street Journal also published their investigations into the programme. The articles revealed a secret programme to track terrorist finances, initiated by the CIA in the weeks after the 9/11 terrorist attacks and overseen by the US Treasury Department’s Office of Foreign Asset Control (OFAC). This programme involved the analysis of millions of banking transactions worldwide through access to the financial records stored in the database of a Belgian cooperative called Society for Worldwide Interbank Financial Telecommunication (SWIFT).

Established by a group of banks in 1973, SWIFT offers its members services to facilitate the (international) transmission of financial messages worldwide through an automated standardized messaging service and interface software. The cooperative is the main financial messenger service in the world and claims to handle 80% of financial transfers worldwide.10 When the TFTP started in 2001, 7457 banks in 196 countries used the services offered by SWIFT and sent a total of 1,534 billion messages.11 The messages transferred through SWIFT’s messaging system, called ‘SWIFTNet FIN’, contain information such as the name, address, and location of the sender and the receiver as well as the amounts of money involved.

The TFTP illustrates the Bush administration’s philosophy of exploiting technological tools to prevent future terrorist attacks. It is based on a ‘proactive form of prevention in which the rationale is to “act before the other” to prevent harmful events from happening’ (Amicelle, 2011, p. 5). In this respect, the SWIFT database is particularly attractive as it constitutes the information hub of a very large part of the formal financial sector. From the perspective of intelligence services, the SWIFT database brings together very detailed information on financial transactions worldwide. While it is impossible to control all individual payment orders from any ordering customer to his or her bank somewhere on the globe, an important
part of this information can be collected in the form of standardized and encrypted SWIFT messages sent through the SWIFTNet FIN service. By analysing massive amounts of international bank transactions available in the SWIFT database, it becomes possible to trace suspected terrorists at an early stage and without issuing separate information requests to individual banks. The data contained in the SWIFT database also permit intelligence services to establish large networks of potential terrorism suspects by mapping the transactions between individuals. Moreover, the relative anonymity of SWIFT outside the financial sector was considered an advantage for using its financial data as a preventive tool in the War on Terror.

Immediately following the disclosure of the programme a vivid debate on the TFTP emerged among politicians, privacy and data protection authorities, civil liberties groups, and the media both in the EU and in the US. In what became known quickly as the ‘SWIFT affair’, questions were raised concerning the legality of the programme, the privacy aspects of financial data, the responsibility of the media, and the relationship between the US and the EU with respect to security cooperation (De Goede, 2012). Less noticed, the debate also included questions about the value of the pursuit of terrorist monies, the political effect of the deployment of risk technologies, and even the suggestion of the leader of the EP’s Civil Liberties Committee at that time that the TFTP itself should be a matter of debate (European Parliament, 2006a).

As Huysmans and Buonfino (2008) have shown, the analysis of political debates helps us to understand how political élites position themselves in parliamentary debates and how political issues are framed. Their work shows, for instance, how the nexus between terrorism and immigration has been politically sustained, the unsuccessful attempts as well as the reluctance to instrumentalise this debate for political gain, and the discontinuity of such debates.

This chapter investigates the debates on the SWIFT affair that emerged between 2006 and 2010 in the US and the EU. How was the SWIFT affair framed in the public debates in the US and the EU? Which issues were considered important once the programme became public and which issues were not discussed? How did debates change over time and how may this be understood? Or more specifically, how did the Terrorist Finance Tracking Programme become uncontroversial after the initial indignation expressed in newspapers? Answering these questions provides us with insights into the issues that became politicized through the disclosure of the SWIFT affair. It also highlights the arguments that have disappeared from the debates. Based on this analysis I argue that in the SWIFT affair power was exercised
through the ‘depoliticization’—a reduction of the political debate to technical or procedural questions—of the TFTP but also through a ‘depoliticized’ understanding of the European fight against terrorism finance in general.

Furthermore, investigating the debates emerging from the SWIFT affair shows how power is exercised and how the political process transformed a potentially wide political and societal debate into a narrow and ‘depoliticized’ understanding of the TFTP. As such it becomes visible how a new field of governing the SWIFT affair emerged and operates. In this field of governing, participants initially held differing and even contesting definitions of the problem. However, they gradually converged to a shared understanding of the issues at stake in the SWIFT affair, although they might still hold diverging opinions on the ‘resolution’ of these shared issues. The chapter also aims to make the wider political debate visible again in order to offer alternative readings and make a more comprehensive evaluation of the TFTP possible.

Although the focus of this chapter is on the EU, it is equally important to study the debates in the US. First, the TFTP was initiated by the US government and most information about the working of the programme was revealed by the American press. Secondly, the American reaction to the disclosure of the TFTP and the opinions of the Bush and Obama administrations regarding the programme are relevant for understanding the year-long transatlantic controversy and negotiations that followed between the US and the EU. Thirdly, the analysis of debates both in the US and in the EU allows for a comparison of the content of the debates and the processes of politicization and depoliticization and provides a deeper insight into how the debates in the EU mirrored or differed from the US debates.

The remainder of this chapter is structured as follows. The next section introduces the notions of politicization and depoliticization in greater detail. Subsequently, the debate on the SWIFT affair in the US will be analysed through these notions, followed by a section on the EU. This analysis is mainly based on European and American newspaper articles but also considers information obtained through interviews, official statements made by governments and SWIFT, parliamentary debates and hearings, most notably in the European Parliament and to a lesser extent in the US Congress, and reports and statements published by data protection agencies and civil liberties groups and in a few cases on internet blogs. The conclusion of the chapter advocates a ‘repoliticization’ of the SWIFT discussion in which the political and societal implications of the TFTP are discussed.
### Detailed timeline of the SWIFT affair 2001-2010

<table>
<thead>
<tr>
<th>Year</th>
<th>Month</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>September</td>
<td>Attacks on the towers of the World Trade Center, the Pentagon, and a fourth unknown target.</td>
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<td></td>
<td>September</td>
<td>The transfer of data from the SWIFT database started within two weeks of the 9/11 attacks.</td>
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<td></td>
<td>October</td>
<td>The UST issued its first subpoena to SWIFT.</td>
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<td>2002</td>
<td>February</td>
<td>The National Bank of Belgium is informed about the TFTP.</td>
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<td></td>
<td>21 April</td>
<td>Central Banks of the G-10 countries are informed about the TFTP during a G-10 meeting.</td>
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<td></td>
<td>June</td>
<td>ECB is informed about the TFTP.</td>
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<tr>
<td></td>
<td>Date unknown</td>
<td>Some selected members of the US Congress are informed about the TFTP.</td>
</tr>
<tr>
<td>2003</td>
<td>8 May</td>
<td>SWIFT officials are invited for a high-level visit to the White House.</td>
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<tr>
<td>2006</td>
<td>Spring</td>
<td>Some members of US Congressional committees are informed about the TFTP.</td>
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<tr>
<td></td>
<td>22 June</td>
<td>The NY Times decides to publish about the TFTP. Late that night US Under-Secretary of the Treasury Stuart Levey is interviewed to give his reaction on the programme.</td>
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<tr>
<td></td>
<td>27 June</td>
<td>Privacy International files a complaint in 33 countries about the transfer of personal data from SWIFT to the US Government.</td>
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<td></td>
<td>29 June</td>
<td>US House of Representatives and Senate adopt resolutions supporting the TFTP.</td>
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<td></td>
<td>5 July</td>
<td>Plenary session in the European Parliament on the SWIFT affair.</td>
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<td></td>
<td>27 September</td>
<td>Belgian Privacy Commission Opinion on the transfer of personal data by SWIFT by virtue of UST subpoenas.</td>
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<td></td>
<td>4 October</td>
<td>European Parliament public hearing on the interception of bank transfer data from the SWIFT system by the US Secret Service.</td>
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<td></td>
<td>22 November</td>
<td>Art. 29 WP Opinion 10/2006 on the processing of personal data by SWIFT.</td>
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<tr>
<td></td>
<td>20 December</td>
<td>Belgian Privacy Commission opinion regarding the preparation of an EU-US agreement regarding the transfer of SWIFT data.</td>
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<tr>
<td>2007</td>
<td>1 February</td>
<td>EDPS opinion on the role of the ECB in the SWIFT case.</td>
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<tr>
<td></td>
<td>28 June</td>
<td>US Treasury adopts a set of unilateral commitments called “representations”.</td>
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<td></td>
<td>16 July</td>
<td>SWIFT joins the Safe Harbour Programme.</td>
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<td>2008</td>
<td>7 March</td>
<td>Appointment of Judge Jean-Louis Bruguière as “eminent European person.”</td>
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<td></td>
<td>9 December</td>
<td>Final Decision of the Belgian Privacy Commission.</td>
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<td></td>
<td>December</td>
<td>First Bruguière report published.</td>
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<tr>
<td>2009</td>
<td>3 September</td>
<td>European Parliament hearing on the EU-US interim agreement following the entry into force of the new SWIFT architecture.</td>
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<tr>
<td></td>
<td>30 November</td>
<td>Adoption of an interim agreement between the EU and the US.</td>
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<tr>
<td>2010</td>
<td>January</td>
<td>Second Bruguière report published.</td>
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<tr>
<td></td>
<td>1 February</td>
<td>The interim EU-US agreement enters into force.</td>
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<td></td>
<td>24 March</td>
<td>Reopening of the negotiations for a EU-US agreement and the Commission’s announcement of an EU equivalent to the TFTP.</td>
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<td></td>
<td>6 May</td>
<td>Biden speech before the European Parliament.</td>
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<td></td>
<td>25 July</td>
<td>EDPS opinion on the new draft EU-US agreement on financial data transfers.</td>
</tr>
<tr>
<td></td>
<td>1 August</td>
<td>The TFTP continues under a new EU-US agreement.</td>
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Table 4.1 Detailed timeline of the SWIFT affair.
4.2 (De)politicization of the SWIFT Affair

The comparison between the European Parliament’s (EP) first debate on the SWIFT affair on 5 July 2006 and the debate in May 2010, not long before conclusion of a long-term EU-US agreement on the transfer of financial data from the SWIFT database, is marked by a sharp contrast. The first debate, and more generally the first phase of debates on the SWIFT affair on both sides of the Atlantic, was characterized by a multiplicity of political questions. In the EP’s debates of 5 July 2006, for instance, Dutch MEP Sophie in ’t Veld intervened and expressed her concerns with regard to the topic from the perspective of privacy, data protection, transparency towards citizens, the effectiveness of the programme in combating terrorism, transatlantic relations, and the US record on respecting international agreements under the Bush administration (European Parliament, 2006a). In May 2010, the debate was much more limited and was centred around a set of ‘technical’ questions. Resisting the pressure from US Secretary of State Hillary Clinton, Vice-President Joe Biden, and even President Obama, the EP’s main concern at this later date was the respect for European personal data protection rules and in particular the transfer of bank data ‘in bulk’ to the US authorities (European Parliament, 2010e).

This distinction in the kind of questions debated can be described as a distinction between questions belonging to the sphere of ‘politics’ and those belonging to the sphere of the ‘political’. Starting with the former, Jenny Edkins defines politics as the political in the narrow sense, including but not strictly confined to the doings of governments, the state apparatus, day-to-day decision-making, and technologies of governance (1999, p. 2). With regard to the SWIFT affair, the reactions of the political elite, the negotiation and conclusion of agreements between the EU and the US and, the adoption of resolutions in the European Parliament are examples of politics. The political in the broader sense sets out what ‘gets to count as “politics”’ (in the narrow sense) and what ‘defines other areas of social life as not politics’ (ibid.). In other words, the political is a process, a struggle, shaping the form of society and defining which issues are at stake. In Foucault’s terminology the political can be seen as the process of defining a ‘regime of truth’. This moment of definition is ‘marked by the articulation of a particular type of discourse and a set of practices, a discourse that on the one hand constitutes these practices as a set bound together by an intelligible connection and, on the other hand legislates and can legislate on these practices in terms of true or false’ (Foucault, 2008, p. 18).

Edkins’s understanding of politicization refers to the political in the broad sense. She
states that ‘[i]ronically what we call “politics” is an area of activity that in modern Western society is “depoliticized” or “technologized”’ (1999, p. 1). This, she continues, is not ‘an absence of the political through some sort of lapse or mistake but an express operation of depoliticization or technologization: a reduction to calculability’ (ibid.). It implies that politics consists mainly of preset procedures, norms, rules, and laws, tending to exclude the questioning of the political order itself, that is, the political. On the other hand, examining and calling into question the representation of power is in Edkins’ view the very essence of (re)politicization. This happens for instance when one social order has not yet been replaced by a new one (1999).

This instance of the political is what Žižek calls a ‘moment of openness’ (2008a, p. 188). During this ‘moment of undecidability’, ‘the turning point “when something is happening”’, a new reading of society is produced which can subsequently become legitimized (p. 189). In this moment a multiplicity of questions can be freely discussed in the absence of a dominant reading or interpretation. When decisions are taken and a new social order has been established, the moment of openness ‘becomes invisible’ and seems to be forgotten (p. 188, emphasis in original).

An alternative understanding of politicization is given by Huysmans and Buonfino (2008). Researching the argument of a nexus between immigration and terrorism in debates of the UK parliament, they consider that politicization does occur in the sphere of politics. They speak of ‘intense politicization’ when an argument is strongly defended or contested (2008, pp. 778-779). Politicization is analysed in terms of political dividing lines, the use of political terminology, and the specific renderings in political positioning and justifying measures. By creating contexts of unease, for instance, the use of smart technology can be presented as a solution to reassure citizens that they are safe and that the government is able to protect them (2008, p. 783). For Edkins this political positioning would be a form of depoliticization.

In a similar way, depoliticization can be understood as taking place in the spheres of both politics and the political. For Edkins depoliticization is linked to politics. To illustrate this she takes up two cases: the case of famines or more broadly humanitarian crises, and securitization. She argues that international actors analyse these emergency situations in technical terms, for instance in terms of food production and nutrition values and sometimes ‘social’ factors (1999, p. 10). By taking this approach, political questions or motivations that may have caused or influenced the emergency do not have to be taken into account. The exclusion of political debate is even more prominent when issues are securitized. If something is considered as an issue of national security, for instance terrorism finance, certain questions
are no longer open for debate. According to Edkins and contrary to mainstream literature in security studies, securitization is a stronger form of depoliticization. ‘When issues are “securitized”, they are even more firmly constrained within the already accepted criteria of a specific social form. And that constraint is even more firmly denied’ (1999, p. 11).

Marieke de Goede has analysed what she considers among modern society’s most depoliticized areas of activity: finance and economics (2005, p. 2). Like Edkins she highlights how financial practices and theory are technologized and presented as a matter of objective and scientific calculation through statistics, formulas, instruments, and indicators. Creating this image of a stable, natural, and objective financial system renders financial practices uncontroversial and places them beyond discussion. She also raises another important aspect of depoliticization. Taking speculation as an example, she demonstrates that it was the adoption of financial regulations after the 1929 crash that ‘made it possible to reify financial practices by erasing traces of their controversial, religious, cultural, moral, gendered and political origins’ (2005, p. 124). It is the ‘normalization’ of these practices through the adoption of a legal framework that legitimizes them.

According to Žižek not only politics is depoliticized but so is the political. In this respect, he speaks of ‘a worldwide sphere of “moderate post-politics”’ (2002, p. 135). Inspired by Rancière, Žižek means by post-politics ‘a politics that claims to leave behind old ideological struggles and instead focus on expert management and administration’ (Žižek, 2009, p. 48, see also Žižek 2008b). In Žižek’s analysis of the political this means that the currently dominant Western liberal consensus declares all realistic alternatives to capitalism impossible and reduces politics to managing capitalism and ignoring political opposition (Žižek, 2002, p. 135). More specifically, he states that the current focus of political discourses on identity has a depoliticizing effect. By first transforming ‘politics’ into ‘cultural politics’ new questions are opened up, hence politicized, but other questions about the foundations of our society are no longer asked. To illustrate this, he claims that postmodern identity politics explains economic inequality referring to racism and intolerance, implicitly abandoning questions on the nature of relationships of production and whether democracy, the state, and capitalism are the ultimate horizons of our political organisation (Hanlon, 2001, pp. 10-11). In the Foucauldian terms, one could say that postmodern identity politics offers a new ‘regime of truth’ by which certain of the previous debates become seen as irrelevant and disappear as objects of debate.

In perhaps less provocative terms, Judt describes this same intellectual shift, paraphrasing Kundera, as ‘the unbearable lightness of politics’ (2010). He argues that since
Thatcherism and Reaganism, ‘the state became reduced to that of facilitator’, ‘reducing public conversation to a debate cast in narrowly economic terms’ (2010, p. 97). Economic jargon dominates the political conversation, appreciating public services only in measurable terms of ‘productivity’, ‘efficiency’, ‘output’, and ‘impact’ instead of in terms of societal values such as providing good quality services responding to collective needs. As a consequence, political questions, for instance whether a certain measure brings about a better world and how we define a better world, are not asked and politics itself becomes insignificant.

These scholars differ sharply in their views of how to ‘repoliticize’ the depoliticized discourses they investigate. With respect to the post-political, Žižek is rather pessimistic about the possibility of repoliticization, which he calls the emergence of an act ‘that changes the very horizon in which it takes place’ (Hanlon, 2001, p. 11). He believes that ‘in politics the space for an act is closing viciously’ and that ‘politics, for some foreseeable time is no longer a domain where acts are possible’ (ibid., p. 12). On the other hand, De Goede and Edkins assert that repoliticization can take place by interrupting or disrupting the dominant discourses, ‘questioning that which is considered to be normal, natural and, most importantly scientific’ (De Goede, 2005, p. 3, emphasis in original; see also Edkins, 1999, p. 12).

The examination of political debates as processes of (de)politicization of politics and the political is a way to study the governmentality of the European fight against terrorism financing. Investigating these debates is interesting because it draws attention to the discursive framing of the SWIFT affair. It also points to the way in which power is exercised through the field of governing. Moreover, it makes visible how the field operates and how governing takes place through a reduction of the debate to expert knowledge. For instance, in a ‘field of force’ (Bigo, 2006), pressure is exercised to come to a shared—and thus depoliticized—understanding of the issues at stake in the field. Likewise, in a ‘field of domination’ the issues at stake are depoliticized as one field successfully imposes its definition of the issue upon other fields. When, contrariwise, the field is one of ‘struggle’, there is no common reading of certain issues. Participants are competing with each other and the issues at stake are part of the political.

This chapter presents an investigation of the phases of politicization and depoliticization in the American and European debates on the SWIFT affair and shows how they were rendered technical. My understanding of the various notions in this chapter is as follows. I use the expression ‘moment of openness’ as described by Žižek and Edkins’ ‘re-politicization’ for phases in which the debates are concerned with the political. I use the notion ‘politicization’ to refer to the issues that become problematized in the political debate.
after the initial moment of openness. Hence, I follow Huysmans and Buonfino in their view that politicization takes place in the parliamentary debates but that these issues are part of politics and not of the political as Edkins suggests. With regard to the notion of depoliticization, I argue that the realms of politics—here, the political handling of the SWIFT affair by the professional field—and the political—in the sense of questioning of the assumptions on which the fight against terrorism finance is based—have both become depoliticized. I will also adopt the approach of Edkins and De Goede to repoliticize the SWIFT affair in the last section of this chapter. However, first this chapter will examine how the debate on SWIFT developed, what important moments of depoliticization took place and what political effects these moments had.

4.3 The US Debate

The *New York Times* article of 23 June 2006 by Lichtblau and Risen revealing the existence of TFTP is a piece of deep investigative journalism, presenting the programme from multiple perspectives. On the one hand it discloses information on the nature and the scope of the TFTP and on the other it reports on the reactions in favour of and against the programme. Two important and interrelated issues stand out in this article and these became the key political debates in the SWIFT affair: the legality of the programme, most notably with regard to privacy rights, and the decision of the newspaper to disclose the programme. However, this first *New York Times* publication, and other newspaper articles that appeared between Friday 23 June and the following weekend, also voice a wider range of critiques and doubts. The next section discusses this first phase of the debate as a moment of openness. Subsequently, the politicization of certain arguments in the ‘SWIFT affair’ in the US is examined as a second phase. A third phase during which these arguments became depoliticized is considered in the last two parts of this section.

4.3.1 Moment of Openness: an Emerging Debate During the Weekend

In the first publications on the subject, journalists cited a number of arguments justifying the disclosure of a secret government programme. According to the *New York Times* journalists and editors, their main reason for the decision in favour of publication was the belief that ‘it is a matter of public interest to be informed about the administration’s extraordinary access to the enormous quantities of financial data held by SWIFT’ (Lichtblau
& Risen, 2006). The Los Angeles Times was also concerned about the programme which it believed ‘raises privacy concerns’ and which it qualified as ‘clandestine’ (Meyer & Miller, 2006). Journalists highlighted that the TFTP obtains millions of confidential financial records through administrative subpoenas, known as national security letters, which differ sharply from the traditional individual court-approved warrants and subpoenas used to obtain financial data. Moreover, these broad subpoenas are secret and without any judicial review. The articles are also critical of the fact that this secret programme had been running for five years without Congressional approval and oversight before becoming public. During the weekend of 24 and 25 June 2006 this point was taken up by a number of Democratic and Republican politicians. Republican Senator Arlen Specter was particularly troubled to learn that the administration expanded its Congressional briefings only when it knew the New York Times would disclose the programme. He said, ‘why does it take a newspaper investigation to get them to comply with the law?’ (Stolberg & Lichtblau, 2006).

Yet concerns were not limited to privacy and legal issues. Reactions from government officials indicated that the duration of the programme was also controversial among at least some of them. One government official said, ‘I thought there was a limited shelf life and that this was going to go away’. Other officials declared that ‘what they viewed as an urgent, temporary measure had become permanent nearly five years later without specific Congressional approval or formal authorization’. A former official is quoted saying that ‘there was always concern about this programme’. Equally, SWIFT executives seemed to have doubts, as expressed by the question of one of them, who wondered ‘how long can this go on?’ (quoted in Lichtblau & Risen, 2006).

The first articles written about the programme also reported on its lack of results. A former administration official questioned its efficiency, saying, ‘We were turning on every spigot we could find and seeing what water would come out. [. . . ] Sometimes there were hits, but a lot of times there weren’t’ (Lichtblau & Risen, 2006). In the LA Times, current and former US officials also expressed their scepticism about the results of the programme, saying ‘the effort has been only marginally successful against Al Qaida’ (Meyer & Miller, 2006).

Similarly The Washington Post reported that

[o]fficials said far more information was collected early on, often on people who had nothing to do with Al Qaeda but whose Muslim names or businesses were similar to those used by suspected members of Al Qaeda. That method flooded the intelligence community with reams of material that was laborious to go through and repeatedly misled investigators (Gellman et al., 2006).
Furthermore, newspapers reported on concerns about the potential problems of the collection of huge sets of financial data. Regarding this issue a former official raised the question, ‘how do you separate the wheat from the chaff? And what do you do with the chaff?’ (Meyer & Miller, 2006). On this same topic a then-current government official highlighted that ‘the potential for abuse is enormous’ (Lichtblau & Risen, 2006). These quotes show that the premises and the effectiveness of the TFTP were not self-evident. They questioned the value of a risk-based approach to the War on Terror, and officials involved in the TFTP indicated that it is a labour-intensive method that produces very little useful information and many false positives.

These first days after the disclosure of the TFTP can be understood as a moment of openness in which the SWIFT affair was part of ‘the political’. There was no political positioning around this issue yet and when the US Treasury learned about the decision of the New York Times to publish the article in the evening of Thursday 22 June 2006 and the next morning, their initial reaction was rather mild. They were unhappy with the situation, but informally they congratulated the journalists with their scoop (interview 13). There was also no established reading of the TFTP. During these first hours and days, newspapers, privacy and civil liberties groups, and politicians addressed a range of issues in relation to the disclosed programme and including fundamental questions concerning the legality and the effectiveness of the programme and the value of trawling though large amounts of financial data. The moment of openness or first phase of the SWIFT affair ended quickly when during the weekend the public debate started to swell.

4.3.2 Politicization: Privacy and Legal Concerns

Attempting to limit the impact of the publication of the TFTP, government officials defended the programme during rapidly convened meetings with the press, assuring the public that it was crucial for US security and entirely legal. Furthermore, the Bush administration, members of the Republican Party and some newspapers and TV stations strongly condemned the New York Times for publishing the article. Focussing their response exclusively on privacy and legality issues on the one hand and the decision to disclose the TFTP on the other, the scope of issues that were debated became reduced. At this moment a second phase started in which a distinction became apparent between issues that were considered legitimate subjects for political debate and others that seemed to be forgotten. The political disappeared in favour of politics.
The response by President Bush, Vice-President Cheney, and officials from the US Treasury to the allegations about the illegality of the TFTP, can be summarized as an aggressive defence of the programme, avoiding much detail and attempting to reassure citizens. On Monday 27 June President Bush asserted that ‘what we did was fully authorized under the law’ and ‘what we were doing was the right thing’ (quoted in Baker, 2006). During the previous weekend and on the day of disclosure, Cheney said ‘the fact of the matter is that these are good, solid, sound programs’ and ‘they are conducted in accordance with the laws of the land’ (quoted in Stolberg & Lichtblau, 2006).

During press conferences and on TV, Treasury Secretary John Snow and Under-Secretary Stuart Levey provided a little more detail on the workings of the programme. They explained that following international transactions makes it possible to map terrorist networks and to locate terrorist financiers worldwide (Snow, 2006a). It provides concrete leads such as names, addresses, and account numbers (Levey, 2006) However, they avoided responding to specific critiques raised by journalists, for instance on the extensive use of large and uncontrolled administrative subpoenas. Snow declared that the TFTP ‘is entirely consistent with democratic values, with our best legal traditions’ (quoted in USA Today, 2006a). ‘It is responsible government. It is effective government’ (quoted in Miller & Meyer, 2006). Levey immediately asserted that the programme was ‘without doubt a legal and proper use of our authorities’, ‘grounded in the president’s emergency economic powers’ (quoted in Lichtblau & Risen, 2006). He continued to say that the programme was ‘hyper legal’ and ‘on rock solid legal ground’. In particular, he said that it was based on the International Emergency Economic Powers Act (IEEPA) that ‘specifically gives us the authority to conduct this type of investigation if there is an emergency declared by the president’ (Gellman et al., 2006). These rather vague and general answers to the legal concerns raised by the media, politicians, and civil liberties groups helped to depoliticize these issues, giving the impression that the program was entirely ‘legal’ and therefore no object for concern, debate, or political struggle. Moreover, this reduced the TFTP to a legal issue, excluding questions about the societal desirability of the programme.

To be more precise, the Bush administration found a legal justification for the programme in a new interpretation of the broadly-worded International Emergency Economic Powers Act, enacted in 1977 ironically to limit and control the emergency powers of the president. According to the IEEPA an emergency is ‘any unusual or extraordinary threat [to the national security, foreign policy or economy of the United States], which has its source in whole or substantial part outside the United States’ (IEEPA, section 1701a). If the president
has declared such an emergency, as Bush did by means of Executive Order 13224, the IEEPA authorizes the president to ‘investigate, regulate or prohibit [. . . ] money transactions and other property of any person subject to the jurisdiction of the US’ (IEEPA, section 1702aA). Generally speaking, it seemed that the TFTP would fit in this legal framework. One official said ‘the program arguably complies with the letter of the law if not the spirit’ (Lichtblau & Risen, 2006).

However, it can be debated whether the scale on which the searches into financial records took place, the duration of the programme, and the targeted suspects still fell within the scope of the IEEPA. That they did not was voiced for example by Pam Dixon of the World Privacy Forum. She said, ‘We need firm lines drawn on how we use emergency powers in crisis situations’ (Miller & Meyer, 2006). Likewise, Democratic Representative and Member of the House Financial Services Committee Carolyn Maloney stated, ‘The administration is basing its actions on a 1970’s law that never envisioned a state of perpetual emergency. It wasn't meant to become the status quo’ (Shane, 2006a). More fundamentally, the unusual or extraordinary threat of terrorism financing which is required for invoking the IEEPA was not irrefutably established.

Another legal issue concerned the role played by SWIFT in transferring its database to the CIA. The New York Times wrote that SWIFT was seen as a ‘willing partner’ (Lichtblau & Risen, 2006), and ‘very resolute in its commitment to the programme’ (Stolberg & Lichtblau, 2006), yet constantly concerned about its legal liability. After the disclosure of the programme, the company’s officials always emphasized their reluctance to cooperate with the US authorities and underlined that the data transfers were compulsory under US law (SWIFT, 2006a). US Treasury and SWIFT officials debated whether SWIFT could be held liable for breaching banking laws such as the Right to Financial Privacy Act. US Treasury officials asserted that SWIFT is not a bank but a banking consortium and concluded that banking laws did not apply. The company itself also examined the legality of the data transfer and concluded that while operating in the US it had to comply with the subpoenas, as this was compulsory under US law (Belgian Privacy Commission, 2006a).

Journalists and European data protection authorities considered the situation to be much more complex. They highlighted that SWIFT’s mirror database is located in the US but the company’s headquarters are located in Belgium, which means that not only American but also European privacy laws could apply to the company. According to several newspapers, the cooperation with SWIFT exploited a ‘grey area’ in the national and international laws regulating banking, which were considered to be ‘complex and rather murky’ (Lichtblau &
Risen, 2006). In reaction to the affair, SWIFT provided a written statement in which it insisted that executives ‘have done their utmost to get the right balance in fulfilling their obligations to the authorities in a manner protective of the interests of the company and its members’ (SWIFT, 2006a). SWIFT said it had complied with all applicable laws on the one hand and that it had negotiated protections and assurances as to the use of the data and had narrowed down the scope of the data that were transferred on the other. Since potential breaches concerned EU law, there was no further debate on the role of SWIFT and its legal breaches in the US.

In addition to the issues involving the legal foundations of the programme, potential privacy breaches also became a matter of great concern. On the day the TFTP became public, the American Civil Liberties Union (ACLU) issued a statement in which it ‘condemned the US government for gaining access to vast troves of international financial data with no judicial or Congressional oversight nor definition of how the information is being used’ (ACLU, 2006a). Anthony Romero, Executive Director of the ACLU, declared that ‘the revelation of the CIA’s financial spying program is another example of the Bush administration’s abuse of power. The invasion of our personal financial information, without notification or judicial review, is contrary to the fundamental American value of privacy and must be stopped now’ (ACLU, 2006a).

The allegations of privacy violations were countered by the Bush administration with three arguments. First, it insisted that the TFTP did not involve national transactions within the US. For this reason, it was argued, the privacy of American citizens was not infringed upon. Yet, the New York Times reported that while the program was mainly concerned with international wire transfers, it also included financial transfers between Americans within the US (Lichtblau & Risen, 2006). Moreover, it must be noted that Americans who make international wire transfers are certainly concerned. In addition, other US Treasury officials stated that the database and the searches did look into the financial information of American citizens but that ‘privacy laws don’t protect individuals believed to be acting as a “foreign terrorist agent”’ (Meyer & Miller, 2006).

Secondly, it was stressed that the TFTP was controlled tightly and that it was targeted rather than involving an examination of all the records. In the words of Treasury Secretary John Snow, ‘It is not a fishing expedition but rather a sharp harpoon aimed at the heart of terrorist activity’ (Snow, 2006a). Moreover, it was revealed that an outside auditing firm had verified that the data searches were based on intelligence leads and that only terrorism-related searches were allowed, excluding for instance tax fraud, drug trafficking, or other inquiries
(Lichtblau & Risen, 2006). This ‘control argument’ was a way of depoliticizing privacy concerns with respect to the TFTP. It suggests that there is nothing to be debated since privacy rights are respected through the introduction of technology, procedures and institutions.

A third argument is that privacy concerns are not relevant with respect to the TFTP. Two variations on this argument can be distinguished. It was argued, for instance by Treasury officials, that the Right to Financial Privacy Act (RFPA), which requires the respect of certain procedures for searching bank records, does not apply since SWIFT is mainly to be considered as a messaging service and is not a bank or financial institution (Lichtblau & Risen, 2006). It would follow from this that government access to SWIFT’s database is not restricted. Under-Secretary Levey went a step further and stated that ‘people have no privacy interest in their international wire transactions’ (Lichtblau & Risen, 2006).

It is interesting to note that in these debates the privacy of non-American citizens inside and outside the US has not been a matter of concern. But more importantly it needs to be emphasized that the three arguments given by the Bush administration are not fully consistent. If indeed international wire transfer data are not of a private nature, the arguments that the programme does not concern the financial data of American citizens and that the searches are very specific and tightly controlled should not be relevant. In addition, behind the scenes, privacy concerns did seem important. Anonymous US government officials declared that ‘the access to large amounts of confidential data was highly unusual’ and that because of privacy concerns and fear of abuse, the government had put some restrictions on the use of the SWIFT data (Lichtblau & Risen 2006).

4.3.3 Depoliticization: Shoot the Messenger!

After the weekend following the disclosure of the TFTP, the Bush administration’s first reaction of defending the necessity and legality of the programme was exchanged for a more aggressive approach. In this third phase, the SWIFT debate became consciously and successfully reframed around the question whether journalists should report on secret programmes concerning national security. First, Dick Cheney, Vice-President at that time, severely condemned the disclosure of the TFTP in the media and declared he was offended by it. He said, ‘What I find most disturbing about these stories is the fact that some of the news media take it upon themselves to disclose vital national security programs, thereby making it more difficult for us to prevent future attacks against the American people’ (quoted in
On the following Monday, President George W. Bush harshly added to the critique condemning the disclosure of the TFTP, qualifying the publication by *The New York Times* and other media outlets as ‘disgraceful’ (quoted in Stolberg, 2006).

That same day President Bush defended the programme in terms very similar to those used immediately after the 9/11 attacks, presenting it as ‘a legal and effective tool for hunting down terrorists’. ‘We are at war with a bunch of people who want to hurt the United States of America, and for people to leak that program, and for a newspaper to publish it, does great harm to the United States of America’ (quoted in Baker, 2006). Such statements contributed to the ‘securitization’ or depoliticization of the TFTP, rendering it more difficult to question the legitimacy and effectiveness of the programme.

Although newspapers continued reporting on privacy and legal aspects of the SWIFT affair, the debates were increasingly centred on the newspapers that published the story and the officials who leaked it to the press. Democratic Congressman Ed Markey summarized the situation:

Bush, Cheney and other Republicans have adopted a shoot-the-messenger strategy by attacking the newspaper that revealed the existence of the secret bank surveillance program rather than answering the disturbing questions that those reports raise about possible violations of the US Constitution and US privacy laws. (quoted in Baker, 2006)

Republican critiques of the media were voiced to various degrees. In a letter to *The New York Times*, US Treasury Snow wrote that he was ‘deeply disappointed’ in the newspaper (Snow, 2006b). Others, for instance Senator Jim Bunning, also condemned the revelation of sensitive information (quoted in Bender, 2006). Senator Pat Roberts requested an assessment of whether the reports had damaged anti-terrorism operations (quoted in Bender, 2006), to which the Director of National Intelligence, John D. Negroponte, answered in the affirmative (Shane, 2006b). A number of Republican congressmen and senators were even more virulently opposed to the revelation of classified information that they claimed could harm national security. Some argued for criminal prosecution of the journalists. For instance, Congressman and Chairman of the House Homeland Security Committee, Peter King, said ‘I am asking the Attorney General to begin an investigation and prosecution of *The New York Times*, the reporters, the editors and the publisher’. ‘We're at war and for the Times to release information about secret operations and methods, is treasonous’ (quoted in Burkeman, 2006). He also said that the officials who leaked the classified information could be prosecuted for violation of the Espionage Act (Fox News, 2006). Other politicians (and
media outlets) accused those media that decided on publication of sensationalism and of letting commercial interests prevail over national security concerns.

In addition, certain media and Internet blogs also attacked the *New York Times*. This newspaper attracted the most attention because it was the first to disclose the programme, because of its (then) recent publications on the National Security Agency’s (NSA) eavesdropping programme and probably also for opportunistically electoral reasons (interview 13). In an editorial, *The Wall Street Journal* assailed the publication by *The New York Times*, reminding the newspaper that ‘not everything is fit to print’ and explaining that its own decision to publish on the SWIFT affair was based on different considerations (2006). A more simplistic and sensational attack came from former federal prosecutor Arthur McCarthy. He wrote that ‘the media’s war against the War continues’: ‘Yet again, *the New York Times* was presented with a simple choice: help protect American national security or help Al Qaeda. Yet, again, it sided with Al Qaeda’ (McCarthy, 2006). In the *New York Post*, a controversial cartoonist compared the *New York Times* reporting on the SWIFT affair to revealing George Washington’s surprise attack of crossing the Delaware River on 25 December 1776 during the American Revolutionary War, leading to the defeat of the forces of the British Empire in Trenton. The cartoon shows a British soldier reading about the planned surprise attack in the *New York Times*, suggesting that the disclosure of the SWIFT affair was an act of treason, informing terrorists of the secret attacks that were taking place on them (see figure 4.1).

Figure 4.1 If the *New York Times* had covered the Revolutionary War, Sean Delonas, *New York Post*, 28 June 2006.
While *The New York Times* and *The Los Angeles Times* discussed their plans for disclosing the secret programme with administration officials prior to the publication and explained their reasons for publication in their first articles, they felt forced by readers and the attacks of the Bush administration to respond to the criticism in public. In addition to the explanation already given in *The New York Times*’ first publication on the SWIFT affair, a number of letters by the executive editor of the newspaper, Bill Keller, followed in the weeks after the disclosure of the TFTP. Accused of being unpatriotic, unwise, and exposing the US to danger, Keller defended the publication as proof of an independent and critical press and as a ‘protective measure against the abuse of power in a democracy and an essential ingredient for self-government’ (Keller, 2006a). In his view, the more citizens know about the news, the better they are able to make decisions and make their views known to their elected officials (ibid.). ‘Our job, especially in times like these, is to bring our readers information that will enable them to judge how well their elected leaders are fighting on their behalf, and at what price’ (Baquet & Keller, 2006).

Keller further insisted that the decision to publish was not taken lightly, which was also attested by one of the journalists responsible for *The New York Times*’ publications. Not long after their publication on the NSA eavesdropping programme in December 2005, Risen and Lichtblau discovered that something was going on in relation to SWIFT. After discovering the first leads to the programme in 2005, it took the journalists one more year to obtain sufficient confirmation of the facts to publish the story. In his joint letter with Dean Baquet, editor of *The Los Angeles Times*, Keller explained the thorough consideration required before an article is published (Baquet & Keller, 2006). In addition, months before actually deciding to publish the SWIFT story, there had been several lengthy meetings with the US Treasury to exchange arguments (in favour and) against disclosure of the programme (Lichtblau, 2009, p. 250). Moreover, before publishing there was an extensive discussion within the editorial board of *The New York Times* on the question whether the public’s interest in unveiling the programme outweighed the potential threat to national security (ibid., p. 251, Keller, 2006a). The newspapers tried to strengthen this argument by highlighting that they do not publish all information they receive on secret counter-terrorism programmes and missions (Baquet & Keller, 2006, Keller, 2006a, Lichtblau, 2009, p. 251).

Moreover, Keller, Lichtblau and others countered the argument that the publication of the SWIFT affair could help terrorists and lead them to change their tactics. They argued that the US government itself had already made reference to the existence of these kinds of programmes and actively sought to render some of its efforts public. ‘Treasury Secretary John
Snow himself had led reporters from major media organizations on a six-day tour to trumpet the administration’s supposed success in tracking terrorist financing and going after their dirty money’ (Lichtblau, 2009, p. 252). ‘The secretary’s team discussed many sensitive details of their monitoring efforts, hoping they would appear in print and demonstrate the administration’s relentless effort against the terrorist threat’ (Baquet & Keller, 2006). Keller and Lichtblau also stated that terrorism financiers already knew that their financial behaviour was being observed by governments. A former US diplomat involved in the UN efforts to combat terrorism financing states, ‘unless they were pretty dumb, they had to assume their transactions were being monitored’; ‘We have spent the last four years bragging how effective we have been in terrorist financing’ (quoted in Bender, 2006). Former US officials even argued that there had been explicit public references to SWIFT before in public sources, among them a 2002 report for the UN Security Council (Bender, 2006).

4.3.4 Swift Depoliticization

Quite surprisingly, none of the legal and privacy issues brought up by the journalists, politicians, and civil liberties groups led to heated political debates or further investigations in the US. Since the US does not have a centralized data protection authority, civil rights organizations such as the American Civil Liberties Union and certain politicians asked the US Congress to investigate the alleged privacy breaches (see ACLU, 2006b). However, the House of Representatives and the Senate decided not to open investigations into the TFTP. Within only a few days a political consensus appeared considering the legal basis of the TFTP and the privacy safeguards introduced to be sufficient. Once the congressional intelligence committees were briefed, they were, according to a senior congressional aide, ‘generally supportive of [the efforts to track terrorist financing]’ and ‘everybody thought they had appropriate controls’ (Miller & Meyer, 2006). Likewise, the open letter of Privacy International (2006d), requesting from SWIFT’s CEO a clarification about the company’s cooperation with public authorities, remained unanswered and did not stir any further debate.

On the juridical level, the potential privacy breaches of the TFTP were addressed in two separate lawsuits. Immediately after the disclosure of the programme on 23 June 2006, plaintiffs Ian Walker and Stephen Kruse filed a lawsuit against SWIFT in the US District Court in Chicago (Walker Kruse v. SWIFT SCRL). They claimed to have made at least one international transaction since 11 September 2001 and accused SWIFT of violating the First and Fourth Amendments of the US Constitution and the privacy rights of Americans by
disclosing private financial information to the government. The suit seeks statutory, compensatory, and punitive damages on behalf of every American who made a domestic or international financial transaction after 11 September 2001 (US District Court for the Northern District of Illinois Eastern Division, 2007a, De Young, 2006). A second lawsuit against SWIFT and a number of the highest government officials was filed exactly two years later on 23 June 2008 by a company called Amidax Trading Group on behalf of itself and all those similarly situated within the jurisdiction of the District Court of the Southern District of New York (Amidax Trading Group v. SWIFT SCRL et al.). This company also accuses SWIFT and the US government of violating the First and the Fourth Amendments of the Constitution as well as the federal Right to Financial Privacy Act, as it made Amidax’s financial information available to the US government by responding to the subpoenas issued by the US Treasury.

These lawsuits may be read as an attempt to ‘repoliticize’ the privacy questions surrounding the TFTP through a judgement on the question whether the programme violates privacy rights. However, these cases did not provoke much debate nor did they lead to any sustained attention to the alleged privacy breaches of the TFTP. After an initial attempt by the Department of Justice to have the case of Walker and Kruse dismissed on the basis of the state secrets privilege, the case was accepted but, at the request of SWIFT, it was transferred from Chicago to a federal court in Virginia (Lichtblau, 2007). The court ruled that the plaintiffs’ allegations were unconvincing as they could not provide evidence that their personal data were directly targeted by the TFTP (US District Court for the Northern District of Illinois, 2007b). Very similar arguments were used in the court case and the appeal filed by Amidax. The District Court and the Court of Appeals stated that the Amidax case failed to have standing because the plaintiff ‘did not allege facts giving rise to a plausible inference that its information had been disclosed as part of the TFTP, and therefore that it had suffered any injury-in-fact’ (United States Court of Appeals, 2010, pp. 1-2). Moreover, the Court of Appeals added among other issues that federal law immunizes SWIFT from liability for compliance with the subpoenas of the US Treasury (ibid., p. 37). The threat to shut down lawsuits concerning the TFTP on national security grounds, the impossibility for plaintiffs to prove that their financial data have been used in this secret programme, and the immunity of SWIFT with regard to the transfer of financial data make further attempts to sue SWIFT or US government officials for privacy violations very unlikely.

The criticism that was not entirely swept away in this moment of depoliticization was the lack of congressional oversight. Although the Bush administration had argued that
Congress was sufficiently informed and had been ‘on board with this all along’ (Miller & Meyer, 2006), several members of Congress had openly complained to the press that they had been left in the dark about the existence of the programme. An editorial piece in USA Today sketched the new ‘regime of truth’ in a few phrases. ‘It’s hard to imagine any American would not want the administration to go after terrorist financing’, and ‘it is improbable that Congress would have blocked the program’ (USA Today, 2006b). According to this article the Bush administration could have avoided any problems with the TFTP if it had ‘accepted the simple bargain’ of getting congressional approval. Hence, the problem with the TFTP was reduced to a failure to follow the procedures of democratic oversight, rendering the TFTP and the war on terrorist financing uncontroversial.

This reading of the SWIFT affair is further confirmed by the rapid adoption of the resolutions of the House of Representatives and the Senate. Both very strongly support the TFTP and condemn the disclosure of the programme by various media in the strongest words. The resolution of the House of Representatives even denies the critique raised by USA Today, stating on the contrary that ‘Congress has been appropriately informed and consulted for the duration of the Program and will continue its oversight of the Program’ (United States House of Representatives, 2006). The adoption of these two resolutions marked to a large extent the end of the SWIFT controversy, just one week after its disclosure.15

The relatively limited concern raised by the disclosure of the programme can be attributed to the skilful handling of the affair by the Bush administration. On the one hand, it continually defended the programme in very forceful and personal terms. Before the House Financial Services Subcommittee on Oversight and Investigation Levey, for instance, stated, ‘I am very proud of this programme’: ‘For two years I have been reviewing the output [of the TFTP] every morning. I cannot remember a day when that briefing did not include at least one terrorism lead from this program’ (US Department of Treasury, 2006a). On the other hand, the Bush administration successfully changed the focus of the discussion in the US. Instead of discussing the content and implications of the TFTP, the media’s decision to disclose the secret programme became central to the debate.

In addition, it is also important to take into account the broader context in which the SWIFT affair took place. Six months earlier the New York Times had revealed a very sensitive eavesdropping programme run by the National Security Agency. This secret programme consisted of monitoring (international) phone calls and e-mail messages to and from American citizens and residents with the help of the biggest telecommunication companies and had provoked an enormous outcry amongst politicians and the population. Many
politicians and many citizens who were aware of the TFTP programme considered it to be on a firmer legal ground compared to the NSA eavesdropping programme. Moreover, they esteemed the collection of financial data much less controversial than wiretapping telephone calls and e-mail messages (interview 12). Representative Arlen Specter, for instance, declared on a TV show that ‘there is not the privacy interest in bank records that there is in a telephone conversation’ (quoted in Kornblut, 2006).

Furthermore, unlike the NSA programme that monitored communications of US citizens, the emphasis in the SWIFT affair was on international wire transfers. Hence, there was a strong belief among Americans that the programme only concerned foreign transactions and that their financial data were not subject to investigation. In short, SWIFT remained overshadowed by the NSA eavesdropping programme (interview 13) and was considered as ‘yet another spying programme’ (interview 12). In fact, the NSA scandal constituted an important lesson for the Bush administration on how to deal with criticism in reaction to the publication of a secret counter-terrorism programme. The Washington Post reported that this time, ‘far from giving ground, the administration mounted a muscular defence of the program [ . . . ]’ (De Young, 2006).

Finally, the newspapers’ own public discussions, in which they explained that the decision to publish the SWIFT story was difficult also contributed to depoliticizing the TFTP and strengthening the government’s security argument. In later publications, the public editor Byron Calame of The New York Times even stated that although he initially strongly supported the decision for publication (2006a), he later ‘altered [his] conclusion’, considering that he ‘was off base’ (Calame, 2006b), and even spoke in terms of a ‘mea culpa’ (Calame 2006b, 2006c). The long-term implications of this mea culpa became visible two years later in the context of ‘The Free Flow of Information Act of 2007’. The objective of the proposal for this act was to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media. In a response to the proposal, US Secretary of the Treasury Henry M. Paulson wrote that the Department was strongly opposed to providing a ‘journalist privilege’ for unauthorized disclosure of government programmes. To strengthen his argument, he discussed the disclosure of the TFTP at length as an example of media coverage that had damaged national security and he emphasized the fact that even the newspapers that had published on the programme now acknowledged their error (Paulson, 2008).

In short, after a short political moment, three questions became politicized in the US debate about the TFTP. These were the constitutionality of the programme, the respect for
privacy, and the newspapers’ decision to publish information about the programme. Framing the debate around questions of legality, national security, and, (connected to this) morality helped quickly and successfully to depoliticize the programme with arguments that were difficult to refute. By ascertaining that the programme was entirely legal, the Bush administration, the US Congress, and later the US courts normalized and legitimized the TFTP. Likewise, the Bush administration, Republican politicians, and certain media organizations defended the programme on the basis of their personal convictions and values and with an appeal to national security, while they accused the newspapers that decided to publish the SWIFT story of a lack of patriotism and professional integrity. The invocation of the argument of national security made it very difficult to challenge the arguments of the Bush administration and to ask questions belonging to the sphere of the political.

4.4 The EU Debate

After the clandestine flights, the abduction of European citizens rightly or wrongly under suspicion and the illegal transfers of prisoners using aircraft landing on European soil, we now learn that, friend of ours though it may be, a power in alliance with ourselves has been rooting around in our bank accounts. When will the blood samples start to be taken? When shall we start having to submit details of births and so forth? Emphatically, enough is enough. Parliament really does need to put a stop to this type of thing.16

—Jean-Marie Cavada, European Parliament, 2006

[In response to the adoption of the US–EU SWIFT agreement:] The true problem remains the incapability of the European Union to equip itself with a computer analysis tool for the analysis of data exchanges similar to that of the United States.17

—Jean-Marie Cavada, press statement, 2010

For more than four years the European Parliament was closely involved in the political handling of the ‘SWIFT affair’ in Europe. The two quotes above illustrate the strong contrast between the broad critique raised in the first reactions to the disclosure of the TFTP in 2006, and the understanding of the issues at stake when an agreement between the US and the EU on this matter was reached in 2010. They not only reflect the evolution in the ideas of the liberal French Member of the European Parliament (MEP) Jean-Marie Cavada (Alliance of Liberals and Democrats for Europe (ALDE)), who presided over the European Parliament’s civil liberties committee (LIBE) from 2004 to 2009, but also represent a shift that took place more broadly in the European Parliament and in EU member states. This section analyses the
political and societal debates in the EU in reaction to the disclosure of the TFTP and distinguishes four different phases in these debates. These phases, it must be emphasized, do not exactly mirror the debates in the US with regard to their duration or their content (see table 4.2). A moment of openness following the publications in American newspapers during which the ‘SWIFT affair’ was hotly debated constitutes a first phase. Contrary to the US situation, in the EU the moment of openness in the debate lasted for several weeks. A second phase consisted of the politicization of certain aspects of the SWIFT affair. During this period, roughly from July until December 2006, newspaper articles on the SWIFT affair continued to appear regularly. Between 2007 and 2009, a third phase of slow depoliticization took place. Finally, a fourth phase of re-politicization can be distinguished, lasting from the last months of 2009 until August 2010.

4.4.1 Moment of Openness: the Mobilization of the European Parliament

Immediately after its disclosure by the press in the US, media across Europe became interested in the SWIFT affair. While the European press initially only reported on the revelations and the debate in the American media, a distinct European debate emerged after a few days. The period that followed can be seen as a moment of openness, during which a range of representatives from public and private authorities – such as the European institutions, national ministries, central banks, NGOs, SWIFT, and banks – reacted freely on the various aspects of the disclosed security programme.

The London-based civil rights group Privacy International rapidly started a campaign to put a halt to the transfer of SWIFT data (Privacy International, 2006c). Four days after the revelation of the secret programme the organization filed complaints with data protection regulators in over 30 countries, including all of the EU member states (Privacy International, 2006a). In its complaints it called for ‘an immediate halt of the [financial data] transfers until essential questions regarding due process and privacy protections can be answered adequately’ (Privacy International, 2006b).

In the European newspapers, one of the first issues that emerged consisted of determining the role of the public and private authorities in this affair on both the European and national levels. While many governments and banks were indeed not informed about the secret programme, those who were informed tried to minimize their responsibility in the affair. The Dutch National Bank, which had known about the data transfers since 2002, distanced itself from the SWIFT affair, qualifying it as an ‘American issue for SWIFT’
The National Bank of Belgium, also aware of the programme since 2002, stated that the data transfers to the US were ‘beyond its control’ (Bilefsky, 2006). According to the Belgian central bank, the central banks of the Group of Ten countries (G-10) \(^{18}\), called the Oversight Group, monitors SWIFT’s activities but only ‘insofar as they are relevant to the maintenance of financial stability’. Since the US Treasury subpoenas did not affect financial stability they were considered ‘outside the purview of central bank oversight’ (National Bank of Belgium, 2006). SWIFT itself stressed that it had to comply with all applicable laws in the US and had no choice but to transfer its database to the US Treasury (SWIFT, 2006a).

The European Commission also denied any responsibility in this affair. A spokesperson for the European Commission declared that ‘the Commission had no powers to investigate the decision by SWIFT to supply the US government with information about bank transfers’ (quoted in, inter alia, Bilefsky, 2006). Moreover, it was argued that there was no European legal framework regarding security-related data transfers since the existing privacy directive only targeted data transfers for commercial purposes (Quatremer, 2006). Another spokesperson stated that the Commission judged that no European laws had been violated with respect to this case (EuroNews, 2006). Hence, Commission officials suggested that member states should open up investigations on a national level.

Similarly, the Finnish President of the Council declared that the Council ‘cannot confirm [...] or comment’ on the revelation of the TFTP and that ‘the national authorities are responsible for this sort of enquiry’. Furthermore, the Council ‘assumes that the cooperation between private companies like SWIFT and the US authorities will be in accordance with applicable law and in compliance with fundamental rights’ (European Parliament, 2006a).

Despite the rapid conclusion of the European Commission and the Council that the matter primarily concerned the individual member states, the European Parliament took a major and persisting interest in the SWIFT case. A first plenary session on the issue was held on 5 July 2006 and can be understood as a moment of openness in the European debate. During this session, various criticisms of the revelations were voiced and the SWIFT affair was debated from multiple perspectives.

The vast majority of MEPs who intervened declared themselves to be highly concerned about privacy breaches and the respect for data protection norms. For instance, Dutch MEP Sophie in ’t Veld (ALDE) stated that
European citizens have never been told about the details of their bank accounts being monitored, and I regard it as a precondition that they should be. I wonder how we would react if it were not the United States, but another country, that was checking our bank accounts, and whether we would be equally tolerant of that’ (European Parliament, 2006a).19

Similarly, Italian MEP Giovanni Claudio Fava (Party of European Socialists (PES)) argued:

[. . .] the Union is an area that is bound by the rules and principles of the rule of law and that, therefore, personal data, all personal data, including our current account data, must not be given to third countries, except in the cases provided for under national laws and now under European directives; there are no exceptions, not even in the name of the fight against terrorism. Anything that goes beyond this constitutes an arbitrary act and an abuse of the system (European Parliament, 2006a).

Aside from the data protection and privacy concerns, the SWIFT affair was also put in a broader economic and international relations context. MEPs were concerned about the possibility for the US ‘to detect not only transfers linked to illegal activities, but also information on the economic activities of the individuals and countries concerned, and could thus be misused for large-scale forms of economic and industrial espionage’ (European Parliament, 2006b). Sophie in ’t Veld also argued that ‘we expect from an allied nation that they inform [the EU] about these kinds of operations’ (quoted in Van der Kris, 2006).

Several MEPs also expressed their concern with respect to the wider societal implications of the SWIFT affair. In response to the various authorities that declined to bear any responsibility, Cavada passionately argued: ‘we must not forget that the members of the Commission and the Council are our government; if they have no means to act against this scandal and do something, it doesn’t prevent you from showing moral virtue and demonstrating and stating what you think about it’ (European Parliament, 2006b). Italian MEP Giusto Catania (Group of the European United Left/Nordic Green Left (GUE/NGL)) stated that ‘for the future of Europe we have to stop the CIA dictating law in Europe’ (European Parliament, 2006b).

MEPs also argued that the SWIFT affair should not be seen in isolation. They drew attention to the similarities with other once-hidden programmes in the US War on Terror such as the secret CIA rendition flights and the secret prisons. According to Dutch MEP Jan Marinus Wiersma (PES), ‘the SWIFT affair is part of the broader discussion on the balance between liberty and security’ (European Parliament, 2006b). He stated that ‘the SWIFT case is not an isolated one, but an example of the way in which the Americans, in particular, hope to fight terrorism’, and that a thorough discussion on the nature of the War on Terror was indispensable (European Parliament, 2006a). Connections were also made with counter-
terrorism programmes that make use of massive datasets. Greek MEP Stavros Labrinidis (PES) stated, ‘PNR [Passenger Name Records], SWIFT, [telecommunications] data retention: in all these cases private individuals are collating data and the police are using them on the pretext of terrorism’ (European Parliament, 2006a). In Catania’s view, these programmes lead to a Big Brother Society as described in Orwell’s 1984 (European Parliament, 2006a).

The day after the plenary session, the European Parliament adopted a resolution on the SWIFT affair. In this resolution the EP also referred to the complaints filed by Privacy International and it demanded that the European Commission, the Council, and the European Central Bank (ECB) explain the extent of their awareness of the secret agreement between SWIFT and the US government, and asked the European Data Protection Supervisor to establish whether the ECB had violated Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. The resolution also stressed the urgent need for the adoption of a regulation covering data protection in the EU’s ‘third pillar’ (this is the framework of police and judicial cooperation in criminal matters) (European Parliament, 2006c).

Although the EP’s resolution ‘requests that the Commission undertake an evaluation of all EU anti-terrorist legislation that has been adopted from the point of view of efficiency, necessity, proportionality and respect for fundamental rights’ (European Parliament, 2006c), the SWIFT debate was somewhat narrowed down rather than being opened up to these broader issues. Within a month after disclosure, the moment of openness disappeared and the discussion about the SWIFT affair became focussed on two main issues: privacy and the Data Protection Agency’s investigations into potential violations of privacy laws on the one hand, and the negotiation of an agreement with the US Treasury to legalize the transfer of SWIFT’s financial records on the other. The next section discusses the politicization of these two issues.

4.4.2 Politicization: Privacy and the Data Protection Law

At the request of the European Parliament and civil rights groups and on their own initiative, data protection agencies opened investigations into the allegedly illegal transfer of financial data from SWIFT to the US Treasury. The main objective of these investigations was to check if any European or national privacy and data protection laws had been violated. Since SWIFT is a cooperative under Belgian law, the Belgian Privacy Commission
(Commissie voor de Bescherming van de Persoonlijke Levenssfeer/ Commission de la Protection de la Vie Privée (CBPL/CPVP)) was assigned to lead the investigations while other (EU member) states did parallel investigations.

The Belgian Privacy Commission issued three reports concerning SWIFT. The first two reports were published in 2006, opinion 37 on 27 September and opinion 47 on 20 December, and a final decision was published on 9 December 2008. The main objective of the first investigation was to determine if (Belgian) data protection law is applicable to SWIFT and whether the reported data transfers to the US Treasury constituted a violation of the law.20 These reports mainly discussed the applicability and interpretation of national and European privacy law. One of the key questions for the Belgian Privacy Commission was to determine whether SWIFT is a ‘processor of data’ or a ‘controller of data’. This is an important legal distinction introducing different levels of responsibility with respect to privacy safeguards. SWIFT CEO Lazaro Campos asserted, ‘SWIFT has always maintained that it is a “processor of data” and not a “controller of data”’ (SWIFT, 2007, p. 17), while the Belgian Privacy Commission qualified SWIFT as a controller of data (Belgian Privacy Commission, 2006a, p. 11). The investigation of the Belgian Privacy Commission also focussed on the transfer of data to American authorities (the US Treasury’s Office of Foreign Assets Control and the CIA) via the SWIFTNet FIN service.

The Belgian Privacy Commission was very critical of SWIFT and expressed great concern about the lack of transparency surrounding the arrangements it had made with the US Treasury. In its first report it stated that ‘SWIFT […] should have realized that the exceptions under American law could hardly justify a secret, systematic and large scale violation of the basic European principles of data protection which went on for years’ (2006a, p. 21). It regrets SWIFT’s decision to ‘comply with American law and searching solutions via secret negotiations’ instead of opting for alternative systems that would respect European data protection laws and consulting European data protection authorities (ibid., p. 22). The Belgian Privacy Commission was also negative about the nature of the subpoenas, which, it argued, could be qualified as ‘non-individualised mass requests’ (2006a). In addition, it accused SWIFT of serious misjudgements and shortcomings in light of European privacy and data protection law.

The Belgian government requested a second report from the Belgian Privacy Commission that would investigate the solutions for the lack of an equivalent level of data protection between the EU and the US and indicate the possible frameworks for an EU-US agreement on the transfer of SWIFT data to the US Treasury. This second report (opinion 47
of 20 December 2006) was still critical of SWIFT but extended its critique to the role of American and European authorities in the TFTP. It emphasized that there was still no proof of the vital interest of the SWIFT information for combating terrorism and that contestation over the secret initiation of the TFTP by Belgian and European authorities was appropriate (2006b, p. 2). In its recommendations, the Belgian Privacy Commission also emphasized that ‘the conclusion of a specific agreement with the US is not the only manner to solve the lack of equivalent protection between the EU and the US’ (ibid., p. 11). They suggested alternatives to such an agreement, drawing attention to existing procedures for exchanging financial data. Furthermore the BPC stated that the minimum requirements for an agreement must be Belgian and European privacy and data protection laws and these existing laws would need to be sharpened to avoid any legal voids.

On a European level, the Article 29 Working Party, in which the national data protection agencies in the European Union cooperate, as did the European Data Protection Supervisor (EDPS), issued opinions on aspects of the transfer of financial data from SWIFT to the US authorities. The investigation of the Article 29 Working Party published on 22 November 2006 was the most comprehensive. Supporting the critical conclusions of the Belgian Privacy Commission’s report, it also established that the existing EC directive 95/46 on data protection applied to SWIFT’s data transfers. Moreover, this report took into account the role of the financial institutions using SWIFT’s network and central banks. The Working Party disagreed with the argument made by banks and central banks that they had no responsibility or competency with respect to upholding privacy and data protection safeguards. In its view, ‘SWIFT and the financial institutions in the EU have failed to respect the provisions of the Directive [95/46]’ (Article 29 Working Party, 2006, p. 26). Furthermore, the working group required a number of immediate actions to be taken to improve the current situation. These immediate actions included a cessation of the infringements, an immediate return to lawful data processing, and a clarification of central banks’ oversight of SWIFT.

The competencies of the EDPS for investigation are limited to data protection issues concerning European institutions and agencies and in this case the EDPS analysed the responsibility of the ECB in the SWIFT affair. In the opinion issued on 1 February 2007, the EDPS addressed the position of the ECB as an overseer of SWIFT, as a user of the SWIFTNetFin service, and as a central policy maker (EDPS, 2007). Contrary to the ECB’s own judgement, the EDPS found that the transfer of SWIFT’s data to the US concerned the ECB in its role as overseer. The EDPS argued for instance that ‘the lack of compliance with data protection legislation may hamper the financial stability of the payment system’ because
‘it could seriously affect consumers’ trust in their banks’ and ‘because it might lead European data protection authorities [. . .] to use their enforcement powers to block the processing of personal data which are not in compliance with data protection law’ (p. 8). On the role of the ECB as a user of the SWIFTNet Fin service, the EDPS concluded that the ECB must also be considered a ‘data controller’ and therefore it has strict responsibilities with regard to the processing of data (pp. 8-10). Finally, the EDPS stated that failed compliance with European data protection rules was a breach of EU citizens’ fundamental rights and potentially exposed European companies to economic espionage. Therefore, the ECB as a policy-maker needed to ensure that European payment systems were fully compliant with European data protection law (p. 12).

The European Parliament Committees on Civil Liberties (LIBE) and on Economic Affairs (ECON) also held a hearing aimed at gathering more information about the respect for data protection laws in the TFTP and whether changes in European law were needed. They invited and questioned a representative from SWIFT, the presidents of the ECB and the EDPS, the president of the Article 29 Working Party, and the head of the European Commission’s Data Protection Unit. In their reactions, the MEPs asked for more detailed information such as the memorandum of understanding between SWIFT and the US, the audit reports on the American data searches, and the legal basis for the institutional set-up of the SWIFT databases. At this point it was said that ‘the wider issue was whether the United States in general provided adequate levels of data protection to comply with the EU requirements for European companies to store or process data there’ (European Parliament, 2006d, p. 2).

From these initiatives, it becomes clear that the political response to the SWIFT affair in Europe was to set in motion investigations led by data protection agencies. The European Parliament was very mobilized in debating the TFTP but until 2010 it had limited legal powers with regard to international security matters. Consequently, the debate became mainly framed as a privacy and data protection issue and other questions that officially fell outside the competencies of the European Parliament and the data protection agencies were pushed to the background. Next, despite the critique expressed by data protection agencies, their reports did not lead to an immediate halt or suspension of the data transfers. The Belgian Privacy Commission’s second opinion, for instance, served the preparation of a first agreement with the US on the transfer of personal data by SWIFT to the US Department of the Treasury. As such, the reports were used to legitimize the continuation of the TFTP by remodelling the programme within the limits of European data protection law.
While the SWIFT affair remained a highly politicized issue for several months, the disclosure of the SWIFT affair was immediately followed by attempts to depoliticize the situation and by efforts to maintain the existing power relations. This is illustrated by the attempts of private and public authorities to minimize their responsibility in this affair and by the focus on the technical and legal aspects of data transfers. Independently from each other, EU member states took steps to ‘solve’ the SWIFT affair. In cooperation with the Dutch Privacy Commission (College Bescherming Persoonsgegevens (CBP)), the Dutch Banking Association (Nederlandse Vereniging van Banken (NVB)) and Dutch banks, for instance, decided to publish an advertisement on their webpages and in national newspapers informing their customers about the fact that their financial data might be stored and become part of counter-terrorism investigations in foreign countries. Commenting on this issue, the Dutch Ministers of Justice and of Finance stated that there was no possibility for customers to avoid the transfer of their financial data when an international payment is made through the SWIFT system (Ministerie van Financiën, 2007, p. 4). Thus, customers of Dutch banks could not prevent their data from being transferred to the US but now they were at least informed about it.

On a European level the SWIFT affair was further depoliticized by the decision not to prosecute SWIFT and to start negotiations with the US instead. Despite the conclusions of the Belgian Privacy Commission and the Article 29 Working Group that European privacy laws had been breached, the Belgian Courts investigating the allegations against SWIFT reached the conclusion on 13 December 2006 that the European privacy framework did not apply to the SWIFT case (Notte, 2009, p. 48). The decision not to take any legal action was also attributed to a work overload (Fuster et al., 2008). Belgian Prime Minister Guy Verhofstadt was also not in favour of prosecuting SWIFT. He concluded from the reports of the privacy commissions that the EU and the US should negotiate about a ‘clear legal framework’ for transferring financial data (Deweerdt, 2007, p. 314). In 2011, in response to allegations that he had actively tried to circumvent the prosecution of SWIFT made on the basis of Wikileaks documents, Verhofstadt declared that at that time ‘the intention was to find a proactive solution in order to avoid the problem’ of having to prosecute SWIFT (De Standaard, 2011). In the second half of December 2006, European Commissioner for Justice Freedom and Security, Franco Frattini announced that ‘he plans to initiate discussions in early January, 2007, with the US Government to address matters surrounding the SWIFT case’ (SWIFT,
From early 2007 onwards, three important initiatives were undertaken by SWIFT, the US Treasury, and the EU to find new grounds for continuing the TFTP.

First, in attempting to fit into existing legal frameworks and to comply with privacy safeguards in the US and in Europe, SWIFT decided to adopt the Safe Harbour privacy principles in April 2007. The seven Safe Harbour principles had been adopted by the European Commission in 2000 in order to facilitate the transfer of personal data from the European Community to the US, ensuring an adequate level of data protection according to European privacy and data protection laws (European Commission, 2000). The principles were initially designed for American companies, which could choose to adhere to these principles, as for instance Microsoft had done (De Hert & De Schutter, 2008, p. 315). However, as Fuster et al. rightly point out, SWIFT is a European company with branches in the US. Having its headquarters in Belgium, SWIFT should in the first place comply with Belgian laws on privacy and data protection, which provide a higher standard of protection than the Safe Harbour principles (2008, p. 197).

Secondly, the European Commission and the Council Presidency negotiated a set of unilateral commitments, the so-called ‘representations’ of the US Treasury, in response to the critical reactions voiced by European governments and the European Parliament. These representations were made public on 28 June 2007 (European Union, 2007). Aiming to reassure Europeans, this document on the one hand summarizes the inception, the general procedures and the (international) legal grounds of the TFTP, and on the other hand describes the controls and safeguards integrated into the TFTP. The representations emphasize the legality of the programme, the restricted and targeted use of the data obtained, and the extraordinary value of the intelligence extracted from SWIFT’s database. The safeguards explicitly mentioned in the representations are the restriction to use the data exclusively for counter-terrorism purposes, adoption of technical and organizational measures to control access and ensure the security of the computer system, the internal and external oversight of the TFTP, dissemination and information-sharing procedures, the (limited) possibilities for redress, and the period during which the data records are retained. In addition, in the document the TFTP is placed in a framework of well-established international initiatives for combating terrorism financing such as the 1999 UN International Convention for the Suppression of the Financing of Terrorism, numerous UN resolutions on this issue, and the recommendations of the FATF (European Union, 2007, pp. 19-20). The document highlights that the TFTP not only protects America’s citizens and national security but also other persons around the world and other countries’ national security. Both arguments aim to render
the TFTP more acceptable to Europeans and contribute to forgetting the highly secret and dubious background of the programme.

It must be emphasized that the representations reflect to a large extent the controls and safeguards that had already been informally negotiated by SWIFT with the US Treasury in spring 2003, when SWIFT realized that the TFTP was not a short-term operation. Increasingly worried about SWIFT’s potential liability, a delegation from SWIFT was invited to the White House where it was given ‘red-carpet treatment’ (Lichtblau, 2009, p. 323). Top officials and key figures including National Security Advisor Condoleezza Rice, FBI director Bob Mueller, and Federal Reserve Chairman Alan Greenspan, all attempted to convince the company of their continued cooperation (ibid.). While the company had been heavily criticized after the disclosure of the programme, the perception of the role played by SWIFT changed in the course of 2007. The critique of the role of the company in the SWIFT affair faded and instead the company’s manner of continuing the TFTP under sharpened conditions was now accepted.

This shift also becomes clear from the third and final report on the SWIFT affair of the Belgian Privacy Commission published on 9 December 2008. The critique of SWIFT has largely disappeared and the report praises the company instead. It states that ‘nothing confirms the suspicions that SWIFT has seriously and repeatedly violated the law. The company acted with such caution that the data requested from SWIFT/USA by the American authorities were duly protected’ (Belgian Privacy Commission, 2008a). Moreover, the Belgian Privacy Commission stressed that SWIFT had meaningfully cooperated in improving privacy safeguards and accepting the Commission’s decisions. In fact, according to the Belgian Privacy Commission, the lesson to be learned was that ‘private companies are unable to combat the risks alone when data they have legitimately acquired are confiscated and unfairly exploited by certain states, nor are they capable of bearing all the consequences’ (2008b). The shift in the consideration of SWIFT from accomplice to almost a victim took place not only in the Belgian Privacy Commission’s reports, but also among members of the European Parliament (interview 6).

A third initiative aimed at rendering the TFTP less controversial was the designation of an ‘eminent European person’ reviewing the procedures governing the handling, use, and dissemination of the SWIFT data subpoenaed by the United States Department of the Treasury. This initiative was part of the representations announced by the Treasury Department. On 7 March 2008, the European Commission appointed the French counter-terrorism judge and active member of President Sarkozy’s party UMP, Jean-Louis Bruguière
for this function. According to EU Justice Commissioner Franco Frattini, ‘Jean-Louis Bruguière is a prominent and highly regarded figure in counter-terrorism circles both in Europe and the United States’ (European Commission, 2008). However, instead of reassuring the European Parliament, the appointment of Mr. Bruguière and the publication of his reports in December 2008 and January 2010 led to heated discussions.

The appointment of Mr. Bruguière was controversial in the view of some MEPs. According to them, he was not neutral because of his 30-year career in prosecuting terrorists in France and his very close relations with the American law-enforcement community. Moreover, Jean-Louis Bruguière had no record of defending privacy and data protection rights, which made him an ‘unconvincing’ candidate for this job (in ’t Veld, 2008). Moreover, according to some MEPs, ‘while discussing his first report Mr. Bruguière made a very big mistake. He made political comments defending why the programme is so important’ (interview 11), while the European Parliament had demanded an objective report presenting the facts.

After the publication of the Bruguière reports of December 2008 and January 2009 MEPs were briefed via in camera sessions about the confidential aspects of the TFTP and they had the right to consult the Bruguière reports under certain conditions. They complained repeatedly about the lack of evidence provided by either the US authorities or the Council of the EU to justify the need for the programme. One MEP declared,

I do not understand why those reports are classified. They are very general and they do not contain the many details that we were looking for. It says what is good about the programme and what could be improved. It is claimed that the programme provides many intelligence leads to the Europeans, it is completely unclear, however, if these leads have led to any indictments (interview 11).

Likewise, Portuguese MEP Tavares (GUE/NLG) stated that to justify the TFTP ‘the repeated references to the Bruguière Report, a secret report, are [. . .] unacceptable. This is hardly convincing as anyone who had read the Bruguière Report knows that it contains almost no empirical data’ (European Parliament, 2010a).

Some were also critical of the fact that the second Bruguière report stresses the importance of the TFTP by referring twice to the foiled terrorist attack on 25 December 2009 on a flight from Amsterdam to Detroit. They felt that linking this attempted terrorist attack, which took place on Christmas Day and just before the publication of the Bruguière report in January 2010, with the TFTP was one of the attempts to convince MEPs of the great value of the programme. Yet, in the words of one MEP, ‘SWIFT [data] had nothing to do with the Christmas attack as it was one of the passengers who stopped the terrorist’ (interview 11).
Although highly confidential, a summary of the first Bruguière report and a complete version of the second report are in fact available on the Internet. The seven-page summary is very general. It repeats the content of the representations, describes the designation and mandate of the ‘eminent European person’ and summarizes the three missions to Washington that Bruguière had undertaken to ‘ensure a proper understanding of the TFTP and the various data protection safeguards surrounding it’ (Bruguière, 2008, p. 4). However, none of his findings, except for his conclusion ‘that the Programme has made a real contribution to counterterrorism efforts’ and the announcement of ‘a series of detailed and specific recommendations regarding the operation of the Programme’, are included in the summary (Bruguière, 2008, p. 6).

The first five pages of the twelve-page second Bruguière report are rather general too. They contain an executive summary, a background section on the TFTP, a reminder of the principal controls and safeguards surrounding the TFTP, and a description of the evolution of the TFTP. The last seven pages cover the investigation of Judge Bruguière on the implementation of the TFTP. The focus of his analysis is threefold. First, it describes and assesses the measures taken by the Treasury in response to Bruguière’s recommendations set out in the December 2008 report. Second, the report considers the compliance with the data protection safeguards set out in the TFTP Representations. Third, it looks at whether the TFTP has contributed to provide a high level of added value to the fight against terrorism, notably in Europe (Bruguière, 2010). Throughout the report, it is emphasized that ‘the TFTP must be seen as an important and highly valuable source of reliable information which has provided police and other services with significant intelligence for the fight against terrorism’ (Bruguière, 2010, p. 12).

In sum, the Safe Harbor Agreement, the US representations, and the appointment of the eminent European person assured the continuation of the TFTP. Despite their improvised and ad hoc nature, outside conventional frameworks of international cooperation, these initiatives normalized and legitimized the surveillance programme, providing it with an alternative legal framework and a certain degree of oversight. In addition to these initiatives, there have been continuous negotiations between the US and the EU in order to establish a more comprehensive agreement. However, before such an agreement was finally adopted in August 2010, SWIFT’s decision to change its processing architecture, withdrawing its mirror database from American soil, and the expiration of the existing interim arrangements between the EU and the US Treasury caused a new period of politicization.
4.4.4 Repoliticizing the TFTP

The SWIFT affair became front-page news again from the end of 2009 through the first half of 2010. The renewed politicization of the SWIFT affair resulted from SWIFT’s decision to review its global messaging system. In order to ‘cope with future capacity increases’, SWIFT adopted a ‘new policy to enhance flexibility and efficiency through a regionalisation of [SWIFT’s] data processing centres’ (SWIFT, 2007, p. 17). This new regional architecture can also be seen as a direct response to the complaints following the TFTP since it would ‘improve our commercial appeal in some jurisdictions’, allowing for different data privacy arrangements (*ibid.*). More specifically, it implied that from December 2009 European financial data records would only be held in Europe—in the existing datacentre in Zoeterwoude in the Netherlands and in a new mirror datacentre in Diessenhofen, located in non-EU member state Switzerland. Through the changed architecture, European data would cease to be automatically available in bulk to the US. In order to assure continued access of the US to *all* SWIFT data after the expiration of the existing agreement on 31 January 2010, a new EU-US agreement had to be adopted before the end of 2009.

The adoption of this new agreement led to a serious power struggle between the US and the EU as well as among the European institutions. With respect to the latter, the Commission and the Council had started negotiations with the US in July 2009, involving the ECB and the EDPS but without informing the European Parliament. They considered that because the EU-US agreement was negotiated as a third pillar issue, according to which the European Parliament had no formal decision-making powers, there was no role for the European Parliament. Moreover, the Commission and the Council aimed to have the agreement in place before the Lisbon Treaty entered into force as they believed that the involvement of the Parliament could take at least six additional months of negotiation (Taylor, 2009). In turn, the European Parliament learned about the negotiations for an agreement from the press but it considered that although the powers of the Parliament are limited, the treaty prescribed the right of Parliament to be consulted by the Council before an act is adopted. In September 2009, the EP reacted to the envisaged international agreement by organizing hearings and adopting a resolution in which the Parliament expressed its critique of the envisaged agreement and repeated its concerns about data protection and privacy breaches as well as economic espionage (European Parliament, 2009a, 2009b).

In the negotiations between the EU member states and the US, Austria, Germany, Greece, and Hungary were very reluctant to normalize the TFTP programme. They continued
to have concerns that the interim agreement would not include sufficient guarantees on data protection (Monar, 2010, p. 146, Taylor, 2009). The debate on the interim agreement was particularly vivid in Germany where the German Bundesrat, the German Federal Crime Office (BKA), German MEPs, and German members of the Council such as the Minister of Justice, Sabine Leutheusser-Schnarrenberger, were very critical of the TFTP while Chancellor Angela Merkel, and the Minister of the Interior, Thomas de Maisière, defended the agreement (Dretzka & Mildner 2010, Monar, 2010). In order to obtain the consent of Germany, Austria, Greece, and Hungary, the highest US officials, including US Treasury Secretary Timothy Geithner and Secretary of State Hillary Clinton, tried to put them under pressure. This is confirmed in one of the Wikileaks cables in which the US Embassy in Berlin reports that ‘Germany relents following intense pressure’ and that the ‘German vote [which allowed the agreement to pass] comes with costs for the coalition [the US]’ (Embassy of the US in Berlin, 2009). By obtaining one of the revisions it demanded—a reduction of the duration of the interim agreement from one year initially to nine months—Germany was willing to stop blocking the agreement. Finally, all four countries decided to abstain from voting when the interim agreement was adopted on 30 November 2009.

The European Parliament was very disappointed and angry about the adoption of an interim agreement just one day before the Lisbon Treaty was to enter into force. It stressed that the timing of the adoption of this interim agreement was significant since under the Treaty of Nice the EP had no formal competencies to control or to be otherwise involved in the decision-making process concerning third pillar issues. The Treaty of Lisbon, on the contrary, would make it possible for the EP to debate and alter the agreement as it was given co-decision power.

Nevertheless, in the end the members of the European Parliament had the opportunity to influence the adoption of the EU-US agreement. According to the formal procedures, ‘there are three stages to the signature of an agreement: complete, adopt, and conclude. On 30 November the agreement was completed but not yet concluded before the Treaty of Lisbon entered into force’ (interview 11). Practically this meant that the EP could not change the text of the agreement anymore but it would gain the right to endorse or reject the negotiated text.

Many MEPs were annoyed by the initial decision of the Council and the US authorities to sign the agreement just before the European Parliament was to acquire new powers. The dissatisfaction of the EP with the Council and the Commission grew as the MEPs found that they did not receive the relevant documents in time and they were put under pressure to give their consent to the agreement quickly. In reaction to this situation, German
MEP Manfred Weber (European People’s Party (EPP)) stated during the parliamentary debates about the interim agreement reached in February,

This whole debate was, of course, initially coloured by the frustration and irritation that many people in the European Parliament felt because we had the impression that, once again, things were being rushed through in the Council before the entry into force of the Treaty of Lisbon (European Parliament 2010a).

Other MEPs complained about the ‘undue haste’ or ‘breakneck speed’ of the procedures. They were critical of the fact that they had received important documents only a few days before the vote of the Parliament was scheduled. The second Brüguère report was made available to the EP just a few days before the vote. MEPs protested that they were never informed about the preparation and publication of this report, and considered that the timing of the report made it impossible to take it into account before the vote. In addition, the text of the agreement was not provided to the EP before 25 January because of delays in translating the document. MEPs called this argument into question and qualified it as ‘unacceptable’, ‘something that cannot be taken seriously’, and they reminded the Council that ‘parliamentary consent must not be a retrospective tool’ (European Parliament, 2010a).

The relations between the majority of the EP on the one hand and the Commission and the Council on the other further deteriorated as the latter sought to persuade the MEPs to vote in favour of the agreement. Proponents of the agreement—the Council but also members of the EPP—referred to a ‘security gap’ that would arise in case of a rejection of the agreement (EurActiv, 2010, Pop, 2010a). They meant that when data transfers to the US authorities ended, ongoing and new investigations into terrorist networks on the basis of SWIFT data would be frustrated, which would pose an unacceptable security risk. It may be noted however, that when the agreement was rejected, SWIFT decided to increase the storage time of its data beyond the regular period of 124 days. This would allow the US authorities to request the missing data when a new agreement would be negotiated. Moreover, as argued by several MEPs, the US could still obtain financial data through traditional channels of international judicial aid and existing legal frameworks of police cooperation.

Furthermore, proponents of the agreement argued that the EP used the agreement for its own political purposes and that a rejection of the agreement would put lives at risk. An EU diplomat for instance warned against ‘playing politics with the security of our citizens’ (quoted in Pop, 2010a). US Secretary of State Hillary Clinton also personally called Jerzy Buzek, the President of the European Parliament, to convince EU lawmakers not to reject the agreement and Stuart Levey, the Under-Secretary for Terrorism and Financial Intelligence, wrote an article in Europolitics warning against the “tragic mistake” of scrapping the deal
Representatives from the Council even accused the European Parliament of using the SWIFT case to show its increasing powers. According to one highly placed European official, the European Parliament was not so much opposed to the agreement but was interested in a power play (interview 20).

In the debates of 20 January 2010 held in the European Parliament to prepare for the vote on the US-EU interim agreement, the TFTP was again considered from a wide range of perspectives. In addition to their attention to data protection safeguards, MEPs questioned the effectiveness of the programme and the desirability of international cooperation in this field. They asked the Ministers of the Interior to ‘convince Parliament that these methods that are now being proposed in this agreement really are necessary for the fight against terror’ and to ‘explain to us where the added value of the SWIFT agreement is’. Others were opposed to the idea of transferring the private data of Europeans to the US because of a lack of trust. In the words of German MEP Franz Obermayer (a Non-Attached Member (NA)) ‘high-ranking politicians and criminal experts doubt that, in the US, the data will be used solely for combating terrorist activities’. Similarly Portuguese MEP Rui Tavares (European United Left/Nordic Green Left (GUE/NGL)) stated ‘it is unacceptable to say that this is a provisional report, when the data collected over the next nine months will be in the hands of the US administration within five years, and it might be a Sarah Palin administration rather than the Obama administration’ (European Parliament, 2010a).

On 4 February 2010, the EP’s LIBE Committee debated and accepted a report written by Dutch MEP Janine Hennis-Plasschaert that recommended the rejection of the EU–US agreement on the processing and transfer of financial messaging data from the European Union to the United States for purposes of the TFTP (A7-0013/2010). In this report three issues were highlighted. First, the rapporteur partially reframed what was perceived to be at stake in the professional field by emphasizing that the EU should take up a more active role and become ‘a true counterpart to the US’, ‘working shoulder to shoulder’ (European Parliament, 2010b, p. 7). She argued that with the proposed agreement ‘it cannot be denied that the EU continues to outsource its financial intelligence service to the US’. Therefore, she stated:

the current debate is not about SWIFT as such but about how Europe could cooperate with the US for counter-terrorism purposes and how financial messaging data providers are requested to contribute to this fight, or indeed more generally the law enforcement use of data collected for commercial purposes (ibid., p. 8).

Secondly, she offered a list of legal shortcomings of the proposed agreement. These include, for instance, the continued violation of the proportionality and necessity principles of data
protection laws that cannot be respected by SWIFT due to the structure of its database and the absence of indications on the retention period of the data, the conditions for sharing information with third countries, and the public control and oversight of the authorities’ access to SWIFT data. In short, she concluded that the agreement ‘does not guarantee European citizens and companies the same rights and guarantees under US law as they would enjoy in the territory of the EU’ (p. 9). Thirdly, the rapporteur criticized the Commission and the Council for failing to respect the duty to inform the European Parliament ‘fully and immediately at all stages of the procedure’ and asked these institutions to make all relevant information available for the deliberations in Parliament (p. 10).

On 11 February 2010, the European Parliament voted on the interim agreement that the Council had concluded on 30 November 2009. During the parliamentary debate the previous day and in line with the Hennis-Plasschaert report, MEPs criticized the data protection safeguards adopted in the agreement, which they qualified as ‘unacceptable’ and a ‘flagrant breach of citizens’ rights’. More generally, many MEPs considered the agreement as a ‘bad agreement’ (European Parliament, 2010c). They also condemned the attitude of the Council which, it was widely agreed, ‘did not act properly with the European Parliament’, and had ‘a really amateurish approach’, as well as the American diplomats, who in the words of German MEP Martin Schulz (PES) behaved like Jonathan Swift’s Gulliver and ‘believes that it can treat the European Parliament as if it were an organization of little people’ (European Parliament, 2010c).

In addition, during the plenary debate doubts about the effectiveness of the TFTP were raised again. Swedish MEP Carl Schlyter (Greens/European Free Alliance) called into question the TFTP’s effectiveness in preventing terrorism, stating that ‘no terrorist attack will be stopped by this proposal. None of the four attacks mentioned by the Council Presidency would have been stopped, although perhaps the subsequent investigations would have been made easier’ (ibid.). British MEP Sajjad Karim (European Conservatives and Reformists (ECR)) emphasized that the ‘instances where SWIFT has failed or let us down’ must also be taken into account. He continued,

There have been many failed or bad investigations in the European Union. In my constituency alone, 12 innocent people were detained and were not able to be charged. At the time they were detained, they were informed that financial transactions were part of the substantial evidence against them (ibid.).

Yet, the broadening of the debate did not last long as the concerns of Schlyter and Karim were not actively defended by many other MEPs. It is important to stress that at this stage the opposition of the European Parliament fundamentally differed from its critique just
after the disclosure of the TFTP. While MEPs remained very critical in 2010, ‘nobody in the European Parliament is against the use of SWIFT data in the fight against terrorism’ (interview 11). Although the interim agreement was massively rejected by an EP resolution (378 in favour, 196 against, 31 abstentions), the Parliament requested that the European Commission and the Council work on ‘a long-term agreement with the United States’ (European Parliament, 2010d). A few weeks later, on 24 March, new negotiations for an agreement between the EU and the US were opened (European Commission, 2010).

After the rejection of the agreement, the Commission and the Council demonstrated a new spirit of cooperation. Home Affairs Commissioner Cecilia Malmstrom commented that “[t]he interim agreement was not perfect, we’ll come up with something better,” and pledged that she would ‘keep the parliament informed from the very beginning and throughout the whole process’ (Pop, 2010b). Subsequently, the Commission immediately informed the European Parliament about their recommendations to the Council to open negotiations with the US that would start on 10 May. Reacting to these recommendations in its resolution of 5 May 2010, the EP indicated the main obstacles to accepting the EU-US agreement. The most important for the EP were its opposition to bulk transfers of data, the need to appoint an independent person to monitor the TFTP, improved access to documents that would demonstrate the necessity of an agreement, and its desire that Europeans have the same rights as Americans in case of abuse of data, including the right to go to court (European Parliament, 2010e). Concerning this last safeguard it is important to stress, however, that the rights obtained would not be very significant. Previous lawsuits in the US against SWIFT and the authorities involved in the TFTP have been unsuccessful and it continues to be problematic for Europeans to prove that their data have been secretly targeted.

In addition to these privacy and data protection-related issues, sovereignty remerged as another important aspect of the TFTP. The EP did not want to ‘free ride’ on the American security programmes, and was opposed to outsourcing Europe’s security policy to the US. This means that the EP was asking for reciprocity with regard to American financial records and the development of a European capability to analyse financial data. It might be called quite surprising that the idea of an EU version of the TFTP had much success with MEPs. If one had suggested such a programme in 2006 this would probably have led to a severe condemnation and massive outcry. However, by 2010 this was seen as a good solution by fractions of the EU institutions. Initially developed by the Council Secretariat and strongly supported by the EU Counter-Terrorism Coordinator, Mr. Gilles de Kerchove, the EU equivalent of the programme was considered as a way to avoid the transfer of data to the US.
authorities and to strengthen the EU’s capabilities with respect to combating terrorism financing. This last argument is somewhat puzzling, taking into account the critique by the same MEPs of the lack of results and effectiveness of the TFTP.

Meanwhile the pressure of the Obama administration continued. On 6 May 2010, Vice-President Joe Biden delivered a speech to the European Parliament in which he tried to convince MEPs about the necessity for the transfer of financial data to US authorities for the purpose of combating terrorism. In what was qualified as ‘sweet talks’ by the European online newspaper EUObserver (Pop, 2010c), Biden complimented and supported the work of the European Parliament and the European Union and he insisted that he, his government, and his President ‘are back in the business of listening—listening to our allies’ (Biden, 2010). He also went into great lengths to explain the importance of, and his personal commitment to, the protection of privacy, but added that ‘no less than privacy, physical safety is also an inalienable right’ (ibid.). Biden emphasized that the ‘Terrorist Finance Tracking Programme is essential to our security as well as yours’ and that ‘as leaders, we share a responsibility to do everything we can within the law to protect the 800 million people we collectively serve’ (ibid.). From the reactions of the MEPs who had been fiercely opposed to the previous agreement, Biden’s speech succeeded in gaining quite some sympathy. According to Hennis-Plasschaert, for example, “the No-vote was a wake-up call for the Obama administration, they suddenly realised we can block things. They’ve since shown willingness to co-operate” (quoted in Pop, 2010c).

Negotiations between the EU and the US authorities continued and on 28 June 2010 the European Union and the United States signed an EU-US agreement on the processing of financial data for the purposes of the TFTP (Council of the European Union, 2010b). Following an earlier threat that the European Parliament would reject the agreement for a second time (Pop, 2010e), many of the European Parliament’s demands were addressed in the new version of the agreement. The agreement acknowledges, for instance, the demand for an EU equivalent to the TFTP in the EP’s resolution of 5 May, a supervisory role and a right to examine data requests for Europol, and the restriction of search tools to terrorism-related requests only.

However, despite the large majority who voted in favour of this agreement (484 in favour, 109 against and 12 abstentions) on 7 July 2010, MEPs were not entirely satisfied about the content. In fact, they felt that their main objection, the transfer of personal data in bulk from the SWIFT database to the US authorities, remained unresolved in the new text. According to MEP Sophie in ’t Veld, “the US has the capacity to filter, so it can be done. We
need to get the technology and do it here in the EU” (quoted in Pop, 2010c). Nevertheless, many MEPs considered that the new agreement was a “step forward” (quoted in Pop, 2010d) compared to the earlier agreement and stated that “it is better to have an insufficient agreement than no agreement at all” (interview 11).

The European Parliament’s consent to the conclusion of the EU-US agreement marked an end of the ‘SWIFT affair’, and the TFTP restarted on 1 August 2010 for a period of at least five years. During the four-year EU debate two phases can be seen as political, the weeks after the revelation of the TFTP, and the debates and the vote on the EU-US interim agreement of early 2010. In these moments the TFTP was discussed from the perspective of privacy and data protection rights, economic and international relations with the US, its effectiveness, and (but only in phase one) the societal desirability of the programme. On the basis of these issues, the privacy and data protection law became most politicized. Like the debate in the US, framing the TFTP around a legal issue and its technical aspects helped to depoliticize the programme. By developing a legal framework and making the financial data transfers compatible with all technical aspects of European privacy law, the TFTP became normalized. Hence, through the involvement and the incorporation of some recommendations of data protection agencies and the conclusion of international agreements on the programme, the TFTP gained legitimacy. From the entry into force of the EU-US agreement in August 2010, the SWIFT affair can be considered as depoliticized. However, occasional media reports indicate that the SWIFT affair is not to be considered as a completely closed case yet. New controversies, such as the seemingly difficult development of the EU Terrorist Finance Tracking System, the revelation that Europol violated the data protection rules set out in the agreement (Pop, 2011a, 2011b), and the court ruling with respect to the disclosure of secret documents concerning the TFTP (Volkskrant, 2012, in t Veld, 2012) continue to appear in the media and the political debate.
4.5 Conclusion

A comparison of the debates on the SWIFT affair in the US and the EU shows significant differences in duration, topical emphasis, contextualization, and political follow-up. The debate on the TFTP lasted approximately two weeks in the US and four years in the EU. In the US the legality of the programme, its respect for privacy, and media organizations’ decision to disclose the programme became politicized, while in the EU privacy and data protection were considered crucial. Furthermore, in the US the SWIFT programme was placed in the broader context of the NSA eavesdropping scandal while in the EU it was most often considered in relation to the American demand for travel data (PNR records) and illegal secret programmes in the War on Terror. Finally, the conclusions from the public debate on the disclosure of the TFTP were radically different, as in the US the TFTP was considered legal and much less controversial compared to the NSA programme, while in the EU a tough and long transatlantic, intra-European, and inter-institutional battle followed (see table 4.2).

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<th>Phase</th>
<th>US</th>
<th>EU</th>
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<td>0. Depoliticization</td>
<td>September 2001–23 June 2006: from its inception after 9/11 until its disclosure the TFTP is completely depoliticized because it is kept secret from the public.</td>
<td>June–July 2006: the TFTP is debated from the perspective of: privacy rights, legality and judicial oversight, congressional approval and oversight, its duration, high-tech data-led approach, and results.</td>
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<tr>
<td>1. Moment of openness</td>
<td>23–25 June 2006: the TFTP is debated from the perspective of: privacy rights, legality and judicial oversight, congressional approval and oversight, its duration, high-tech data-led approach, and results.</td>
<td>June–July 2006: the TFTP is debated from the perspective of: privacy rights, data protection laws, legal competence, the possibility of economic espionage, transatlantic relations, the desirability of the programme, and the wider context of the War on Terror.</td>
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<td>2. Politicization</td>
<td>26–29 June 2006: the issues discussed are the legality and privacy aspects of the TFTP on the one hand and the decision to disclose the programme on the other.</td>
<td>July–December 2006: data protection agencies investigate the TFTP and formulate recommendations to enhance privacy and data protection safeguards.</td>
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<td>3. Depoliticization</td>
<td>From July 2006: the debate mainly focusses on the media’s decision to disclose the TFTP. Congress supports the TFTP and does not start investigations into the programme.</td>
<td>January 2007–November 2009: three initiatives are taken to render the TFTP acceptable: SWIFT joins the Safe Harbour Principles, the UST Representations, and an ‘eminent European person’ is appointed to review the TFTP.</td>
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<td>4. Re-politicization</td>
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<td>December 2009–August 2010: critical debates and rejection of the EU-US agreement by the EP. This is followed by new negotiations taking into account the demands of the EP and Biden’s speech before the EP. Eventually, the EP gives its consent to the new agreement entering into force by August.</td>
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Table 4.2. Phases of politicization and depoliticization in the SWIFT affair.

However, there are also important similarities in the (de)politicization of the SWIFT affair. On both sides of the Atlantic, the disclosure of the TFTP was followed by a moment of openness during which many questions were raised. These included questions about the
‘political’, calling into question the TFTP and even the assumptions underpinning the War on Terror. Subsequently, certain aspects of the programme became politicized and can be seen as part of ‘politics’. In a third phase attempts were made to depoliticize the programme. In this phase, debates continued as a part of politics, with a shared understanding of the problem developing around questions of administration (what are the legal competencies of institutions and which legal procedures must be followed?) and detailed technical questions (how can privacy safeguards be integrated into the analytical software used by the US authorities? And how can datasets become more targeted?). In this phase the programme was rendered uncontroversial and the focus was on ‘solving’ specific matters. Making this process visible demonstrates that societal and political questions that call into question the political order can emerge in the ‘moment of openness’ and when an issue becomes repoliticized. Only in these instances is there room for ‘the political’.

Comparing the questions of the political raised in the moments of openness in the US and the EU shows another similarity. In both debates two subjects were raised but never became debated. First, the philosophy of the War on Terror that also shaped the TFTP was not part of the SWIFT debates. At the core of this philosophy, like Laplace’s demon, is the desire to see into the future with the help of science and technology to prevent terrorism from happening. More practically this means that the assumptions of the War on Terror were based on the idea that terrorists can be caught before they strike through the analysis of massive sets of personal data by ‘smart software’. This belief in complex risk- and link-based calculations and the timely connection of data dots for detecting terrorists preventively was at the core of the Bush administration’s counter-terrorism policy, and continues to be important today. However, despite the connections that were made between the TFTP and other secret and controversial programmes, and more general remarks about the need for reflection on the War on Terror, the debates in the US and the EU did not deal with the philosophy underpinning the War on Terror.

A second issue that was raised but never discussed thoroughly in the American and European debates on the SWIFT affair was the effectiveness of the TFTP. Despite the hints about the lack of results, potential abuse, and false positives in the first newspaper articles, and the repeated questions from MEPs on the effectiveness and the added value of the programme, the working and the tangible results of combating terrorism through SWIFT data have remained piecemeal or vague. It is important to highlight the absence of these vital elements of the debate on the TFTP as it shows how the ‘political’ was occulted and how the questioning of the political order and the raison d’être of the TFTP was avoided.
Analysing the kind of questions that were raised or avoided in the SWIFT debate as well as the shifts that took place during the debate also leads to the question why none of the participants in the field objected to the depoliticization of the affair. While a reduction of the debate to politics and calculable questions might be understandable from the perspective of those in power, it is interesting to see that other participants, such as the entities responsible for monitoring or controlling the authorities, civil liberties groups, national data protection agencies, the parliamentary opposition, and the media, also restricted their contributions to a few specific and technical issues.

From the perspective of governmentality and field theory, two explanations can be found to explain the abandonment of the political. After a first reaction of strong protest, the European Parliament was most interested in solving the issue. In this case it is important to stress that unlike national parliaments the EP is not organised into a governing majority and an opposition. To maximise its influence on European decision-making it is of great importance to find a compromise that is supported by a majority of the MEPs. The Belgian Privacy Commission, and privacy commissions in general, explained that their task was to establish whether privacy or data protection laws had been violated. They did not examine ethical questions (interview 9). Journalists in turn might claim that their job is to report different opinions and facts but not to take an ethical or political position. In other words, it seems as if nobody owns the questions concerning the societal desirability of the TFTP and more broadly the philosophy on which the War on Terror is based. This underscores Judt’s and Žižek’s point that both politics and the political are depoliticized in favour of a bureaucratic technique of governance.

Secondly, the analysis of the debates in the US and the EU shows how a field of governing emerged in relation to the SWIFT affair and which issues were at stake in this field. In both debates a shared understanding of the TFTP emerges. Within two weeks an agreement was reached in the American debate that the programme was a ‘vital tool’, representing ‘government at its best’, providing a ‘unique and powerful window into the operations of terrorist networks’, and saving lives (inter alia, Lichtblau & Risen, 2006). Likewise, despite the lengthy debates in Europe, a consensus that an international agreement with the US had to be concluded to legalize the transfer of European data to the US already existed in September 2006. The central question raised in the European Parliament, and this is very clear in the debates of early 2010, was how to continue the TFTP with respect for European (data protection) law. Both fields can be seen as fields of domination or fields of force in which power was exercised by framing the TFTP as an issue of national security and
around legal arguments. Proponents of the TFTP exercised pressure by highlighting the importance and the necessity of the programme for national security, which was difficult to challenge. Furthermore, the focus on establishing and complying with the law helps to end the debate, as it implies that the societal, and political questions and debates that preceded or destabilized the law can be avoided. In short, the structuring of the field facilitates the depoliticization of the TFTP and the avoidance of questions of the political.

Finally, in the European debate on the SWIFT affair, the European Parliament played a small but important role in generating public attention for the EU-US agreement on the transfer of bank data, and showed its commitment and powers as a defender of European citizens’ fundamental rights. However, the demands and concerns of the European Parliament must be considered as mainly part of politics. They ‘revolve around day-to-day decision making and ideological partisanship’ (Edkins, 1999, p. 2). Despite the attempts of some MEPs, the European Parliament did not succeed in debating adequately the questions of the political raised by the SWIFT affair. The following chapter attempts to re-politicize the SWIFT affair by addressing the questions of the political that were avoided in the debates in the US and the EU. It aims to investigate how the TFTP works opening the black box of SWIFT, and to consider the TFTP from the perspectives of effectiveness and the broader War on Terror philosophy.