

Oceans apart?

# when US and EU ICT policies collide

The **collapse of the US-EU Safe Harbor** agreement has revealed fundamental ICT policy differences between the two sides – but can they still **learn something from each other**?

“The extent to which today’s digital policy has become politicized on both sides is a cause for concern”

*“Different conceptions of privacy and free speech often lead to different transatlantic approaches to regulating the internet. Whereas a strong first amendment in the US often means the US regulators are less likely to circumscribe speech and expression in online forums, the EU’s strong principals-based approach to privacy and individual reputation often trumps individual rights to free speech.*

*In the EU, internet entrepreneurs – particularly those that are building platforms that enable communications – need to be cognisant of the higher likelihood of regulation and legal responsibility that could be foisted on them to control and police user communications.”*

– Dan O’Connor, Vice President for Public Policy, Computer & Communications Industry Association (CCIA)

Over the past 12 months, it has become increasingly clear that fundamental differences exist between European Union (EU) and United States (US) lawmaking when it comes to the regulation of technology. Following the nullification of the Safe Harbor agreement by Europe’s highest court – the European Court of Justice – on October 6, 2015, the political and socio-economic impact of these differences is now under scrutiny across the globe.

This article presents key areas of transatlantic divergence – and convergence – in digital decision-making that could shape the future of ICT regulation globally. We divide our analysis into five components – politics, principles, power, market and

priorities – before suggesting some areas in which each side can learn from the other.

## THE POLITICS

Policymaking is always influenced by political agendas in some shape or form. But how do political motivations compare on both sides of the pond? Overall, we are seeing a convergence of agendas, with differences arising rather in the **degree** of priority awarded to specific issues.

Firstly, technology is of **strategic importance** to both European and US lawmakers. Although the EU institutions are slightly late to the party, they now understand that data is fast replacing traditional commodities as the currency of the future – and unlike oil or gold, is practically infinite in supply.

Secondly, technology is now widely considered a lever of **geopolitical power**. Although important in both regions, this is more of a concern in Washington than in Brussels. Online platforms are also increasingly used to facilitate traditional crime and spawn entirely new types of sophisticated wrongdoing, such as mass hackings. The US has traditionally been a greater target from foreign attack, which is reflected in its national security-anchored policy agenda. Nevertheless, recent terror attacks and militant threats in Paris and Brussels respectively are likely to result in a shift in priorities in Europe.

Brussels has also caught up with the US in its recognition of the **economic power** of technology. The ability to transform whole industries and





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drive vital post-financial crisis growth using ICT is well understood stateside, with American ICT firms’ global leadership and market dominance standing as testament. In Brussels, the political desire to capitalize on the growth potential of ICT is much stronger than fear of its national security risks.

**Ethical considerations** are influencing digital policies on both sides. For example, how can legislative frameworks balance citizens’ fundamental rights and the evolution of user needs, individual states’ sovereignty and EU or federal authorities, and cultural diversity with the benefits of ICT-enabled harmonization? These are serious questions that both EU and US regulators are grappling with.

Finally, the extent to which today’s digital policy has become politicized on both sides is a cause for concern. Legislators in Europe and the US are increasingly leveraging it to gain the upper hand politically, resulting in skewed policies based on circumstantial evidence.

#### THE PRINCIPLES

Although the political drivers of policy may be similar, the **principles underpinning EU and US lawmaking** are very different.

EU policymaking is based on the **Precautionary Principle**, whereby legislation is passed to avoid a risk before it happens. US regulators are more inclined to let market forces play out, staging an intervention only in clear cases of market or regulatory failure.

There are also theoretical differences in **how rules should be applied**. Take data protection: Europe relies on designated commissioners and authorities to enforce citizens’ right to privacy and data protection online. In the US, users must settle disputes privately by identifying infringements and suing the offending parties.

EU decision-makers are often wary of **market**

**dominance**, preferring a vibrant base of small and medium-sized companies. This is evidenced by several high-profile legal investigations by the EU into US ICT firms’ commercial practices (such as Google in online search or Apple’s tax affairs in Luxembourg). Regardless of the merits (or otherwise) of the European Commission’s concerns, there is no denying that market dominance does not draw the same political concern in the US.

Each approach has its pros and cons. While the EU’s principles-based approach is preventative and helps to avoid cataclysmic problems such as the collapse of the US investment bank Lehman Brothers in 2008, it can also result in superfluous regulation that is highly restrictive to ICT sector growth. The onerous draft General Data Protection Regulation (GDPR) under negotiation and due to be wrapped up in late 2015 is a perfect example that is currently dividing industry and policymakers in Brussels.

The US approach, more *laissez-faire* and free market in nature, creates scope for problems arising from the absence of regulation to which lawmakers can then only react. Nevertheless, it has also largely avoided the creation of rules and regulations that fundamentally reduce the user-value of the internet.

#### THE POWER

Navigating the opaque and tangled nexus of competent authorities can be challenging on both sides of the Atlantic, and is where companies often struggle in their lobbying activities.

One key difference between digital policymaking in Europe and the US is the respective **influence over (or the ambition to influence)** legislative development at the supranational level.

In Europe, EU institutions (and particularly the European Commission) are striving for much greater authority to make decisions in this field. As a result, there is a growing **power struggle**

between Brussels and certain Member States who already have comprehensive national laws in place, including Germany, France, the UK and the Netherlands. Poland is also set to become a key player in this tug-of-war following the recent election of the nationalistic Law and Justice party.

In the US, competence to amend or introduce technology laws remains largely at **state level**, with the federal government relatively reluctant to take on more responsibility in this area. Why? Washington is all too aware that the political nature of Congress and its protracted decision-making prevent it from reacting to the legislative needs of a fast-moving sector like ICT.

So where does the power really lie on both sides? In the EU, it is a mix of powerful Member States such as France and Germany (with the Franco-German axis almost unbeatable), with Brussels growing in top-down influence and capability.

In the US, certain states and cities are driving policy development from the bottom up, including California (innovation, labor law), New York (consumer protection) and Boston (prevention of ICT-enabled crime). **Prominent us regulatory agencies**, including the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC), also play an active role in shaping legislative development. These agencies are widely recognized to be more influential than individual states, but more reactionary than the federal government.

In terms of effectiveness, the most robust argument for increasing EU-level competence in digital policy lies in the fact that issues requiring regulatory attention in the ICT sector transcend national frontiers. The internet creates a borderless society and economy, making pan-European, harmonized legislation more appropriate in theory.

That said, the impact of ICT is cross-sectoral and societal, which means that national or state contexts should be taken into account. What will be most interesting is whether a gradual cession of EU Member State power to Brussels sparks a corresponding debate in the US about the need for a stronger federal role in ICT policy.

Related to this issue is the **lobbying culture** in the US and Europe. Federal politicians tend to take a more permissive stance on external lobbying, while the practice is often viewed with mistrust in Europe. Indeed, the difficulties faced by US ICT companies in Brussels could be attributable to their previous lack of awareness of this cultural difference. Particularly in the context of the new EU Parliament elected in 2014, transparency, humility and constructive engagement are central if companies are to have a real say in EU decision-making.

#### THE MARKET

Regulators in Brussels and the US view the concept of **disruption** very differently. Despite re-

cent Digital Single Market rhetoric to the contrary, the idea of mass-market upheaval provokes nervous tremors in European political circles still reeling from the devastating effects of the 2008 financial crisis.

By contrast, the majority of US lawmakers believe the status quo to be the ultimate enemy of fair competition and consumer choice. Online market players are not considered an unfair threat to perceived traditional industries like transport, automotive or industrial manufacturing, with lawmakers more accepting of the “survival of the fittest” school of thought.

European and American legislators’ **differing conceptions of the market** are likely down to both cultural and economic factors. The EU is a more prudent legislator by nature, and is less comfortable with fundamental change to the status quo than the US.

The US has also traditionally led the way when championing the biggest and best businesses across the globe. The European economy is predominantly made up of small and medium-sized companies that are more at risk of failure from large-scale market disruption, and the EU therefore feels it has a duty to **protect** them from powerful incumbents with colossal market share.

But do these **conceptual differences** translate into different **policy decisions** that regulate the market? Arguably not. European lawmakers are currently assessing the need to impose new rules and regulations on online platforms to level the playing field and protect users. Certain prominent US states are effectively doing the same in parallel, as politicians shift from seeing the Ubers of the world as disruptive innovators to recalibrators with little regard for law and order.

#### THE PRIORITIES

How do policy agendas compare in the two regions?

In both the EU and US, **privacy and data protection** are paramount. EU legislators are focused on protecting citizens’ personal data, both in Europe under the draft GDPR and in third-party countries under international agreements. There is a general trend in Europe toward placing **stronger obligations on ICT companies** to safeguard personal data, with new rules on joint processor-controller liability and the legal basis for processing and data profiling likely to be adopted in late 2015.

Privacy is equally high on the agenda in the US following the Edward Snowden revelations, mass hacking scandals, and powerful (yet vying) interests fighting for a say over the processing, storing, caching, hosting, transmission and control of data.

Where the EU and US come into conflict is on the polemic issue of **mass surveillance**. US regulators are fighting to maintain their ability to use personal data for national security and defence,

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something the EU is actively opposing at home and abroad. This divergence of views vaulted to the forefront of global news in October 2015 following the European Court of Justice's nullification of the Safe Harbor Agreement, which had allowed transatlantic data transfers since 2000 and whose invalidation leaves ICT companies in a state of mass legal uncertainty.

**Intellectual Property Rights (IPR)** are also highly topical on both sides of the pond, with the EU focused on copyright laws and the US looking at patent reform. Specifics of the debate differ, with Brussels discussing internet users' cross-border access to and portability of copyright-protected content online, and US lawmakers looking at enforcement, licensing agreements and litigation processes.

Unique to Europe is **growing regulatory scrutiny in the areas of competition and consumer protection**. Indeed, under the European Commission's Digital Single Market strategy, several legislative reforms are planned for the next 18 months to tackle perceived issues in these areas.

Among the most controversial include an inquiry into competition abuses in the e-commerce sector (ongoing), an assessment of the need for platform regulation and greater intermediary liability (already launched), copyright reform (Q4 2015), and reforms of telecoms rules, the e-Privacy Directive, and the Audiovisual Media Services Directive (2016). VAT reform and digital taxation will also be in prime focus from next year.

The majority of these issues are less of a priority stateside, where the focus is on cybersecurity and the potential challenges posed by the Internet of Things, and how to ensure the application of US labor law in the sharing economy.

#### CONCLUSION

There are clear and fundamental differences between digital policymaking in Europe and the US, particularly in theoretical approaches to lawmaking, the political apparatuses making decisions and conceptions of the market.

The nuances of European and American policy agendas are also different. The federal government's access to data and defence against ICT-

enabled threats enjoy much greater prominence in Washington. Although this may rise up the EU agenda in light of recent events in Paris and Brussels, questions such as consumer protection, prohibitive market dominance and the need to scale up European companies will still reign supreme in Brussels.

That said, a polarized view of EU and US ICT policy would be simplistic and based on circumstantial evidence. There are points of convergence and even agreement on various issues (although both parties may be loathe to admit it). The political motivation driving policy is often the same, and regulators on both sides are struggling to reconcile the demands of a fast-moving ICT sector with the protracted nature of creating new laws.

Moreover, the US and European political and policy debate is not immune from mutual influence. The US is known to be watching EU developments on data protection and data transfer extremely closely, while the EU will likely follow the US in pushing stronger net neutrality laws as part of a telecoms policy reform next year.

Also of cross-border concern is how individual decisions may affect other regions into which European and/or American companies are looking to invest. Politicians in the White House may not consider EU developments as policy influencers on home turf, but are known to be monitoring how decisions made in Brussels may affect legislation in the BRIC countries and Asia, for example.

Are there areas in which each side can learn from the other? Absolutely. The EU could learn from its US counterparts in their approach to competition, and become bolder in the face of natural market evolution. EU regulation should be much more risks-based and the enforcement of competition law should be the default option to address antitrust issues.

On the other hand, the US could learn from the EU's philosophy of balancing the needs of governments and businesses with the privacy concerns of citizens. In doing so, it could seriously improve its relations with its trading partners and potentially avoid Safe Harbor-like catastrophes in the future. ●

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