Negotiating Privacy

The European Union, the United States, and Personal Data Protection

Dorothee Heisenberg

NEGOTIATING PRIVACY

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iPOLITICS: Global Challenges in the Information Age

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Dorothee Heisenberg

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Although the subject of this book only peripherally involves computers, it seems fitting to dedicate this book to my computer science husband, Greg.

NEGOTIATING PRIVACY

Contents

Transatlantic conflicts are nothing new. Since the establishment of the European Economic Community, there have always been small trade, regulatory, or foreign policy issues that divided the US and Europe. Over time, as the Europeans created more of a state-like entity and enlarged from six to twenty-five member states, it also began to assume a larger global role, especially in commercial matters. The member states eliminated nontariff barriers, ceded greater control to the institutions of the EU, and began trying to forge a European identity with European citizenship and currency.

The United States quietly supported European integration, and also reaped benefits from the increased market size and political stability that the expanding EU created.[4] In general, however, the transatlantic relationship was bifurcated; when there were differences in foreign policy, they were handled bilaterally between the US and the affected member state(s) without using the EU institutions. However, when conflicts involved commercial problems, increasingly, the EU handled these issues. Over time, the EU market became larger than the US market in terms of both gross domestic product (GDP) and population, and the EU became more assertive in commercial matters, setting international product standards,[5] costeering the World Trade Organization (WTO) trade agenda,[6] and scrutinizing foreign companies' mergers for anticompetitive implications.[7]

The data privacy conflict that arose between the EU and the US in 1998 was more important than the other economic conflicts that the close US-EU relationship had spawned. It was bigger because of its potential size—the US estimated that $120 billion worth of trade was at risk, making it thirty times larger than the next largest trade conflict (the Foreign Sales Corporation dispute)—and because it reflected two very different ideas about personal data privacy. The fundamental right to data privacy first became enshrined in the EU Charter of Fundamental Rights signed in 2000, and was later integrated into the June 2004 European Constitution. For the Europeans, data protection had become a fundamental human right, thus, automatically trumping many other rights.

By contrast, although the right to privacy had always been an important and expanding right in the US, it was not at par with explicit, constitutionally guaranteed rights. The US had very strict privacy laws in some sectors, but any data not covered by those sectoral laws were unprotected. In practical terms, this meant that the EU and the US reached very different conclusions about the rights of businesses and individuals relating to personal data, and these differences threatened to derail a large proportion of transatlantic commerce.

It also meant, however, that the conflict had zero-sum characteristics, making it more difficult to resolve than a collective action problem. Either standard was viable internationally, but the two were incompatible with

each other, and in order to make commerce possible, one side had to adopt the other's standard. Although it was true that the Europeans were only trying to get data protection for any European data that were transferred to the US, in practice, it would have been impossible to write legislation to monitor, and to enforce, a law requiring compliance with the European data protection laws for European data only.[8] Thus, any legislative solution in the United States would necessarily have been binding on US personal data as well. The conflict was, therefore, whether the Europeans could force the US to do something the Clinton administration was unwilling to do.

Compounding the diplomatic problem was the fact that privacy protection was explicitly exempted from WTO jurisdiction, and thus, the data protection dispute could not be resolved by that supranational body as many of the other EU-US trading conflicts had been. Another traditional method of diffusing "standards" issues, that of mutual recognition,[9] was also impossible because of the Europeans' established definition of privacy as a fundamental human right, meaning a "lowest common denominator" approach would not be acceptable to them.

The clash between the EU and the US, in short, had become a classic international conflict: international institutions and regimes did not cover the issue area, and compromise looked impossible. Negotiations began in early 1999, but a year later they had still not found a solution. In early 2000, partly because of the pressure created by the imminent departure of the chief US negotiator, Ambassador David Aaron, the Safe Harbor Agreement was finalized. That agreement (detailed in Chapter 3) allowed individual US companies to sign up to a list kept by the Department of Commerce, and warrant that they were following the requirements of the European Data Protection Directive in house. The Safe Harbor Agreement resolved the potential problem of blocking data flows and commerce between the EU and the US. The agreement itself, however, was the stuff of significant controversy: on the EU side, the European Parliament, which did not have the institutional ability to veto the agreement, voted to reject the agreement, saying it was unsatisfactory in important ways that had been elaborated by the national data protection authorities. Meanwhile, on the US side, the incoming Bush administration pledged to renegotiate the Safe Harbor Agreement, declaring the EU had no right to dictate to the US.

In a similar vein, the US-EU Passenger Name Record conflict was also abridged by an agreement granting "adequacy" to the US procedures for using the EU citizens' personal data. The data protection authorities in Europe expressed significant reservations about those procedures, and the European Parliament rejected the agreement, but again the European Commission elected to conclude the negotiations.

■ Making Sense of the Outcome

Given the many contradictions that characterize the Safe Harbor and Passenger Name Record Agreements, how should one understand the outcomes between the US and the EU on personal data protection? Since the issue is still relatively new, one should distinguish the short term and the long term effects. In the short term, the Safe Harbor Agreement did not result in an official bilateral treaty on data privacy, nor did it set in motion negotiations for a multilateral regime for other non-EU states to join. It did, however, prevent egregious abuses of Europeans' personal data, and it did prevent the EU from blocking an estimated $120 billion of transatlantic trade. In the short run, the Safe Harbor Agreement appears to have been a victory for the US commercial interests that were actively involved in preventing European style regulations in the US. Any abstraction from the negotiations on data privacy would likely conclude that the final agreement was closer to the preferences of the US than those of the EU. The EU was able to force the US to deal with privacy issues, but the negotiated outcome was clearly not the preferred solution of the EU.

In the long term, however, the Safe Harbor Agreement looks much less like a victory for the US commercial interests that were its main proponents. Neither did the agreement establish a new norm of industry self-regulation that was copied by other countries, nor did it create a flood of companies seeking to sign up for the Safe Harbor status. It did not prevent the EU from establishing a de facto international privacy regime, in the sense that the EU's standard is used by most other countries around the world, and it did not forestall greater US state-level regulation that resembled much of the philosophy behind the EU directive. In short, the agreement may come to be seen historically as a costly ceasefire during which most other countries (as well as some US states) allied with the Europeans.

The outcome of the Passenger Name Record Agreement, by contrast, was more of a capitulation by the EU. The European airlines had already been complying with the US requirements, and had more to fear from US retaliation, which could take the form of screening passengers in the US and fining the airlines, than it did from the threat of fines for violating the European Data Protection Directive. The agreement itself, challenged before the European Court of Justice by the only directly elected body of the European institutions, is unlikely to be overturned by the European Court of Justice. The Europeans tried first to establish a multilateral regime under the auspices of the United Nations, something in which the US showed only a passing interest, and then, as a fallback, suggested the creation of a new EU-wide forum for the discussion of personal data protection issues arising from international co-operation on security matters. As with the Safe Harbor Agreement, the fact that the EU was able to force the

US to deal with the privacy issues at all, and to make some minor concessions from the original, showed that the EU's privacy standard was significant. Overall, however, the US largely determined the outcome, and US preferences were dominant. The EU was much more deferential to US preferences in security matters than commercial issues.

In order to understand these two outcomes, it is necessary to review some of the factors that other analysts have used to gain leverage on these problems. Here the discussion centers on five differing explanations that should not necessarily be considered mutually exclusive. The first is a "power" approach, represented by Krasner's (1991) "Life on the Pareto Frontier" argument. The second explanation, elaborated by Shaffer (2000), credits the EU's market power, showing how the EU was able to leverage its growing internal market power by threatening to block data flow to the US, shielded by the WTO exemption for privacy. A third explanation, by Mattli and Büthe (2003), hinges on the institutions in Europe, where more formally organized business groups have communication advantages that encourage their involvement in the setting of standards at the international level earlier and more effectively than their US counterparts. Similarly, Newman (2004) argues that transnational data protection authorities in Europe compelled the EU to act in this issue by leveraging their power to block data flows. The fourth, constructivist, explanation was used by Farrell (2003)[10] who argued that the US-EU dialogue shifted the preferences of decisionmakers in both countries, diffusing the power conflict, and making a hybrid solution possible. Finally, the liberal intergovernmentalist approach, elaborated by Moravcsik (1997), explains the emergence of the US and the EU's negotiating preferences by showing how interest groups in each region had differential impacts on the initial negotiating positions taken by each side. Each of these explanations is reviewed in greater detail below.

Krasner (1991) analyzed the emergence of global telecommunications regimes with the observation that co-operation was the result of power symmetry between states, rather than the conquering of market failure. According to him, co-operation among states was more likely when the relative power among states was equal than when powerful states could simply do as they pleased. The reason for states to co-operate was to avoid adverse consequences from the other states that had the power to inflict them. The regimes created, however, were skewed toward the preferences of the powerful states, and thus ensured that the costs of adjustment fell onto the others.

Krasner identified these types of conflicts as co-ordination problems with distributional consequences: "Though the states agreed on mutually undesirable outcomes [in this case, the halting of data flows and commerce], they disagreed on their preferred outcomes."[11] Krasner does not give a par-

ticular way to assess power differentials, beyond stating that if an agreement is reached, power is symmetrical. "Agreement . . . has been limited to areas where states have shared interests and relatively equal power."[12]

In essence, in both data privacy cases, the basic conflict between the EU and the US was a classic power conflict—could the EU make the US do something it did not want to do, namely, pass comprehensive federal privacy legislation and apply European standards to Passenger Name Record data? Or could the US make the EU accept something (less data protection abroad) that it did not want to allow? The fact that an agreement was ultimately reached, and that neither side tried to renegotiate the terms after it had been signed (the Bush administration quietly shelved plans to try to renegotiate the agreement a couple of months after it had looked into the matter more carefully), shows that the agreement had durability, and that both parties were unable to move the agreement closer to their preferred position. According to Krasner, this implies that the US and the EU had symmetrical power. The US was unable to prevent the EU from extending its data protection to the US companies at home, but neither could the EU force the US to extend the kind of protection it wanted, and had to conclude a suboptimal data protection agreement in order to keep transatlantic commerce flowing. Thus, the two states reached the pareto frontier, but ultimately selected a point nearer the US position (no comprehensive federal privacy legislation).

The power framework has a great deal of appeal, especially when one sees the interaction between the EU and other countries in this context. Whereas the US was able to resist the demands of the EU to pass comprehensive privacy legislation, and still get an adequacy ruling, other states were not able to move in that direction, and most of the countries that implemented privacy policies to transfer data to and from the EU eventually adopted legislation that comports with the EU's directive.

However, there are two drawbacks to the power analysis of this issue: the first is that it does not present an iterative or strategic process. Gruber (2000) demonstrated that states do join regimes even when a priori the regimes were not consonant with their preferences. Thus, changing the facts on the ground can change a state's preferences. There are many examples of states joining successful regimes that they initially opposed because it was better to be within the structure than outside it (perhaps the classic case was Britain's entry into the EU). In the case of data protection, it is too early to say whether the US will ultimately join the rest of the world in passing comprehensive privacy legislation, since it is large enough to remain isolated and has reached an equilibrium with the EU at present.

The other drawback to the power approach is that it does not give any explanation of how that power is accrued. The observable outcome, that of the parties having reached an agreement, implies that the EU and the US

have power symmetry, but exactly how the EU or the US was able to force the other to the negotiating table is left underspecified.

Looking at just that question, Shaffer (2000) examines the role of using the common internal market as leverage. In his view, the EU was able to force the US to negotiate by virtue of holding transatlantic data flows hostage. Further, since privacy related legislation was specifically exempted from WTO jurisdiction, the US had no recourse to multilateral trade institutions and was forced to confront the EU's privacy demands. This argument has appeal, as economic motives have been a staple in state coercion for a long time. But it does raise the following question: if the EU could prevent data flow, and the US was motivated by the threat to transatlantic commerce, why was the EU not able to get an agreement closer to its preferred spot on the pareto frontier? By all accounts, the Europeans were unhappy with many of the features of the Safe Harbor Agreement, yet the EU Commission and the Council of Ministers decided to accept it. If the market access threat was credible, it is difficult to understand why the EU would settle.

A second answer to the question of how the EU was able to bring the US to the negotiating table and create a new international privacy regime is elaborated by Newman (2004). Newman correctly points out that the market access threat should be credible in a number of policy areas, including corporate governance and securities regulation, but the EU has failed to convert the US to its positions. Thus, not just market power, but what he calls effective market power, "a nation's capacity to deploy domestic political institutions into international political influence,"[13] is necessary. For Newman, the domestic institutions that reinforce the domestic policies in an issue area make the market power effective. Thus, the creation of a group of independent data privacy authorities that traded information among themselves, and had the power to force the EU Commission to act, proved to be the lynchpin of the EU's success. Others have also credited the more comprehensive institutional infrastructure, which the EU developed during its evolution, with yielding benefits at the international level. Mattli and Büthe (2003) demonstrate convincingly that the EU is more effective than the US in setting international product standards in the International Standards Organization because the EU and its member states have formalized institutions to bridge the business-government gap, whereas the US does not. Using an institutional approach to understand why the EU was effective in promoting its standard is conducive to understanding the conflict. Again, however, the argument suffers from the same question: why, if the EU had effective market power, did negotiations result in an agreement that reflected a great deal of EU compromise?

Farrell (2003) tackled that question with a constructivist argument, that the EU's compromises were the result of real preference changes among

decisionmakers, brought about by the long and intensive discussions with the US negotiators. His argument was that deliberative discourse among the different actors created conditions that made each side receptive to new ideas about solutions. Rather than seeing the Safe Harbor Agreement as showing EU weakness vis-à-vis the US, Farrell used that outcome to demonstrate how dialogue can change attitudes, interests, and negotiating positions of both parties. He writes:

> Thus, the negotiation of Safe Harbor provides important evidence supporting constructivist accounts of how international actors behave. The two key moments of the negotiations demonstrate the importance of argument and persuasion as a vital explanatory factor. . . . [Aaron's] initial proposal for a 'Safe Harbor' disclosed new possibilities of action to the protagonists . . . [and] actors on the U.S. side were successful in persuading EU member-state representatives to accept a new set of ideas concerning self-regulation and privacy.[14]

The harmonious conclusion painted by Farrell, however, is in sharp contrast with the acrimonious debates within the EU institutions themselves. Although the representatives of the member states were ultimately persuaded to accept the self-regulatory mechanism, the Article 29 Working Party (the member states' data protection commissioners, who had the technical expertise with privacy issues) was against the arrangement. Moreover, the European Parliament voted 279 to 259 against considering Safe Harbor adequate. Safe Harbor exists today only because the Article 29 Working Party and the European Parliament had no power to prevent the Commission from recognizing the agreement. In the words of Internal Market Commissioner Bolkestein to the European Parliament: "If Parliament were ultimately to support the Commission's proposal, then it would not end up out in the cold . . . The United States has no desire to revisit the discussions again and the Commission also takes the view that the talks are over." If this is constructivism, then it would be difficult to distinguish it from power bargaining theories in any meaningful way.

There is, however, an inquiry that is analytically prior to the "how the EU was powerful enough to force the US to negotiate" question. That question is, "Why did the US and the EU disagree about privacy protection in the first place?" By most accounts, the US and the EU should have had fairly similar preferences for data protection; they had agreed on the principles of data protection in international regimes, and similar ideas were the basis for national laws. Bennett (1992), who authoritatively analyzed the data privacy debates in Europe and the US through 1990, concluded that there was convergence in the policy inputs, even as divergence in policy outputs existed because of national structures. By virtue of negotiating and ratifying multilateral privacy framework documents, like the 1980 OECD

Guidelines on the Protection of Privacy and Transborder Flows of Personal Data ("OECD Guidelines"), the EU member states and the US had already agreed to honor the same data protection principles.[15] It is, therefore, fair to ask, why was there a US-EU conflict at all? After all, within the EU itself, different legal systems and institutions were able to comply with the Directive. There was nothing structural in the US legal system that would have prevented the US from adapting legislation to guarantee data privacy in line with its OECD commitments.

Westin (1996) argued that different cultural legacies were the source of the conflict. Whereas the EU preferred a regulatory approach consistent with its administrative infrastructure, the US wanted a decentralized, self-regulatory system that comported with its traditional regulatory approach. Naturally, there are historical and cultural differences between all states, and it would be foolish to overlook these factors completely, especially given how history and institutions are related.[16] On the other hand, the EU managed to implement the directive in various different regulatory frameworks in Europe. More importantly, the claim that the US would be culturally uncomfortable with the comprehensive data protection offered by the Europeans is refuted by opinion polls (analyzed in greater detail in Chapter 2) that show a majority of Americans preferred the federal government to legislate privacy protection. Europeans and Americans also reported similar levels of distrust of businesses to protect their data. If there were few cross-national differences between the US and EU publics on data protection, there were even more similarities in the multinational businesses' response: in EU countries and the US, similar reservations about the proposed system were voiced by business lobbies and industry associations. Thus, the claim that culturally the US would have been an inhospitable ground for the European Data Protection Directive's privacy strictures is undermined by data showing similar preferences of interests across borders. What changed across governments, however, was the access that pro-privacy interests or business interests had to the government. That is the analytical lens that best captures the different preferences and outcomes.

To answer the earlier question of why there was a conflict despite similar outlooks by various interest groups on both sides of the Atlantic, this book uses a liberal intergovernmental approach. Liberal intergovernmentalists derive state preferences from interest groups vying for power within the state. By understanding which groups the state represents in international negotiations, a state's preferences become more robust empirically and more comprehensible. Similarly, negotiation outcomes should be understood in the context of these preferences. Moravcsik (1997) argued that, "the state is not an actor but a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors. Representative institutions and practices constitute the critical

'transmission belt' by which the preferences and social power of individuals and groups are translated into state policy. . . . Every government represents some individuals and groups more fully than others."[17]

By analyzing where the negotiating positions of the US Government and the EU Commission originated, it is easier to see patterns of responses, and to explain how and why the Safe Harbor Agreement had the characteristics it did. Only a focus on different interest groups in the creation of each country's negotiating stance can really explain why there was a conflict to begin with, and how it was resolved. In fact, the interest group interactions become essential to understanding the European reaction to the Passenger Name Record dispute in 2003. When one recalls that the European Parliament and Article 29 Working Party had been forced to watch their recommendations being ignored in the final Safe Harbor Agreement two years earlier, it is easier to understand their willingness to take the relatively extreme step of suing the Council of Ministers and the EU Commission in the European Court of Justice.

As the following chapter shows, opinion surveys in both the EU and the US showed that citizens were concerned about how their data were being used, trusted similar institutions to do the right thing with their personal data, and were interested in greater government regulation in this area. Moreover, in both the EU and the US, businesses were opposed to the data protection proposals. Shaping the negotiation positions of both "countries"[18] (for want of a better word in the EU context), however, was the relative access of interests to the negotiators. In the EU, when crafting the European Data Protection Directive in 1990, only pro-privacy interests (the data protection authorities of several member states) were consulted, and businesses were unable to make significant changes to the Directive after it had been drafted by the EU Commission.[19] In the US, by contrast, business interests were consulted almost exclusively and the administration's negotiation position was based on a paper written essentially by telecommunications industry lobbyists.[20] Thus, the power conflict described above did not originate from systematically incompatible structural differences between the US and EU, but rather from the relative positions of interests within each society, and from the type of causal mechanism that linked state bargaining behavior with domestic preferences.

As this book will argue, the resolution of the conflict was also not determined by structural differences in power capability between the EU and the US. On both sides of the Atlantic, important groups preferred an imperfect agreement to nonagreement and a potential trade war. The fact that the dispute was considered a trade dispute, and hence negotiated by the Department of Commerce in the US and the Internal Market Directorate General in the European Commission, meant that keeping commerce flowing was the overriding goal of both sides. Those groups or institutions with