

New issue-areas in the transatlantic relationship:**E-commerce and the *Safe Harbor* arrangement****Henry Farrell****Introduction**

In the recent past, scholars have sought better to understand the evolving EU-US relationship, both in its own right, and as an important example of emerging forms of international governance.¹ Particular attention has been paid to the important role that transnational actors have begun to play in this relationship. Business, consumer, labour and environmental interests have been given a formal voice in EU-US relations through the creation of various dialogues. This literature has found that business interests play by far the most important role in this process, through the Transatlantic Business Dialogue (TABD) (Green Cowles, 2001; Bignami and Charnowitz, 2001; Knauss and Trubek, 2001). The Transatlantic Consumer Dialogue (TACD) is seen as playing a subsidiary role, while the Transatlantic Environmental Dialogue (TEAD) and Transatlantic Labour Dialogue (TALD) are respectively suspended and moribund.

This body of work has provided an excellent beginning point for our understanding of transatlantic relations, and the role that transnational actors play within them. However, by focusing on the implication of transnational actors for the transatlantic relationship, it has in part neglected the reverse relationship; the implications of the transatlantic relationship (and its dialogues) for transnational actors. Further, general conclusions about which interest group is stronger or weaker

overall in the process may be misleading; different actors may play more or less substantial roles in specific policy areas. Even if the TABD may have substantially more influence than other interests in a global sense, it may play a less prominent role in certain policy areas than those others.

In this chapter, I seek to examine the role that transnational actors have played in a specific policy area; the protection of privacy in e-commerce. E-commerce is an increasingly important issue area in the transatlantic relationship, as its economic weight increases, and as its cross-national implications lead to increased regulatory interdependence between EU and US (Farrell, 2003). Perhaps the most salient transatlantic issue within e-commerce has been privacy. Differences between the EU and US in the area of privacy protection threatened to lead to a potentially grave dispute, after the EU introduced legislation that potentially had consequences for US e-commerce firms. Negotiations between the EU and US between autumn 1998 and mid-2000 culminated in the so-called “Safe Harbor” arrangement, whereby the two sides sought to resolve their differences through a novel institution involving both public and private enforcement.² The Safe Harbor negotiations are an important test case for how the transatlantic relationship may deal with the novel regulatory challenges posed by e-commerce. Indeed, it has been cited as an example for how these challenges may be resolved in future (White House, 2000).

The history of the Safe Harbor negotiations provides sometimes surprising insights into the relationship between transnational actors and the EU-US relationship in a key policy area. While business sought to influence negotiations - often with some success - it typically did not do so through the TABD, instead relying for the most part on direct bilateral contacts. In contrast, consumer interests took direct advantage of the opportunities offered by the TACD to gain access to US policy makers who otherwise would have had little interest in meeting with them. While they

opposed the arrangement that was reached, important consumer groups felt that they had gained substantial concessions, which would provide them with important leverage in future disputes. Further, the existence of TACD not only had important implications for their access to policy makers, but it also created the basis for a coherent voice representing consumer interests not only in the Transatlantic relationship, but in the US too, where consumer groups had previously been bitterly divided among each other.

This chapter begins with a brief account of the transatlantic differences over privacy that led to negotiations, and of the negotiations themselves. I then go on to describe the two key actors, TABD and TACD, and the specific implications of the transatlantic relationship for the power of these actors to achieve desired results in the arena of privacy policy. My discussion focuses on how the transatlantic relationship has affected interest politics within the US; it was in the US polity that the political questions surrounding privacy and the EU's demands played out. I conclude by examining the more general implications that this may have for study of the transatlantic relationship.

Transatlantic disputes over privacy

Regulation of privacy has taken very different trajectories in the EU and US. In both political systems, privacy became a topical policy issue in the early 1970s, when political actors began to become aware of the potential of new technologies for invading the privacy of individuals. Initial worries concentrated on the potential for abuse of centralized databases, especially by governments.³ Accordingly, legislation was introduced in many advanced industrial democracies to forestall the abuse of such databases. In European states, this led over time to the creation of extensive global

protections for the privacy of individuals, with regard both to the government and other actors. In the US, in contrast, while individuals were protected against certain incursions into their privacy by the government, legal protection for privacy in many other areas of social life was sporadic to non-existent. While this in part reflected fundamental differences in values (such as, for example, the extraordinary weight given to freedom of expression in US constitutional discourse), it also reflected the ability of US business to stymie legislative change that might hamper its own operation (Kobrin, unpublished). While self-regulatory schemes purported to protect privacy in areas such as direct marketing, these schemes were undemanding and often ignored in practice. They may perhaps better be understood as attempts by firms to provide a patina of legitimacy for their activities and forestall criticism and legislation, than as serious efforts to protect consumer privacy (Froomkin, 2000).

These two approaches to privacy came into conflict as a result of two coinciding sets of pressures; the increasing porousness of national borders to information exchange, and the desire of European legislators to prevent this porousness from undermining European citizens' privacy rights. As the European Union sought to further the integration of its member states' economies, it had found it necessary to create overarching legislation at the European Union level, in order to prevent blockages of data flows between its member states. The Data Protection Directive (in its rather long-winded official title, the 'Directive on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data') was thus primarily intended to alleviate incompatibilities between the national laws of EU member states (European Commission, 1995). However, it also imposed quite strong restrictions on the export of EU citizens' personal data to jurisdictions outside the EU. Such export was forbidden unless either the third party jurisdiction in question had been recognized by the EU as providing 'adequate' protection, or other restrictive

requirements set out in the Directive were satisfied. The rationale for this was quite clear; information and communication technology would otherwise allow firms to evade the force of the Directive by exporting data outside the EU and processing it there.

The Directive, which came into force in late 1998, had serious implications for US multinationals and e-commerce firms. In contrast to most other OECD member countries, the US had no overarching set of laws protecting privacy, and instead relied on a mixture of sectoral laws and self regulatory schemes. Most commentators agreed that it was highly unlikely that the EU would recognize the US as an 'adequate' jurisdiction, so that US firms wishing to import data on their customers or employees in the European Union would at best face substantial uncertainties. At worst, these firms might have their data flows blocked, and/or legal penalties imposed on them. US e-commerce firms in particular were aghast at the Directive. US policy had sought to leave e-commerce largely unregulated, on the principle that it was in such a state of flux that government efforts to regulate would likely do more harm than good. This light hand accorded well with the interests and expressed desires of e-commerce firms, which had considerable influence over administration officials under the Clinton administration. When the European Union proposed to regulate privacy - and effectively to seek to determine the behaviour of US based firms, many of these firms saw this as the thin end of a regulatory wedge. Further, some believed, with more fervour than accuracy, that the Data Protection Directive's extraterritorial ambitions was intended as retaliation against the Helms-Burton measures that asserted extra-territorial jurisdiction over European firms.

The initial reaction of the US administration was to try to persuade or, if necessary, force the European Union to back down on their threats of data blockages that might affect US firms. Ira

Magaziner, the US administration's e-commerce 'czar' sought to create divisions among European states, and threatened WTO action against the EU as a final resort. Both blandishments and threats proved ineffective; EU officials believed that they could not back down without effectively undermining the implementation of the Directive.

Early EU-US discussions

Informal discussions began between the EU and the US in late 1997, but were hampered by the lack of an obvious coordinator for privacy policy within the US administration. Privacy touched not only on e-commerce, but on broader issue areas that had traditionally been the bailiwick of the Federal Trade Commission, the Department of Commerce, and the Department of the Treasury. In the EU, the European Commission's Directorate-General for the Internal Market (DG Internal Market) was the designated interlocutor; privacy had emerged as a policy issue in the context of market integration. There was no formal cross-Directorate General committee as such, although DG Internal Market did engage in informal discussions with other DGs in the course of formulating its position.

While both Magaziner and Commissioner Mozelle Thompson of the Federal Trade Commission engaged in informal discussions with European officials, they were not designated representatives of the US as such. The US Trade Representative (USTR), despite its considerable experience in transatlantic disputes, expressed little interest in taking a lead role in the emerging conflict, which, although it potentially had serious consequences for transatlantic trade in services, was not itself a traditional dispute over trade.

After discussions within the administration, the Commerce Department, and in particular Ambassador David Aaron, the Department's Undersecretary for International Trade, emerged as the

lead negotiators, reporting back to an inter-departmental committee headed by the White House's Office of Management and Budget (OMB). The Department of Commerce had already developed significant expertise in the area of privacy and self-regulation. Further, it was deeply involved in the transatlantic relationship, and was highly aware of the sensitivities of European officials and politicians. Even while Commerce was highly responsive to the interests of US firms, it was also more adept than certain others within the administration at representing those interests in the transatlantic context, and potentially in finding areas of common ground with European negotiators.

Negotiations proper started in early 1998, some several months before the Directive was due to take effect. Initially, they proved highly frustrating for both sides. On the one hand, European negotiators demanded that the US introduce a system of privacy protection along European lines, with strong laws with comprehensive coverage, that would be backed up by specialized officials, along the lines of the system of data protection commissioners existing in Europe. As described by a European negotiator; 'we had on our side a relatively strict set of rules which meant that transfers to the US risked being illegal - they either had to be stopped or their protection had to be increased. There was a problem there that needed to be solved, and certainly the simplest way of solving it was to say hey US, what about adopting something similar.'⁴ On the other hand, US officials refused to countenance suggestions of broad-scale legal reform within the US because 'within the US government there was a fair amount of sentiment that we weren't going to be pushed around by the Europeans, and too bad if they had this law, we weren't going to have to oblige them'.⁵ Instead, US negotiators sought to win European recognition of the existing patchwork of laws and self regulation as adequate. The strong - and almost entirely incompatible - positions taken by the two sides led to considerable pessimism among negotiators that any substantial agreement might be possible.

The Safe Harbor Arrangement

The breakthrough came with a suggestion by Ambassador Aaron that the EU did not have to recognize the US system as a whole; rather, it might accord recognition to a subset of firms that had voluntarily agreed to adhere to a given set of privacy standards.⁶ These firms would then have “safe harbor” from EU enforcement action as long as they obeyed these principles. While initially cautious, European Commission officials were intrigued enough by this suggestion to continue negotiations - and to discuss in more detail what these principles might involve. A first draft of these principles was announced in a draft letter from Ambassador Aaron to US industry in November 1998, as summarized here:

1. *Notice* - organisations must inform individuals about what type of personal information were collected, how it was collected, whom it was disclosed to, and the choices individuals had for limiting this disclosure.
2. *Choice* - organisations must give individuals the opportunity to opt out when information was used for purposes unrelated to the use for which they originally disclosed it. Individuals must be given opt in choice with regard to certain sorts of sensitive information.
3. *Onward transfer* - Individuals must be able to choose whether and how a third party uses the information they provide. When information is transferred to third parties, these parties must provide at least the same level of privacy protection originally chosen.
4. *Security* - Organisations must take reasonable measures to assure the reliability of information, and prevent loss or misuse.
5. *Data integrity* - Personal data must be kept accurate, complete, current, and used only for the

purposes for which it is gathered.

6. *Access* - Individuals must have reasonable access to data about them, and be able to correct it when it is inaccurate, subject to the sensitivity of the information and its dependent uses.
7. *Enforcement* - There must be mechanisms for assuring compliance with the principles, recourse for individuals, and consequences for the organisation when the principles are not followed. Enforcement could take place through compliance with private sector privacy programmes, through compliance with legal or regulatory authorities, or by committing to cooperate with the data protection authorities in Europe.

Aaron and other US officials hoped that these principles would be swiftly accepted by the EU, and thus resolve the nascent dispute. However, EU member states proved far more suspicious of the proposed arrangement than US negotiators had anticipated. Some (most notably France and Germany) were overtly hostile to the strong reliance on self-regulation implied by the enforcement principle, while others were dubious about the specifics of the principles, and the extent to which they provided a level of privacy protection that was adequate according to the Directive. Further, the member states' Data Protection Authorities were hostile to the proposal; even though they had no official veto power, they did have a consultative role which they used to express their (largely negative) opinion of it. In consequence of the member states' difficulties with the proposed arrangement, the Commission and the US Department of Commerce embarked on an extended set of negotiations over the principles.

Negotiations over Safe Harbor

Negotiations focused on the principles that Aaron had suggested; the EU sought to make these

principles tighter, and to bring them more closely in line with its interpretation of the Directive. Perhaps the most difficult of the seven principles to agree upon was access. Initially, the EU sought to ensure that individuals could have almost unlimited access to information that firms held about them. The United States counter-proposed that access should be ‘reasonable’, in order to prevent access from being exercised for frivolous or malicious purposes, or in circumstances where the cost to firms of providing information would be out of proportion with the benefit to the individual. The Europeans, for their part, believed that the term ‘reasonable’ was too vague to be useful in this context: firms might deny access on grounds that they themselves found reasonable, but which were specious or unconvincing in a broader sense of the term. Further, EU negotiators had identified access as a key principle to the success of self-enforcement: in the absence of the broad safeguards which European consumers had when dealing with European companies, access provided a means for consumers to be sure that firms were actually doing what they were saying. Eventually, a compromise was reached whereby access had to be granted except when the costs of providing it would be ‘disproportionate’, a formulation which provided a higher degree of specificity in the eyes of the EU.

The principle of choice posed difficulties for other reasons: following the lead of the Data Protection Directive, the EU wished to distinguish between certain categories of sensitive data, where individuals would have to opt in explicitly to uses of the data other than those for which the data had originally been collected, and other categories of data, where the ability to opt out would be sufficient. While the US accepted this basic principle (and indeed had domestic legislation which already required opt-in for certain kinds of data, such as medical data), there were pronounced disagreements between the two sides as to which categories of data could be considered sensitive. In

particular, there was a philosophical disagreement over data on racial or ethnic origin, highly sensitive in Europe, because of memories of National Socialism, but commonly used and available in the US. In the final version of the principles, the US agreed to accept the European position despite its reservations, and included data on ethnic and racial origin as a ‘sensitive’ category requiring opt-in.

Onward transfer of data also presented problems. The European Union sought to prevent onward transfer from becoming a loop-hole through which firms in the Safe Harbor could send data to other firms not bound by the Safe Harbor. However, the US wanted to ensure that firms in Safe Harbor should not be held liable for the behavior of third parties, when they themselves had made good-faith efforts to ensure that the data would be treated properly. Negotiations were also complicated by the ongoing domestic US discussion of financial privacy in the context of the 1999 Gramm-Leach-Bliley bill on financial services, where there was vigorous debate about whether financial firms would, or would not be able to share data with their affiliates. The US deliberately slow-pedaled their negotiations with the EU over onward transfer, for fear that any agreement that was reached would be seen as establishing a precedent for current debates in Congress. The final form of the principle marked a compromise whereby organizations would only be able to transfer personal information to third parties which also subscribed to the principles, were bound by the Directive or another adequacy finding, or which had entered into a written agreement with the original firm undertaking to give the data the same level of protection as under the principles. As long as these strictures were abided by, organizations would not be held liable for the misuse of data by third parties that they had passed it on to.

Finally, there was the principle of enforcement, which became the most difficult negotiating

point towards the end of the negotiations. Much of the difficulty centered on the unwillingness of EU member states to accept that self-enforcement could provide an adequate form of privacy protection. Their skepticism was bolstered by their domestic Data Protection Commissioners, which, although they accepted that self-regulation could protect privacy in principle, were in practice unconvinced by the arrangements existing in the United States. In particular, Commissioners pointed to the fact that individuals were not able to complain directly to the FTC and have a guaranteed investigation of their claims, in contrast to arrangements in Europe. At times there was a clear disconnect between Commission negotiators, who had accepted that self-regulation could work in the US at a relatively early stage, and officials in the member states and data protection commissioners, many of whom remained resolutely unpersuaded.

This disparity led the EU negotiators to sometimes weave back and forth on the issue of enforcement, as they sought to reconcile the near-impossible contradictions of keeping the member states on board, while presenting negotiating positions which the Americans might possibly accept. The breakthrough moment when this disconnection disappeared came in a meeting in mid-January, when member state representatives were invited to Washington DC for three days of presentations from US government officials and private sector bodies to explain how the enforcement aspects of Safe Harbor would work. Officials on both the EU and US side credit this meeting with having effected a sea-change in member state positions. The opportunity to question bodies such as BBBOnline and TrustE directly allowed some member states to move from a position where they *a priori* rejected self-regulation as a means to enforcement, to one where they were prepared to engage with the specific strengths and weaknesses of this approach.

A second set of issues revolved around the different sorts of enforcement that might be

possible under Safe Harbor. Under the principles, enforcement must involve independent recourse mechanisms which may be provided through private sector developed privacy programmes, through compliance with legal or regulatory authorities that provide for the handling of individual complaints and dispute resolution, or through direct cooperation with European Union data protection authorities or their representatives. The second of these was a dead letter in the absence of appropriate legal authorities in the US, while the last was problematic. Cooperation with EU data protection authorities was more suitable than other recourse mechanisms for certain sorts of data, such as employment and human resources data (for which it was required). However, EU data protection authorities, which have relatively limited resources, had no desire to deal with a deluge of US companies, each requiring specific agreements. US firms, for their part, were worried about the divergences of approach between different national data protection authorities, which potentially gave rise to serious uncertainties. In the end, an arrangement was worked out whereby organizations could commit to work with the data protection authorities through so declaring to the Department of Commerce. The authorities themselves would form an informal panel at the European level to harmonize their approach, and would deal with complaints through three member panels, including one member from the jurisdiction where the alleged problem had occurred.

The negotiations did not only look at the seven principles. Aaron's initial announcement had suggested that these principles would be accompanied by additional guidance for firms as to how they should be applied in specific circumstances. This guidance, which was issued on April 19, 1999 for public comment, along with redrafted versions of the principles, took the form of Frequently Asked Questions (FAQs). This was another of Aaron's innovations, borrowing from Web terminology, but the FAQs themselves became the subject of extensive negotiations on two levels.

First, there were different views as to the precise status that these FAQs should have; they could offer guidance pure and simple, they could offer authoritative guidance, or they could be binding. If they only offered guidance, without any guarantees as to its authoritativeness, however, their usefulness to those seeking to apply the principles would be uncertain. On the other end of the spectrum, if they were binding, they would provide a high degree of certainty, but would by the same token be impossible to revise to meet new needs without extensive renegotiation.

In the end, the negotiators agreed that the FAQs should provide authoritative guidance, a formulation which, it was hoped, would provide certainty to businesses seeking to apply them, while maintaining the possibility of future flexibility and redrafting.⁷ Second, as the FAQs became important, much of the negotiations focused on their content, as well as the content of the principles themselves, sometimes leading to heated debate. On many issues, European negotiators suspected that the US side was seeking to whittle away the commitments that had been made in the principles themselves, through seeking out carve-outs, special exceptions, and interpretations which maximised the flexibility of US firms. The US, for its part, felt that the Europeans often failed to acknowledge the wide leeway in interpretation and application that European firms sometimes enjoyed under the supposedly strict standards of the Data Protection Directive, and were determined that US firms should have some measure of equivalence on the level of practical application as well as theoretical principle.

The EU and United States announced on 17 March 2000 that they had reached a tentative conclusion to their Safe Harbor dialogue, and that they sought to conclude their dialogue by the end of the month. This announcement was followed by a meeting of the EU Council of Minister's Section 31 Committee, which unanimously endorsed the arrangement on 31 May. Under the

comitology procedure, the European Parliament was then entitled to exercise procedural oversight of the agreement: a draft report on the arrangement was prepared by Member of the European Parliament Elena Paciotti for the Parliament's Committee on Citizens' Freedom and Rights, Justice and Home Affairs.⁸ This report delivered a negative assessment of the substance of the arrangement, citing the doubts of data protection commissioners. Despite Commission pressure, the Parliament voted against the arrangement on the basis of this report. But, the Commission took the view that the Parliament had exceeded its powers in so doing: its oversight in the matter was limited to purely procedural issues, and did not include the power to demand substantive changes.⁹ Accordingly, the Safe Harbor arrangement came into practical effect from 1 November 2000.¹⁰

In the period since Safe Harbor has come into operation, some 300 companies have formally agreed to adhere to the Safe Harbor principles. While not a failure, it is safe to say that this is a far lower number than negotiators for both the EU and US initially anticipated. Further, there remain considerable uncertainties about the implementation of Safe Harbor; while a number of complaints have been made under the procedure, no formal action has been taken against any company for breach of its Safe Harbor requirements, even though Commission research suggests that there is evidence that a large number of Safe Harbor companies have failed to comply with the rules. Where the Safe Harbor may be having a more important effect is through its indirect influence on the standards of self-regulatory organizations (Farrell 2003). One important self-regulatory organization (BBBOnline) has adopted the standards set out in Safe Harbor as the baseline for its own privacy standards. This was an intended effect on the part of EU negotiators, who hoped and anticipated that Safe Harbor might influence the behavior of self-regulatory actors within the US, and thus pave the way over time for comprehensive legislative protection of privacy in the US (Farrell 2003).

The relative power of non-state actors in the transatlantic relationship

Until recently, the relationship between the EU and US was dominated by traditional transgovernmental relations between diplomats and officials on both sides of the Atlantic. However, starting with the TABD non-state actors have increasingly been accorded a significant role in transatlantic policy discussions. Of the four main dialogues aimed at involving non-state actors in transatlantic relations, two have withered on the vine. The TAED has suspended its activities *sine die*, due to difficulties in getting funding from the US administration, while the TALD appears to be inactive. The TABD and TACD remain active; while they do not have a direct role in transatlantic negotiations, they may have an important indirect role in setting the agenda, in bringing new items into policy discussions, and in mobilizing support for and against various proposals on both sides of the Atlantic.

The detailed history of how non-state actors have become increasingly engaged in the transatlantic relationship is discussed at length in the literature (Pollack and Shaffer, 2001; see also Steffenson in this volume). Briefly, the scholarly consensus is as follows. The TABD, which was the first of the dialogues to become established, plays a considerably more substantial role than any of the other three dialogues. Business has used the TABD to influence the transatlantic agenda quite successfully, in terms of the transatlantic policies adopted - and not adopted - by US and EU policy makers and regulators (Green Cowles, 2000). The TABD has enjoyed greater resources, greater influence, and a higher profile than others. Those who represent consumer, environmental and labour interests have found themselves struggling to catch up, where they have not indeed given up the struggle altogether.

This broad assessment of the influence of various groups within the transatlantic relationship captures important truths. Business interests incontrovertibly have much more influence on policy makers -especially in the US- than consumer, environmental or labour interests. Many of the advantages enjoyed by business are structural ones. For example, it is highly unlikely that consumer interests will ever enjoy the same influence over policy makers as business interests; consumer organizations typically have far fewer resources to deploy in the political marketplace.

However, precisely by virtue of their structural advantages, business interests have less need to take advantage of the formal channels of influence offered within the transatlantic relationship than others might. This point should not be exaggerated; it is clear that the existence of the TABD has given business access to areas of policy making (such as EU trade policy) that were previously relatively opaque (Green Cowles 2000). Nonetheless, to the extent that business has already enjoyed substantial influence over policy makers, the existence of the TABD provides only one more tool to affect policy outcomes, albeit a quite important one in certain areas. Other groups may enjoy less influence within the transatlantic relationship than business. But by the same token, these groups may be relatively uninfluential in domestic politics too, especially in the US, where non-business interests have had little influence on international commercial and trade policy. Thus, even if these groups enjoy less power in an absolute sense, they may find themselves advantaged in relative terms by the new channels of influence created as part of the transatlantic relationship.

This observation is especially pertinent to the relationship between the TABD and TACD, the two civil society dialogues which are still active. The TABD clearly enjoys far more influence over EU-US relations than the TACD. Prominent policy makers are rather more likely to attend TABD meetings - and to take proper account of their conclusions - than TACD meetings. However, by the

same token, the fact that the TACD has come to play a formal role in transatlantic relations at all is itself a modest victory. Transatlantic economic policy has largely been the preserve of the USTR and of the Commerce Department, both of which have traditionally been responsive to business to the virtual exclusion of consumer and other interests. The existence of TACD has given consumer groups a formal voice in transatlantic policy deliberations, which make them more difficult to ignore completely, and has allowed them to leverage their influence over European policy makers into a greater influence over US policy makers too.

How has this played out in the area of e-commerce? E-commerce and the new economy have become more important both for business interests (which have sought to forestall government regulation of e-commerce) and for consumer groups (which have sought to ensure that consumers have strong statutory rights and protections against abuse). Privacy and data protection - where EU-US differences were at their starkest - provides evidence of both business and consumer efforts to influence the transatlantic agenda. As I argue below, it offers evidence that in one issue area at least, the transatlantic dialogue has offered new possibilities to consumer groups to organize and press their demands; they were able to influence outcomes in a manner that would have been far more difficult in the absence of these transatlantic structures. In contrast, business interests had far greater difficulty in agreeing on the specifics of privacy policy, and thus, after raising the transatlantic dispute as a possible concern, were content to use more traditional national-level means of lobbying rather than presenting detailed proposals through the formal channels of the TABD.

Business interests and privacy in the transatlantic relationship

The development of the transatlantic relationship in e-commerce was a priority for business interests

very nearly from the beginnings of the TABD. Indeed, the birth of the TABD was almost exactly contemporaneous with the beginning efforts of policy makers on both sides of the Atlantic to address e-commerce brought and its associated issues. The issue became relevant before the transatlantic ‘early warning’ system to identify potential disputes in the making had come into operation. Business interests initially had difficulty in focusing policy makers’ interest on the European Data Protection Directive, despite the Directive’s clear implications for the regulation of privacy within e-commerce. European businesses had lobbied over the Directive itself, but were less concerned with its extraterritorial implications than its domestic ones. US businesses, for their part, had been relatively slow to seek to counteract the potential effects of the Directive for transatlantic flows of data.¹¹ Although their EU-based lobbyists had made vigorous efforts to mitigate the extraterritorial impact of the Directive (Regan 1999) while it was being drafted, they were relatively slow to organize a coherent campaign against its implementation. In part, this may be attributed to the lack of an obvious point of contact within the administration on international issues of privacy regulation.

Business began to organize properly in the context of the TABD in 1997. The Rome meeting of the TABD, held in that year, presented a number of recommendations regarding e-commerce, with particular attention paid to the EU Data Protection Directive, and its international implications. At this point, business, especially in the US, was hostile towards the Directive, which it viewed as potentially disrupting transatlantic commerce. The Directive’s extraterritorial reach was seen as probably incompatible with WTO rules, and as a barrier to trade.¹² Generally, the feeling among firms in the TABD was that the Directive presented a serious problem, and that the TABD should fight to ensure that it was not implemented in a maximalist fashion.¹³ Accordingly, the TABD recommended in its mid-year report that the EU did not create a barrier to trade, and that contracts

and self-regulatory tools be developed to provide adequate protection for privacy. Business leaders also used this meeting to present their concerns to US and EU officials more informally, bringing the issue to the attention of Undersecretary Aaron among others.¹⁴ However, it was not until early in the following year, following discussions within the administration, and further representations by business, that the US government began actively to develop a coherent position on the Directive.

Over the course of late 1997 and early 1998, the position of firms within the TABD began to change. The Europeans had proven resistant to business pressures to water down the implementation of the Directive at the Rome TABD meeting (Green Cowles 2000), and firms gradually began to realise that the EU was not prepared to back down. Furthermore, privacy and data protection began to become increasingly salient within the US as well as the European Union, as advocate groups began to publicize the embarrassing lack of means for consumers to protect their privacy, especially in the area of e-commerce. Many firms moved from a position of outright resistance to the Directive to a modified understanding that some accommodation with Europe was inevitable, and perhaps not entirely detrimental to their interests.

Accordingly, by mid-1998, the TABD position had shifted in a modest, but nonetheless important fashion; rather than criticizing the EU position *per se*, the TABD sought to ensure that any potential agreement reflected the interests of its members. Specifically, it proposed that the problem should be solved through both EU and US converging on a recognition of self-regulatory mechanisms as a solution to consumers' privacy concerns - business muted its criticisms of the Directive's effects on trade, and instead sought to create principles of self-regulation and have them accepted by government. In this context, industry initiatives such as the Online Privacy Alliance (OPA) drafted privacy principles that were intended directly to address the transatlantic debate as

well as debates within the US domestic context. Unsurprisingly, these principles were undemanding in the extreme; however, they were cited in TABD publications as evidence of industry's efforts to create credible mechanisms of self-regulation.

As direct discussions between the EU and US over Safe Harbor began to develop, TABD policy proposals became increasingly less relevant. This was for two reasons. First, it was far easier for firms to agree in general terms that the transatlantic impasse on privacy was a problem than to identify and agree upon credible solutions to it. Just as in the parallel Global Business Dialogue on E-Commerce (GBDe), the privacy principles that firms could agree on were a rather vague lowest common denominator. These were effectively incredible as a solution; it was impossible that the EU accept the principles proposed by groups such as the OPA without almost entirely negating the effect of the Directive. Second, while the majority of firms and industry groups were primarily interested in a solution to the transatlantic dispute, even if this solution involved some concessions to the EU, some (primarily US based) firms feared that any agreement might have knock-on consequences for the privacy debate within the United States. This was a commonly expressed worry; in the words of a US negotiator; 'there ... was a fair amount of concern from the private sector that anything we agreed with the Europeans would become the template for domestic legislation. And ... a great deal of concern that either we would turn around and put it in legislation, or just by dint of it being out there it would create a problem'.¹⁵

European negotiators, while more insulated from US firms, perceived similar pressures as '[I]ndustry was afraid that the discussions on Safe Harbor would turn into some kind of Trojan horse - what would be agreed with the Europeans would automatically become the national standard'.¹⁶ The US financial services industry was especially worried about the potential consequences of a

Safe Harbor agreement within the US; it was seeking to steer legislation through Congress that would have mandated a substantially lower set of privacy standards. As a result of the difficulty in reaching agreement on specifics, the TABD continued to issue statements that were generally supportive of EU-US efforts to address the outstanding problem, and to urge a swift resolution, but did not provide detailed recommendations as to how that might be achieved, beyond reiterating the virtues of self-regulation. Their position was not specified clearly enough to have a substantial effect on negotiators' positions. According to a US negotiator, 'TABD, the first year, the members, this was where the private sector wasn't so sure what they wanted to do with it, there was not firm support for the Safe Harbor negotiations the first year that they met that this was on the table. The second year it had evolved and I think that there was more support, and they were saying hurry up and finish this. But it didn't have much of an impact on the negotiations'.¹⁷

In the absence of a detailed TABD position, individual firms and industry groups sought to lobby both US and EU negotiators on an individual basis. Even though EU and US negotiators retained final say (Farrell 2003), there were numerous opportunities for business actors to express their opinions to negotiators on both sides of the Atlantic. The Department of Commerce solicited formal comments from business at various stages of the negotiations, and also engaged in close contacts with concerned firms both at the political and senior administrative level. Furthermore, other departments and agencies within the administration had their own contacts with firms, and the opportunity to reflect the interests of their various constituencies through the OMB-led committee that Commerce reported to. Treasury, for example, was highly responsive to the demands of firms within the US financial sector. While the links between the US administration and industry groups were stronger than the links between the EU and affected firms, EU negotiators also met frequently

with US industry associations on trips to Washington, and in Brussels.¹⁸

In summary, the TABD's role in the Safe Harbor negotiations primarily involved the identification of a potential problem, rather than detailed suggestions as to how this problem might be resolved. Without the TABD's initial prodding, the US administration might have taken longer to react to the Data Protection Directive, and perhaps might have acted in a different fashion. It is also likely that the TABD's support for efforts to resolve the dispute was helpful to Commerce in selling its case to sceptics within the administration, even if this support was stated in a rather vague and generic fashion. However, the TABD did not provide detailed input into the negotiations, because of difficulties in agreeing a position among its member firms. Instead, individual firms used more traditional - and direct - lines of communication with the negotiating parties and other parts of the US administration.

Consumer groups and Privacy in the Transatlantic Relationship

The TACD is a younger organization than the TABD; it was formally launched in September 1998. Prior to the launch of the TACD, there had been relatively little coordination among US consumer groups, in part because of divisions stretching back to the introduction of the North American Free Trade Agreement (NAFTA). Some consumer groups had supported NAFTA, arguing that free trade was in consumers' interests; others had pointed to NAFTA's potential costs for labour and the environment. This disagreement had left a legacy of bitterness and distrust.

TACD not only allowed US and European consumer groups better to coordinate their policy; it allowed US consumer groups to come together in a way that they had not previously. Unlike the TABD, the TACD had relatively limited resources; it decided to concentrate these on three groups of

issues - food safety issues, e-commerce, and a catch-all group for all other issues. The strong emphasis on e-commerce was in large part a reaction to the priorities of the TACD's funders; the consumer affairs directorate of the European Commission had a direct interest in creating a transatlantic consumer voice in debates over e-commerce. Initially, US consumer groups were less interested than their European counterparts in e-commerce related issues, with the exception of a few smaller organizations with specialist expertise and interests in the area. Within the e-commerce working group, the proposed Safe Harbor arrangement quickly emerged as an important issue.¹⁹ Indeed, the Electronic Privacy Information Center (EPIC), a founding member of TACD, was already an important voice in the debate over the Directive, which it saw as a possible means to bring US domestic privacy laws and practices up to international standards. A group of TACD founder members had issued a highly critical assessment of Safe Harbor before the TACD was properly up and running.

The TACD was thus active from its inception on Safe Harbor and data protection issues. In contrast to the TABD, it continued to issue detailed and critical comments on the various drafts of the Safe Harbor principles and associated Frequently Asked Questions, making specific recommendations as to how the principles might be improved; 'as they continued to propose various iterations of the Safe Harbor documents, we continued to try to put pressure on them'.²⁰

Its activism may be attributed to two major factors. First, consumer organizations found it considerably easier than business to agree on privacy principles. The TACD worked on a consensus basis, but given the wide variation in interest and expertise among consumer organizations, certain groups such as EPIC - which were better informed and more interested in a specific area than the average member - tended to take the lead. Other groups tended to defer to the lead groups except

where they had a direct interest in the matter. Second, in contrast to business, consumer groups had a strong interest in presenting a collective position through the channels of the TACD. These groups often had relationships with agencies such as the FTC, or with members of Congress. However, they had little to no history of interaction with certain parts of the administration, including the Department of Commerce and the USTR. The TACD, when it came into existence, transformed this situation. For the first time, consumer groups had an official voice in the transatlantic relationship, which they could also leverage into increased access to decision makers within the US.

The TACD has had three main effects. First, it has allowed consumer groups to move beyond their previous disputes and present a unified voice on issues that were important to them. This has considerably increased their legitimacy and effectiveness. Second, the existence of the TACD has given consumer groups a means to differentiate themselves from ‘astroturf’ groups set up by business. This is a not-inconsiderable problem in the radically pluralist system of the United States, where firms very frequently set up organizations that are nominally supposed to represent consumer interests, but that are in fact fully funded by business. Previously, policy makers and members of Congress could justifiably complain that they found it difficult to distinguish between “genuine” consumer groups, and front organizations - TACD gave the consumer group community a way to organize itself domestically within the US, as well as internationally. A TACD participant noted that:

Now, we're in a new stage where [policy makers are] beginning to say - oh, there does exist an NGO constituency. And we can tell which ones are authentic or not, because they have this organization which includes the real ones, and they can give us something

that represents the consensus position of a lot of groups, so it's not just one group's opinion, we can rely upon the fact that this actually has a real constituency. This is not a trivial issue in my opinion. And they can tell when we meet together that we are unified when we talk about things: it's not as if people start bickering amongst each other when we meet the government'.²¹

Third, and perhaps most importantly, it provided consumer groups with direct access to policy makers who were previously largely inaccessible. Quite simply, administration officials charged with international trade and commercial policy had little interest in speaking to consumer groups prior to the inception of TACD because 'commerce has always been strictly a ra-ra pro-business operation. ... We didn't have any entree into Commerce, none of us did ... We knew that Aaron was negotiating this thing for the government but we didn't have any real good entree with them'.²² Ambassador Aaron's first call for comments on Safe Harbor, for example, was addressed exclusively to 'industry representatives'.²³ Privacy advocacy groups complained, with considerable justification, that the administration was uninterested in their perspective, but eager to solicit the views of firms.

The creation of TACD meant that policy-makers within the Department of Commerce had little choice but to respond to advocacy groups' arguments about Safe Harbor and other related issues. Officials from both Europe and the US attended TACD meetings, and found themselves having to defend their positions, respond to criticisms and otherwise engage with consumer advocates. A TACD member noted that, 'I like to think that because we started to get involved, there was an increase in transparency in what the Commerce Department did. They

started to develop an email mailing list, and they started to announce these ... briefings ... and invite anybody from civil society - I think they counted business groups as being civil society as well'.²⁴

Further, TACD members were able to secure meetings with high level officials on specific matters much more easily than previously:

we've had high level meetings ... In the United States, the Federal Trade Commission or the Department of Commerce, or USTR or State, and we meet with real people that have influence. And what's good about it is that it's given us an opportunity to find a consumer group position which is credible because it's a real process in which you develop formal positions. The first stage is that they were clueless as to what we were thinking, because they would insulate themselves from us. They wouldn't give us access, they wouldn't meet, they wouldn't accept invitations. We wouldn't know what was going on, we would be clueless as to a lot of important deadlines for things. And even if we went, they wouldn't be able to distinguish my group from some business funded front group, that purported to represent consumer interests or something like that.²⁵

Where US groups had difficulty in persuading US officials of their case, they often received a more sympathetic hearing among European officials. This was so in the Safe Harbor negotiations, even though the lead Directorate General - Internal Market - was less open to consumer interests than other parts of the Commission.²⁶ Indeed, the Commission often found the arguments of US consumer advocates useful in exposing domestic differences on privacy

within the US that helped its negotiating position. The attention that the Commission paid to consumer advocates was sometimes quite uncomfortable for Commerce Department officials, who found it odd that consumer groups should have such influence on Commission thinking, which perhaps indeed they exaggerated in stating that ‘for some reason the European Commission listens to consumer groups more than they listen to business, and [they] never figured out why that is’.²⁷ Despite this, US negotiators sometimes were forced to acknowledge the points made by TACD position papers, which they acknowledged as having a significant impact on the negotiations.²⁸ A TACD member concluded that, ‘I think we had an effect ultimately ... If you look at Aaron’s original proposals, and you look at what was finally negotiated ... I think you’ll see that they substantially strengthened it in a number of areas ... Now, granted the Commission wanted those improvements ... but so did US and European consumer groups’.²⁹

The final TACD assessment of Safe Harbor was a negative one, pointing to continuing problems in the principles, as well as the many lacunae in the enforcement process. Nonetheless, even if it is unsatisfactory in itself, TACD members view the Safe Harbor as an important intermediary victory, which may provide both a basis to criticize the continuing lack of comprehensive legislation to protect privacy in e-commerce, and as a minimum baseline for new legislation.³⁰

We looked at it as a two part thing. First of all, we looked at it from the international perspective; we wanted to help the European groups. Second of all ... this was all before we were able to raise the issue of privacy to as high a level as it has been

raised ... if we ended up with a really bad Safe Harbor, an atrocious one like Aaron proposed at first, that would have undercut and undermined all the work we're trying to do here down the street at Congress. ... The Data Directive is high, Safe Harbor is middle, US privacy law is low except for a couple of narrow parts ... It's above [the standard of] US law, and it gives us a new benchmark.³¹

The existence of the TACD had important implications for the ability of consumer groups to influence the Safe Harbor negotiations. First, and most simply, it provided these groups with a means to present an unified view on Safe Harbor, which carried weight as the “official” view of the consumer movement. Second, it provided consumer groups with access to decision makers who otherwise would have been highly unlikely to meet with them.

This is not to say that consumer groups carried more weight in the process than business groups, or that Safe Harbor was an unalloyed victory for them. Far from it. However, it is to say that the civil society mechanisms of the transatlantic relationship allowed them access to levels of decision making that they would not otherwise have enjoyed, and an outcome, which if not ideal from their perspective, provides them with a baseline to work up from in their future efforts to improve domestic and international protections for privacy.

Conclusions

In this chapter, I have argued that the existing literature on the transatlantic relationship, and the role that private actors play in it, has some important gaps. Specifically, by focusing on the implications of private actors for the transatlantic relationship, it fails to pay close attention to the

implications of the transatlantic relationship for private actors. By documenting the role of the TABD and TACD in the negotiation of the Safe Harbor arrangement, I hope to have shown that the transatlantic relationship can have important - and differential - effects for the ability of these groups to shape policy outcomes. In the area of privacy and e-commerce, the TABD provided an important early warning of the risk of conflict between the EU and US over privacy. However, the TABD then had difficulties in shaping the EU-US negotiation process in any but the most generic sense. While it supported efforts of both sides to find a solution quickly, it had little advice to offer about the specifics of what this solution should involve. While the individual members of TABD, together with other interested firms, lobbied negotiators, they typically did not do so through formal TABD statements, but rather through more traditional informal channels of influence. Thus, it can be seen that in this policy area at least, the existence of TABD was not crucial to business efforts to shape the negotiating process. Firms could and did use other means to influence outcomes.

In contrast, the TACD was crucial to consumer group efforts to make their voices heard in the transatlantic process. Without the TACD, US consumer groups would have had little hope of gaining access to the Department of Commerce. Within the TACD, consumer groups not only had such access, but were sometimes able to leverage EU support so as better to achieve their policy goals (the opposite relationship also held) (Farrell, 2002). The TACD's detailed policy positions affected the final Safe Harbor outcome in important ways.

In conclusion, one may point to the emerging institutional structures surrounding the transatlantic relationship as an important example of how consumer groups may exercise some influence over the terms on which international commercial relations are conducted. It is important not to exaggerate this; clearly, consumer groups remain disadvantaged in comparison to business.

But nonetheless, they play a real, and adversarial role. Further, the TACD has been successful in identifying a common set of consumer interests across the Atlantic, and in representing these interests. In an important recent paper, Stephen Kobrin speaks of how emerging transnational social issues require ‘the rudiments of a transnational social community’, as well as effective institutions (Kobrin, unpublished). The TACD, and indeed the TABD reflect nascent efforts by social actors to organize transnationally in order to address regulatory issues that are not confined to the borders of a single nation state. They are thus an interesting -and important- experiment along some of the lines that Kobrin suggests. It remains to be seen whether they will lead to any more general reorganization of the transatlantic social space over time.

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Notes

- 1 See especially Pollack and Shaffer, eds. (2001).

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- 2 I discuss other aspects of the negotiation of Safe Harbor in Farrell (2002; 2003)
 - 3 For detailed discussion of the history of the privacy debate, see Bennett (1992) and Mayer-Schönberger (1997).
 - 4 Interview with European negotiator, January 15, 2001.
 - 5 Interview with US negotiator, September 18, 2000.
 - 6 The course of the negotiations is documented in more detail in Farrell (2003).
 - 7 It remains to be seen whether the FAQs will be easily revisable in practice. Certainly, the negotiations over the FAQs were at times as difficult as the negotiations over the principles themselves.
 - 8 The amended version of this report is document PE285.929, available at <http://www.europarl.eu.int/meetdocs/committees/libe/20000621/libe20000621.htm>
 - 9 Thus, while the Parliament's vote was embarrassing to the Commission, it was not sufficient to forestall the arrangement from taking effect. One should also note that the vote was relatively close, and that a substantial minority in the Parliament was in favour of the arrangement.
Discussion with Pat Cox, President of the European Parliament, Sept. 13, 2000.
 - 10 Note that Safe Harbor is an arrangement, and not an agreement; technically, it is a recognition on the part of the European Commission that certain arrangements can be considered to be adequate under the Directive.
 - 11 Interviews with US negotiators.
 - 12 Interview with TABD official, June 12, 2000.
 - 13 Ibid.

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- 14 Interview with Ambassador David Aaron, September 19, 2000.
- 15 Interview with US negotiator, September 18, 2000.
- 16 Interview with European Commission official, June 29, 2000.
- 17 Interview with US negotiator, September 18, 2000.
- 18 Interview with European Commission negotiator, Jan 11, 2001.
- 19 One TACD member identifies Safe Harbor and the genetically modified food debate as the two major issues that the TACD faced in its early phase. Interview with TACD member, September 25, 2000.
- 20 Interview with TACD member, September 25, 2000.
- 21 Interview with TACD member, September 18, 2000.
- 22 Ibid.
- 23 For the full text of the letter, see <http://www.ita.doc.gov/td/ecom/aaron114.html>
- 24 Interview with TACD member, September 25, 2000.
- 25 Interview with TACD member, September 18, 2000.
- 26 The Directorate General for Health and Consumer Protection, which was consumer organizations' traditional point of access to Commission decision making was only marginally involved in internal Commission deliberations over Safe Harbor until the last stages of discussion.
- 27 Interview with US negotiator, September 18, 2000.
- 28 Ibid.
- 29 Interview with TACD member, September 25, 2000.
- 30 Interviews with privacy advocates. See also the comments of Marc Rotenberg, executive director

at EPIC, available at http://www.epic.org/privacy/consumer/hr4678testimony_92402.html.

31 Interview with TACD member, September 25, 2000.