

Brave New Digital Europe

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ABSTRACT In the last few years, the European Union has been developing alternative ways of digital governance. This 'European way' could represent a shared model for new players worldwide, or else, herald the beginning of the fragmentation of the World Wide Web. These developments—from rulings of the European Court of Justice on 'the right to be forgotten' and on safe harbour, to record-breaking sanctions for violations of competition law, to standard setting and, indeed, the very policies of the EU such as the new General Data Protection Regulation and copyright reform—all contribute to making Europe a brave new digital space.

INTRODUCTION: TOWARDS A NEW DIGITAL GOVERNANCE

In a world where the production of software, hardware and rules of the digital economy are set mostly in Asia and in the US, the Old Continent is succeeding in the creation of an independent and original regulatory system for the new digital age.¹ The European way can represent, not without concerns, a model for the rest of the world and a reminder that everyone can participate in the challenge of governing the internet.

The latest chapter in Europe's digital tale is the European Court of Justice ruling of October 2015, striking down a safe harbour system that had long shielded US companies from liability in courts

across Europe over data protection standards.² The case was initiated by Max Schrems, an Austrian activist who asked the European Union to stop the social-media giant, Facebook, from transmitting his personal data to the US on the grounds that many technology firms had cooperated with the National Security Agency as exposed by Edward Snowden, the former CIA computer analyst who has become the world's most known whistle-blower. Although certain checks and balances are adopted in the US in the surveillance of its citizens, no such guarantees have been applied to foreigners, whose data are

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vulnerable even when they are merely transiting through a US server.³ The ECJ ruling is therefore a strong blow to the US' cloud computing industry, as their regulations will have to change or companies will have to store European data in the European continent where higher privacy standards are guaranteed to its citizens.

A few days after the ruling was passed, the European Parliament officially reiterated its concerns over mass surveillance of EU citizens and asked to terminate the Terrorist Finance Tracking Programme (TFTP) agreement with the US.⁴ The EP called as well on EU member states to "drop any criminal charges against Edward Snowden, grant him protection and consequently prevent extradition or rendition by third parties, in recognition of his status as whistle-blower and international human rights defender".⁵

This was not the first time that the Luxembourg-based court has set Europe apart in the digital universe. In the beginning of October 2015 it ruled in the *Weltimmo* case that companies operating in a country, even if headquartered elsewhere, can be held accountable by the data protection authority in that country.⁶ In 2014 the ECJ also notably established the "right to be forgotten" with a ruling in favour of the Spaniard Mario Costeja González against Google.⁷

Gonzalez's case has not been the only challenge to Google. The company also remains under investigation by the EU Competition Commissioner Margrethe Vestager for its alleged systematic practice of favouring its own services over those of its rivals; it faces with possible fines in the order of €6 billion.⁸ Sanctions are indeed a distinct European phenomena for their sheer magnitude. In March 2004, for instance, the EU ordered Microsoft to pay €497 million for abuse of dominant position in the market.⁹ The company had been fined an additional €280.5 million in 2006 and €899 million in 2008 for failure to comply with the 2004 antitrust decision.¹⁰ Notably, Intel has been fined a record €1.06 billion for anti-competitive behaviour in 2009.¹¹

Beyond sanctions and court rulings, in the last few years, the EU as a whole has been

progressively pursuing a digital policy articulated in several initiatives such the 2013 EU Cyber Security Strategy¹² and the 2010 Digital Agenda for Europe, which comprises the Digital Single Market Strategy launched in May 2015, as one of the pillars of the Europe 2020 Strategy.¹³

The goals have both internal and external dimensions: while connecting Europe they also aim to "regain technological sovereignty".¹⁴ While unlocking funds for ICT research, investing in broadband infrastructure and removing internal barriers to e-commerce, the Union engaged itself in comprehensive reforms. The first of these reforms concerns intellectual property rights for which the EU Commission is expected to table a proposal by the end of 2015 to modernise EU copyright law and give it a better fit for the digital age as part of its Digital Agenda framework.¹⁵ According to a report of the European Parliament, approved with broad support, the new European intellectual property legislation should take into consideration several innovations such a single European copyright title and the tackling of Geoblocking, the practice of restricting access to content based on the user's geographical location.¹⁶

The European General Data Protection Regulation is expected to be finalised before the end of 2015.¹⁷ Sanctions are slated to increase, with the European Parliament calling for fines to be set at five percent of the annual turnover of the designed company and for at least €100 million.¹⁸ More radically, companies that previously fell outside data protection jurisdiction, including those with minimal ties to Europe, are being brought within its scope.¹⁹ The most important element is instituting regulation on data privacy in the first place. Data protection, after all, is enshrined in the EU Charter of Fundamental Rights, and of the countries that have adopted any regulation on the matter, more than half are located in Europe.²⁰ The US, for example, does not recognise the right to privacy as such in its Constitution, much less if the subject is data privacy.²¹ Things are evolving, of course, and there is an ongoing growth of privacy laws in countries around the globe which have a very high

correlation with the European standard.²² The previous European Data protection regulation of 1995 has been the most influential international instrument, more so because only countries that the EU Commission consider to have an 'adequate' level of protection of privacy can enjoy a free flow of personal data from EU member states.²³

On the international level, a fundamental debate on internet governance is the IANA Transition process, in which the EU has a strong voice. The process began in March 2014, when the Commerce Department's National Telecommunications and Information Administration (NTIA) announced its intention of surrendering its oversight role of the Internet Assigned Numbers Authority (IANA) to a new body.²⁴ The debate is important as it represents a departure from the US Department of Commerce ownership of the core of the internet infrastructure towards a new understanding. This understanding is made of different views, from the Russian and Chinese one, oriented on an intergovernmental approach, to the now dominant multistakeholder approach of which the EU is champion.²⁵ Among the relevant actors adding its voice to multistakeholderism is India, which revolutionised its position in June²⁶ contributing to the incorporation of this principle in the proposal of the IANA Stewardship Transition Coordination group (ICG) finalised on 29 October 2015.²⁷

A MODEL FOR INDIA?

A final aspect of the European external digital dimension is in its contribution to ICT standardisation. Europe has a long history in this regard with innovations such as the MP3 audio format and the Bluetooth, which eventually compelled non-European markets to adopt them.²⁸ Taking the case of India, it is possible to glimpse at the challenges and the successes of the EU in this field, as articulated by sources within the EU. The bilateral relation is highly active: In May, the EU-India Cyber Dialogue took place in Brussels and India is one of four countries, together with China, USA and Brazil, to benefit of

a permanent representative of the EU Commission directorate for communications. Early in 2013 the Indian Government was pushing for India-specific standard regulations which worried many, including in the EU, of the risk of further fragmentation of the standardisation panorama.

Later that year the Telecommunications Standards Development Society (TSDSI) was founded and India shifted its approach and reached for the European Telecommunications Standards Institute (ETSI) from which it took inspiration even for its own internal rules and procedures. Challenges remain, to be sure, for instance related to the Preferential Market Access (PMA) policy notified by the Government of India in February 2012 which aims to preserve and indeed promote domestic manufacturing, especially in the ICT sector.²⁹ This protectionist policy affected both private and public sectors until July 2013, when the limitations on private procurement were suspended as a consequence of international pressure on India as a WTO member.³⁰ However, India, as an observer to the WTO's Agreement on Government Procurement is not legally bound to remove PMA from the public sector. This remains a cause for international friction.

Beyond standardisation, India is inevitably influenced by developments in Europe. In June 2015, for the first time, an Indian website was asked by an individual to remove a link under the "right to be forgotten" provision.³¹ The French National Data Protection Authority asked Google to extend the "right to be forgotten" worldwide as the application of the ruling only to the European territory would diminish its effectiveness.³² As of today, the European Court of Justice ruling of October 2015 is clearly not binding for India and the country has no provision for such right either in its Information Technology (IT) Act 2000 (amended in 2008) or the IT Rules of 2011.³³ Nonetheless, this case feeds into India's own privacy debate, where the number of people affected by such a right is potentially greater than in Europe. In the continent, where filing a report is as simple as filling an internet form, some

348,085 requests have been made targeting more than 1.23 million internet pages according to a November 2015 report by Google; the same report notes that the company complied in 42 percent of the cases.³⁴ Before the Supreme Court, the government of India recently asserted that the right to privacy is not a fundamental right under the Indian Constitution. The Supreme Court of India nevertheless suggested that liberty and privacy are intertwined, while referring the matter to a larger bench.³⁵ Encryption is another ongoing debate in India with the government having been forced to fall back on its position when it released its draft policy on the matter and withdrew it soon after, following public uproar.³⁶ The measures would have given the government backdoor access to all encrypted information stored on computer servers in India and required the storage of all encrypted and plaintext communication for at least 90 days and make it available to security agencies.³⁷ In the EU, European Commission Vice-President Andrus Ansip, in charge of the Digital Single Market, announced in May that no backdoor was planned to be implemented, making a stand on secure communication alternative to the trends in US and Asia that seems to resonate with Indian public opinion.³⁸ A last example is the intellectual property rights in the digital environment. Although India is not a signatory to the WIPO Copyright Treaty 1996 and WIPO Performances and Phonograms Treaty 1996, it has amended in 2012 its Copyright Act of 1957.³⁹ The amended text introduced certain Digital Rights Management (DRM) provisions through sections 65A and 65B, but they are not as extensive and exhaustive as US or European laws.⁴⁰

CONCLUSION

If considered altogether, every ruling, policy and sanction, have marked the European Union as a special place in the digital world. The EU does not have any major internet company since Skype was bought by Microsoft, but this weakness has been

transformed to a strength.⁴¹ With a 500-million-people strong market with high internet penetration, the EU, relatively free from internal economic interests, can achieve both ethic and strategic goals in digital governance by setting standards that cannot be ignored by the rest of the international community.⁴² In a span of only a few years, the EU worked for the creation of a 'European way', carving for itself a unique regulatory space that comprehensively spans from intellectual property rights to data protection, upholding battles in the interest of every internet user on inclusion and network neutrality.

The digital world is evolving; a schism is becoming more obvious between the American style of governance and the new, alternative European way. The split expresses itself on many debates erupting all over the globe, including in India and other key actors, on encryption, privacy and intellectual rights, among many other topics in the digital ground. The interconnectedness at the core of the system implies a great pressure to move towards a common model or, on the other extreme, to build digital walls in the World Wide Web. Although the EU has "a vision of Internet as a single, open, neutral, free, un-fragmented network, subject to the same laws that apply offline," the European way has indeed generated risks of territorialisation, beginning with Europe itself by reducing the flows of data outgoing from the continent.⁴³ Countries like Russia, China and Iran have advocated for the localisation of the data of their citizens and the EU claims reinforces their stances.⁴⁴ However, cost and concerns in the territorialisation, for some even balkanisation, of data, should be weighed in with the question of the defence of citizens' rights on the net. The creation of a European digital space might be a face of the race for technological sovereignty, but it represents an innovation coming from a continent often considered 'old' and without resources to compete, and yet is now forcing the entire world to reckon with its take on digital governance. 

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