

International Affairs Forum Interview:

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Prof. Dorothy Heisenberg (John Hopkins University) discusses Safe Harbor, a policy agreement established between the United States Department of Commerce and the European Union (E.U.) in November 2000 to regulate the way that U.S. companies export and handle the personal data (such as names and addresses) of European citizens.

International Affairs Forum: Could you explain the privacy policy agreement Safe Harbor and its history?

Prof. Heisenberg: I think in some sense Safe Harbor isn't about privacy, it's about commerce and keeping commerce flowing between the EU and the United States. It was designed to ensure that commerce didn't stop as a result of a European data protection directive passed in 1995 stating that data could only be sent outside the EU if adequate privacy protection was in place in that third country.

There was a widespread concern since its inception whether the U.S. would be able to meet the standard. Even though Congress had already passed legislation providing privacy protection regarding information such as drivers licenses, financial data, and health care information; the entire private sector wasn't covered. So this wasn't the omnibus legislation the Europeans were looking for.

In 1998, David Aaron of the Department of Commerce entered discussions with the EU about the issue. After about two years talks with the European Commission(EC) and member states resulted in the formula for Safe Harbor. The key point in negotiations, and basis for this diplomatic agreement, was that the Europeans accepted the premise that a U.S. company could offer privacy protection versus a country, as is the case in Europe. That is, the settlement stated that U.S. companies, not the Government, would warrant to the Europeans that data in would be treated in accordance with what Europeans wanted.

Moreover, the U.S. addressed a major European concern by providing enforcement controls. They instituted a two tiered system for handling disputes. The first line of defense is a dispute mechanism where plaintiffs can go for arbitration. If that doesn't work, the U.S. Government will step in to resolve the dispute.

The European Parliament(EP), along with the privacy experts, were unhappy with the final compromise brokered with the EC. However, they were unable to veto it because this falls into a class of decisions where the EP doesn't have an equal say with the member states or the EC.

Another issue that concerned the Europeans was airline passenger data, or Passenger Name Records (PNR). The results of the dispute with America were similar. The European parliament and data privacy directors claimed that the U.S. was not providing adequate protection of commercial data. The Department of Homeland Security negotiated for about a year over it and again, the EC agreed to a negotiated settlement. This was again not satisfactory to the European privacy experts and the European parliament. In response, the EP is now suing the Commission claiming that it didn't take their duties seriously enough by not listening to their complaints. It seems unlikely to me that the European court of Justice will overturn the present settlement.

IA-Forum: How would you rate the performance of Safe Harbor to date?

Prof. Heisenberg: I'm somewhat agnostic about whether or not Safe Harbor is working. There are two major viewpoints to be considered: I call them privacy hawks and privacy doves.

Privacy hawks feel very strongly there is a fundamental human right regarding privacy protection and that most people don't realize their rights are being violated. The fact that there have been few complaints tends to support the latter argument. So far there have been only 27 complaints that were all resolved using the dispute mechanism.

So the U.S. Government really hasn't had to do anything so far. On the European side, where there is strict privacy legislation, people are not complaining either. So I think the privacy hawks are right in their argument people don't understand what the law says and what rights they have; and thus are much less likely to complain.

Conversely, the privacy doves say 'no harm, no foul'. Their position is that people don't realize their data is being farmed or that the vast majority is unaware of what is actually happening and, in spite of this, there hasn't been a big outcry - so it can't be too serious. They believe that controls in are place to stop the most egregious excesses of data mining but at the same time are flexible enough to not unnecessarily regulate commerce.

An interim report published about a year and a half ago by the EC stated that even though adherence to the policy had not been stellar, it was probably a product of growing pains and inexperience with the new system. As time goes on, it is expected that more companies will be aware of their obligations.

IA-Forum: You talked about a low recognition of privacy rights by customers. Do you attribute this to a lack of published privacy policies and transparency?

Prof. Heisenberg: Large companies have shifted to a much more transparent privacy policy. Firms like Amazon and Expedia have, over time, drifted towards the stricter European model. This may be from a 'cause and effect' or they have determined that data they gathered wasn't as useful as they thought. But the big companies are, at

least in terms of the privacy policy, giving customers assurance that data will not be resold. I don't know about the smaller companies.

The wording of privacy policies, as of three years ago, has been problematic. Data shows that published policies (e.g., on a web site) were aimed at a 12th grade or higher reading level and were very difficult to interpret for anyone without a law degree. This also provided companies with a good deal of latitude.

IA-Forum: Do you view the underlying issues of Safe Harbor demonstrative of a transatlantic divide between the EU and the United States?

Prof. Heisenberg: Even though there is a cultural gap between the approach both sides have taken, there appears to be some convergence. The prevailing view of privacy experts like Alan Weston is that the Europeans prefer a regulatory system and the Americans prefer a self-regulatory system, and that barriers should be made only if there is some kind of harm occurring. But polls show that, from 1995 (when the European directive came out) to 2003, a majority of Americans were in favor of the Government regulating data privacy. Even now, I think Americans are interested in having the Government step in to ensure that businesses adhere to a basic minimum standard of data privacy protection, one that's not as onerous as the European model.

There's been some movement on the European side as well. In the EC's interim report, it was stated that they

were trying to make Safe Harbor more business friendly and not as rigorous to comply with. So, the Europeans have recognized that a move towards a simplified structure is better.

IA-Forum: How do you see the future prospects for Safe Harbor and its success?

Prof. Heisenberg: I think Safe Harbor is off and running. I don't expect the Commission to state in their upcoming report that Safe Harbor is not working at all and that it needs to be revamped. There are enough other transatlantic problems that the EU is content to let Safe Harbor stay as it is. The data privacy experts are fairly marginalized in this diplomatic process and even though they might have very specific complaints about Safe Harbor, their voices won't be heard in the council, or the EC. Even though the Europeans will still state that they're very concerned about data privacy, they're actions don't actually indicate that. In public opinion polls, 68% of Europeans didn't realize the existence of these laws that prevent data transfer. So the majority of Europeans are completely unaware of their rights.

The Americans have softened on their approach as well. Early in the Bush administration, the stance was that the U.S. should not allow the Europeans to call the shots on this issue. But after a few months, the issue was quietly dropped. The Administration realized that Safe Harbor was indeed, good enough, and any changes would result in a less stable environment.

