

Protecting Privacy in Europe: Transgovernmental policy entrepreneurs and administrative feedbacks

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Memo for *the State of the European Union*,

Princeton University September 16, 2005

European Leadership in Data Privacy Protection

Over the last three decades, Europe has become the international leader in data privacy protection. Starting in the 1970s, nations including France and Germany enacted comprehensive regulations that establish a basic set of privacy principles for the collection and processing of personal information in the public and private sectors. These principles are enforced by powerful independent regulatory agencies – data protection authorities. With the passage of the EU privacy directive in 1995, all member states were required to adopt comprehensive rules. Followed by a set of specific directives in the areas of telecommunications and electronic commerce, European citizens enjoy an internationally unprecedented level of privacy protection.

The construction of a comprehensive regime for data privacy protection within Europe has had far reaching consequences within Europe and abroad. Because data privacy laws were firmly in place prior to the information

technology revolution of the late 1990s, digital marketplaces in Europe have a distinct flare. Consumer information is much less readily available than in comparable sectors in the US and consumer trust of on-line environments has received considerable public policy attention. Similarly, law enforcement and executive agencies within Europe face unique constraints imposed by the stringent privacy regime. The new national security environment brought on by terrorist attacks in the US, Spain, and the UK has further accentuated these tensions. Despite government efforts to expand police power, however, privacy protection has proven extremely resilient in the European context.

At the same time, European privacy rules have had far reaching international consequences. A critical extraterritorial provision of the privacy directive limits the transfer of personal information from Europe to markets that provide “adequate” protection. Nations without comprehensive systems face the risk that cross-border data flows will be disrupted. This has led to heated negotiations between Europe and many of its major trading partners. Over 30 countries including the majority of the OECD have modeled European rules. Multinational firms have been forced to reorganize their information collection and processing systems, often barricading European data within Europe. After a period of heated disputes that verged on the first trade war of the information age, even the US has signed an international agreement that compels US firms

active in the European market to comply with European rules. In addition to the obvious implications for international trade, the European data privacy regime has recently raised a series of security disputes between NATO allies.

The expansion and resilience of data privacy policy in Europe is particularly striking given the perceived market-making obsession associated with the EU. The European Commission, long concerned with constructing the internal market, initially opposed European privacy rules. Repeatedly during the 1980s, the Commission argued that privacy rules acted as a non-tariff barrier that distorted trade flows within Europe. Similarly, many of the most powerful states within Europe were skeptical of supranational action in the policy area. Given this initial resistance, current European global leadership seems particularly surprising.

When Regulators Become Actors – the role of administrative feedbacks and transgovernmental entrepreneurs

In order to understand the ratcheting up of privacy protection within Europe over the last several decades, this chapter focuses on the role of domestic regulatory agencies to motivate and maintain supranational action. I argue that national regulators – data protection authorities – cooperating across borders serve to inject both policy change and policy stability into the regional integration process. National regulatory institutions constructed in previous

rounds of domestic legislation forged cooperative networks becoming new political actors at the European level. These regulatory agencies have employed their technical expertise and enforcement authority to build powerful coalitions capable of influencing regional political outcomes. Taking advantage of the European integration process, these regulatory agencies have expanded levels of protection and guarded against retrenchment efforts.

The argument developed in the chapter extends on historical institutional work that has investigated the role that feedback mechanisms and sequencing play in policy maintenance and change. The feedback argument highlights how institutional developments may create new political actors capable of re-enforcing and consolidating a certain policy path (Pierson 1993). Much of the existing literature has focused on *client feedbacks*. Born in the social policy literature, these studies identify the ways in which benefit programs created clients that then mobilize as political actors to protect and promote their political cause (Weir 1988). Andrea Campbell has examined how the Social Security system in the US shaped the way elderly Americans identify and organize politically. The AARP, a prototypical example of a client feedback, has become an active participant in the policy landscape fighting to maintain the Social Security system and protect the interests of senior citizens in the US (Campbell 2003).

This chapter identifies a related but distinct causal mechanism, *administrative feedbacks*. In contrast to client feedbacks, where policies create constituents that reinforce institutional trajectories, the administrative feedback argument scrutinizes the agencies that are constructed to oversee, implement, and monitor a policy regime. The administrative feedback argument integrates the importance of time to traditional bureaucratic politics arguments and it opens up an important debate concerning the preferences of these new political actors. Far from simply competency maximizers that relentlessly attempt to expand their authority, regulatory agencies develop a particular organizational culture and set of ideological beliefs that drive their policy preferences and priorities (Carpenter 2001; Barnett and Finnemore 2004). In the case of data privacy, a set of progressive lawyers, who believed that law could play a critical role in navigating the threats that information technology posed to human dignity, mobilized on behalf of data privacy legislation. Once data protection authorities were created, these lawyers filled the new positions. The chapter examines how and why such regulatory bodies may influence regional policy-making. Additionally, it examines when such administrative feedbacks may promote institutional stability and when they may stimulate policy change.

In addition to the feedback argument just described, the chapter highlights the critical role of sequencing for institutional change in the European

Union (Shefter 1977; Pierson 2004). I argue that the emergence of European privacy legislation cannot be explained without considering previous national regulatory action and the interaction between national rules and European integration. Initial legislation created new political actors – data protection authorities – that organized cooperative networks across Europe in the 1980s. This transgovernmental network feared that European integration could undermine privacy protection, as many countries in the EU did not have comprehensive legislation. Data protection authorities then leveraged their expertise and regulatory authority to promote regional action. Critical in this effort, data protection authorities threatened to block data transfers within the internal market. The transgovernmental network leveraged its political resources to change the preferences of the other major European actors (Slaughter 2004). The Commission as well as powerful national governments recognized that in order to meet their goals of integrating the European market as well as constructing a functioning European public administration they would have to relent to the demands of the *transgovernmental policy entrepreneurs*. These entrepreneurs then used the timing of the single market project to advance their agenda. Had the single market been constructed prior to the creation of strong national privacy regulators, it is unlikely that the European Union would have passed stringent comprehensive rules.

The argument developed has several important theoretical implications. The chapter suggests that the rise of the regulatory state in Europe may have far reaching political consequences at the national and regional levels as newly constructed regulatory bodies develop and assert their preferences. Additionally, the chapter hopes to push forward research on feedbacks by distinguishing client from administrative mechanisms and then identifying how and when administrative feedbacks shape political outcomes. Finally, by focusing on the role that regulatory agencies play as feedbacks and entrepreneurs, the chapter attempts to emphasize the role that historical institutional arguments play in explaining both institutional stability and institutional change.

The chapter plan

The chapter is organized around five sections. After the introduction, the chapter examines current explanations for European involvement in data privacy that focus on powerful member state preferences and Commission activism. This section is followed by a discussion of the feedback and sequencing arguments. The theoretical debate is followed by the policy narrative, which examines both the lead up, and passage of the 1995 privacy directive as well as recent attempts to curtail privacy protection in the face of new security concerns.

The final section highlights the implications of the argument for European integration and historical institutional debates more generally.

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