

The European Internet: Common interests and EU legal achievements

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Summary:

As we observe from the history of the Internet's growth on the continent since the mid-1990s, Europe has never managed to assert itself as an economic and political power in this new segment of the economy. The endless debate over demand- versus supply-side policies has, with respect to the development of a European Internet, turned into an opposition between, on the one side, those who advocate an approach mainly based on stimulating competition for the immediate benefit of consumers and, on the other side, those who want the EU to better protect its industry and create the conditions for the emergence of European champions in digital technology. At international meetings, this wavering of Europe is visible in the disagreement between a northern bloc, very close to American proposals, and a southern one, supportive of specifically European solutions.

A few points of comparison

The European Union, which usually describes itself as a market of 500 million consumers,¹ is, as an economic zone, the leading world power. With a GDP in 2015 of more than €14 billion for its 28 member states, it ranks before the United States and is still the first trading partner for all other regions in the world.²

When comparing the weight of the digital economy in the EU and US GDPs however, we notice that Europe is lagging. Information and communications technology (ICT) weighed in at 7.1% of the American GDP³ in 2015 whereas it barely amounted to more than 4% of the European.⁴

Let us now turn to the number of Internet users. According to Internet World Stats,⁵ there are nearly 403 million cybernauts in Europe; in other words, 79.3% of the population uses the Internet. These figures are to compare with the numbers in the United States: close to 281 million; in other words, 87.4% of the population.⁶ This same source provides us with another precious statistic about the number of Facebook users: (only) 192 million in the US as compared with 236 million in the EU.

¹ See the EU website on European law:

http://eurlex.europa.eu/summary/chapter/consumers.html?locale=fr&root_default=SUM_1_CODED%3D09

² http://europa.eu/about-eu/facts-figures/economy/index_fr.htm

³ In the United States, the tech industry accounts for 7.1% of overall GDP and 11.4% of total private-sector payroll. See:

<https://www.comptia.org>

⁴ <https://ec.europa.eu/digital-single-market/en/news/digital-agenda-scoreboard-2015-most-targets-reached-time-has-come-lift-digital-borders>

⁵ <http://www.internetworldstats.com/stats9.htm>

⁶ <http://www.internetworldstats.com/stats2.htm>

As Pascal Perin and Didier Pouillot have clearly shown in a commentary on Europe in the digital economy,⁷ the EU's percentage (21%) in worldwide demand for digital services is considerable, but businesses in this field supply only 17% of these services.

The relative proportions of sales by type of operator in the digital economy diverge widely on the two shores of the Atlantic. In Europe, telecommunications accounts for 58% of sales as compared with 21% in the United States. Nonetheless, we would be wrong to believe that, given the economic structure of its digital economy and the predominance of telecommunications, the European economy has no place for on-line content producers: their share of sales in this sector (16%) slightly surpasses the United States' (15%). In contrast, over-the-top content (OTT) deliverers, the major business on the Internet, only account for 1% of sales in Europe as compared with 10% in the United States.

The stage has been set: Europe, an economic powerhouse, has advantages. It represents the world's biggest potential digital economy market (thanks to its per capita GNP and the high percentage of the population using the Internet); and its financial environment is relatively investment-friendly. However it seems to have no position to defend during international negotiations on digital technology. This economic and political entity even seems to disintegrate when questions are brought up about governance of the Internet, whether during discussions in a very American setting (such as the Internet Corporation for Assigned Names and Numbers, ICANN, and the World Summit on the Information Society, WSIS) or in intergovernmental meetings (such as the UN's International Telecommunication Union, ITU).

Do European and American interests actually converge in the digital economy? Why do we feel that nothing specifically European has emerged in this highly strategic sector? This is what we are going to try to understand...⁸

The European approach to digital technology is not economic, and the American approach pretends not to be

True, the EU has set up DG Connect (a follow-up on DG Information Society), published European digital agendas and released plans for a Digital Single Market.⁹ However my regular observations on the premises of international negotiations about the governance of the Internet have made me realize that, as a political entity, Europe has held to a constant position since 2000. Let me summarize it as follows:

- The digital economy's development is possible only if it goes in hand with a "liberalization" of services, a reinforcement of free, undistorted competition and the opening of doors to economic globalization. Europe soon embraced the idea that the Internet was a tool of globalization. Reflection on this topic has been "*part of the EU's efforts towards a 'regulated globalization' pursued in the WTO and other appropriate global forums*".¹⁰

⁷ Pascal Perin and Didier Pouillot, "L'Europe à la peine dans l'économie digitale". Available at: http://www.orange.com/fr/content/download/30450/882715/version/2/file/L_Europe_a_la_peine_dans_l_economie_numerique_Mai_2015.pdf

⁸ Article translated from French by Noal Mellott (Omaha Beach, France).

⁹ On the history of these developments, see the Wikipedia article available at:

https://en.wikipedia.org/wiki/Directorate_General_for_Communications_Networks_Content_and_Technology

¹⁰ §2 in the communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Towards a global partnership in the information society: Follow-up of the Geneva Summit of the World Summit on Information Society (WSIS)". Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004DC0111&fr=EN>

- The political dimension has been constant, presenting the digital economy's development as inseparable from advances in individual freedoms and referring to the Internet as a tool at the service of the Union's values. Several passages in the just quoted communication from the Commission to the Council attest to this.
- The economic dimension has been scaled down to defending the interests of European consumers.
- The European Commission also considers, continuously since 2000, that the role of member states must be defined negatively: a "good" state is one that does not busy itself with the Internet's technical aspects, that lifts barriers and loosens regulations.

These points correspond exactly to what the United States advocates during international negotiations, in particular at the United Nations (ITU, WSIS) and ICANN. This gives the impression that viewpoints are very similar on both shores of the Atlantic, and places the debate on the governance of the Internet in a highly political arena. Bearing in mind the respective weights of ICT in the European and American GDPs, it is legitimate to ask whether Europe should have adopted this position...

For the United States, it is, of course, not necessary to draw attention to the Internet's economic dimension. It would even be somewhat counterproductive to do so since, as Olivier Sichel has pointed out in his excellent report on the "American" digital playing field, thirteen out of the twenty biggest "over-the-top" firms in the world are American, eight of them ranking among the first ten in terms of market capitalization.¹¹ In fact, these thirteen firms account for more than 90% of sales by the twenty world leaders.

According to the *World Startup Report*, no European firm figures on the list of the ten largest market capitalizations in this sector.¹² Although this might seem logical given the extreme predominance of GAFAM (Google, Apple, Facebook, Amazon and Microsoft), yet it comes as a surprise when we realize that this ranking of the ten biggest firms only retains one (the biggest) firm per country.

In this context, how to explain that Europe seems to have the same strategy as the United States in international negotiations even though these two blocs have such divergent economic interests? In a striking contrast, points of contention on trade, agriculture (or even manufacturing) frequently lead to legal clashes between the EU and US, evidence of this being the long list of disputes that these two blocs have brought before the WTO.¹³ Nevertheless, Europe does not, as we clearly see, oppose the United States on issues related to digital technology.

In international forums such as the ITU, Europe has even gone as far as to strike an alliance with the United States against China and Russia. This brings to light the pervasiveness of the purely political approach to this question. Adopting a heroic posture, the European Commission vauntingly claimed to have defended an "open Internet" at ITU's Dubai conference in 2012.¹⁴ In fact, it rallied behind the campaign launched by Google, which, even in the United States, has been criticized as overblown.¹⁵ By doing so, it saw to it that the conference was a failure since it urged EU member states to not sign an ITU treaty declaring that nation-states are free to regulate the economic segment of the Internet inside their borders.

¹¹ Olivier Sichel, "L'échiquier numérique américain: Quelle place pour l'Europe?", *Potomac Paper* (Paris: IFRI), 20, September 2014. Available at:

https://www.ifri.org/sites/default/files/atoms/files/numeriqueamericaineurope_pp20_sichel.pdf

¹² http://www.worldstartupwiki.org/page/Internet_Hall_Of_Fame

¹³ For a recent account, see "EU-US economic disputes: There is more to trade than goods and services" on:

<http://www.euractiv.com/section/trade-society/opinion/eu-us-economic-disputes-there-is-more-to-trade-than-goods-and-services/>

¹⁴ See the Commission's press release, "Digital Agenda: EU defends open Internet at Dubai international telecommunications conference". Available at: http://europa.eu/rapid/press-release_MEMO-12-922_en.htm

¹⁵ Jody Westby, "Google's media campaign against the UN slapped down". Available at:

<http://www.forbes.com/sites/jodywestby/2012/12/04/googles-media-campaign-against-the-un-slapped-down/#65423277868e>

Ranking of the top three Internet firms in each of fifty countries by valuation in billions of dollars		
Rank	Country	Billions of US\$
1	United States	\$410 B
2	China	\$200 B
3	South Africa	\$46 B
4	South Korea	\$28 B
5	Japan	\$28 B
6	Russia	\$15.8 B
7	Israel	\$13.6 B
8	Australia	\$6.6 B
9	Brazil	\$6.4 B
10	Canada	\$6.3 B

Source: World Startup Report. Available at:
http://www.worldstartupwiki.org/page/Internet_Hall_Of_Fame &
https://docs.google.com/spreadsheets/d/1XrExbBV681ONANr_jFOXNEsQkLGM_Qs6TQb5X_OfXGc/edit#gid=0

A Europe of consumption, not of production

It would be unfair to rest satisfied with this impression of Europe being simply aligned on the American position, which emphasizes the Internet's political (even nearly messianic) dimension in order to hide its overwhelming economic supremacy. This strategy allows for condemning (under cover of the fight for... freedom) attempts to question the supremacy of the big American firms, but it is not at all effective for convincing the world that the expansion of the big American platforms ought to have as corollary the ever longer arm of American consumer law. The Commission has turned out to be punctilious on this point. Several examples illustrate the differences between the two approaches.

A priority for the EU is to protect, by stimulating competition, the rights of consumers to benefit from less expensive services. The best example of the importance (and success from the consumer's viewpoint) of this approach is, without any doubt, the prices now applied on the continent for a connection to the Internet and for mobile telephony devices.

According to Pascal Perin and Didier Pouillot in the aforementioned study⁽⁷⁾, Europe is the only region in the world where the telecommunications sector is declining, "the market having decreased in value by nearly 3% per year" during the period from 2009 to 2014. Furthermore, "this decline is mainly due to a drop in telecommunication services affected by lower prices". The attention turned exclusively toward defending consumers' interests has a price...

By recalling how much telecommunications represents in total ICT sales in Europe, we realize how much value is now being destroyed in the EU. All the same, Europe has become the economic zone where the pricing for Internet access is among the lowest in the world. Much ado, notwithstanding that, as previously shown, the percentage of the population using the Internet in Europe is much lower than in the United States; and yet American consumers pay much more for access. Without any European champion among OTT content deliverers, Europe apparently does not seem to know what to defend during international negotiations, apart from the right of citizens to make ever more connections to Facebook at an ever lower price.

Since the Junker Commission took office however, the EU has started imagining that it might formulate more clearly its own position on digital technology, even if this means making the big American firms irate. The confidentiality of personal data or the fight against the abuse of dominant position are two levers the Commission will be using more frequently. On the issue of data confidentiality, I would like to point out that it was the Court of Justice of the European Union (the CJEU and not the Commission) that decided to force Google's hand on the application of the "right to be forgotten".¹⁶ Furthermore, this same court invalidated in October 2015 the European Commission's US Safe Harbour decision, whereby the United States "*ensures an adequate level of protection of the personal data transferred*".¹⁷ In the latter case, the CJEU was judging a complaint filed against Facebook. It is as if the judicial power were forcing the European executive to include the protection of European citizens in the digital realm among the EU's legal achievements. When the Union talks about the Internet, it sometimes "forgets" to assert its differences. Meanwhile, usual procedures have been used to fight against the abuse of dominant position and against market distortions.

These fields of the Commission's actions are assigned to the Directorate-General for Competition. Although these actions might have a major impact on targeted firms, they do not stem from an industrial strategy for breeding European champions. It is, in fact, worth noting that the first major case setting the Commission at odds with an American giant (Microsoft) in the digital economy was launched by two of the latter's American competitors (Sun and Novell).¹⁸ The DG Competition also has an inquiry under way against Google, about the excessive use of the application Google Shopping in the Android environment on smartphones. It resembles the case previously brought against Microsoft; but this time, the victim of this abuse of dominant position turns out to be... Facebook!¹⁹

As we clearly see, the differences in size and in market shares among European and American players in the digital economy are such that the Commission's actions, when they try to enforce the EU's legal achievements, end up arbitrating contentions between rival American firms.

We still fail to see how EU actions reflect an industrial strategy for our continent's digital economy...

¹⁶ CJEU press release n° 70/14. Available at:
<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>

¹⁷ CJEU press release n° 117/15. Available at:
<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>

¹⁸ <http://ec.europa.eu/competition/sectors/ICT/microsoft/>

¹⁹ <http://www.lesechos.fr/idees-debats/cercle/cercle-154746-la-commission-europeenne-vs-google-pourquoi-la-regulation-des-donnees-est-elle-le-veritable-enjeu-strategique-1203922.php>

Europe, the world's largest digital market, but not for European firms

When there is talk about the digital economy, Europe seems afflicted with a sort of complex. Despite its strength owing to its powerful players in telecommunications, it is still, as a political entity, extremely close to the ideas advanced by alternative (OTT) services for bypassing traditional network operators. This is clearly illustrated in the debate about “web (or net) neutrality”, which quite regularly sets off commotion in the European digital ecosystem. In this debate, web neutrality is said to be the same as the free circulation of ideas; but it is, too, the technical rendering of the idea of free enterprise...

Once again, behind the political rhetoric surrounding this concept of neutrality, a battle is raging between operators in telecommunications and the OTT content deliverers. These operators (who have to continue investing in networks) consider that the major users (the OTT firms) of these networks do not participate enough in financing them. Though simple in theory, this question about how to distribute value is complicated owing to an approach that, once again, is very political. Is web neutrality threatened if Google is asked to pay its fair share of the cost of transmitting its contents toward a subscriber of an Internet access-provider (such as Free)?

We could support the argument if the big platforms were not developing their own strategies in clear opposition to these very principles. Such is the case of the touted “zero-rating” offers that, launched by Facebook in India, have been rejected by the Indian telecommunication authority, but that are now being made via Google’s YouTube in the United States.²⁰

We understand the economics of zero-rating, but we cannot support both the principles of net neutrality and such offers. In effect, zero-rating allows cybernauts to have access to contents on the Internet, but without being billed by a telecommunications operator — as if this access were made without using a broadband connection. Of course, zero-rating has no interest for consumers who have unlimited access thanks to a fixed-fee subscription. But when access is billed as a function of the broadband packages transmitted (as frequently happens for mobile subscriptions or subscriptions in developing countries), zero-rating is then of interest for three reasons:

- For the OTT content deliverer, zero-rating makes the content it proposes more attractive, increases the number of persons using its services and allows for sponsoring content with access-providers.
- For the access-provider, part of the costs (which it bears as a telecommunication company) of broadband transmissions is covered by the OTT deliverer.
- For users, zero-rating reduces the cost of subscriptions.

Of course, all of this rips to pieces web neutrality, which the telecommunications access-provider must normally respect when routing streams of data over the Internet.

The very fact that American telecommunication firms and OTT deliverers might work out an unlawful agreement on this topic is evidence that the EU’s approach, which, — for years now, has brushed aside the economic dimension of net neutrality so as to retain the political dimension alone — is, once again, erroneous.

If Europe wants to fully use its many assets to develop a genuine digital industry of its own, it should work out its position at the international level in line with its direct economic interests. This does not seem to be the case today. Simply repeating that Europe wants to be a vector of progressive ideas (individual freedoms and the inclusion of all parties active in developing the Internet) does not suffice to guarantee our continent’s independence given the predominance of the United States and, too, of Asia in the Internet economy.

Without giving up its principles, the EU has the duty to work out arguments and a winning strategy for the sake of its digital industry.

²⁰ <http://www.brookings.edu/blogs/techtank/posts/2016/03/23-zero-rating-net-neutrality-mcclellan-west>