

The NSA bugging “scandal” obscures the real opponents of the floundering EU-US trade talks – the independent regulators.

*Proposals for a transatlantic trade deal between the U.S. and the European Union have waxed and waned for more than two decades, with this year’s talks running into difficulties following revelations of American monitoring of European communications. **Simon J. Evenett** argues that this row obscures the real enemies of the trade talks: independent regulators on both sides of the Atlantic want to water down proposals for greater regulatory alignment. He writes that with the world economy increasingly regulated on a fragmentary, national basis, the likely failure of the regulatory aspects of the trade talks will set back the cause of reciprocal trade liberalization for some time to come.*



Much has been made of the threats to the EU-US trade talks from the sharp reaction to press reports on the scale of American monitoring of European citizens’ communications. Some prominent members of the European Parliament have called for these talks to be suspended, statements which assume a certain importance given that this legislative body must approve any future deal. Others, including the German government, have called for the trade talks’ agenda to be expanded to include data protection. A negotiation launched to much fanfare at the G8 Summit in June 2013 now looks like it is in trouble, at least according to many commentators.

These pundits are wrong—and not just because the European “shock” over American spying is overdone. The real opponents to the EU-US trade talks are already lining up to emasculate one of the key objectives of this negotiation—namely, to promote greater alignment in regulations, allowing firms to more easily meet standards on both sides of the Atlantic without watering down protections for employers, customers, and the environment. If the bugging scandal spirals out of control, this will suit the purposes of these opponents who will now have to spend a lot less political capital to head off this threat to their interests.

Who are these opponents? They are the so-called independent regulators on both sides of the Atlantic, many in the legal community who work with them, and the firms that have invested vast sums meeting regulatory requirements and don’t cherish the prospect of competition from firms that haven’t made similar outlays. What few realise is that, when politics was taken out of domestic regulation, with the creation of “independent” regulators that operated at arms-length from governments and from legislatures, these same regulators would resist attempts to cooperate internationally. After all, having won from their governments freedom to maneuver, why tie themselves down with international obligations? The more money that is at stake, the more likely firms line up behind national regulators as they fend off proposals to harmonize rules or treat foreign rules as equivalent to domestic rules.

Legal and constitutional considerations on both sides of the Atlantic reinforce the dearth of meaningful regulatory cooperation. For example, in many sectors cooperation would be facilitated by the exchange of information between regulators. All too often, legal rules protecting allegedly confidential information preclude data sharing. That sounds reasonable until hard questions are asked as to whether the information in question is really confidential and whether the definition of what is confidential is applied in an elastic manner. Much regulation is heavy on jargon so non-experts, including senior officials and ministers, are bamboozled by daunting language that deliberately emphasises the downside risks of changes to the status quo.

The consequence is that an increasingly connected world economy is regulated on a fragmentary, national basis. The deliberate diffusion of regulatory power seen on both sides of the Atlantic limits the further integration of world markets. Now, regulators will object to this characterization—arguing they have good relations with foreign counterparts, as if that were enough. Some regulators have agreed international best practices and nice clubs which they attend on a regular basis. Just because regulators talk to each other on a regular basis doesn’t mean

they've ever shared information in "sensitive" investigations (that is investigations where foreigners get hurt) or adopted standards that they weren't perfectly comfortable with. Sceptics of this argument might be surprised if they posed the following question to regulators that parade their cosmopolitan credentials: what commercially significant regulation or practice has your agency adopted in response to an international accord between regulators that the agency would not have adopted anyway? In short, where's the real value added from all this non-binding talk between regulators?



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It's the binding part of international accords that vexes parochial national regulators—and that explains their efforts to limit the regulatory alignment agenda of the on-going EU-US trade talks. A telling, recent example is the opposition of the US Treasury to the inclusion of financial regulations in the talks, much to the chagrin of British policymakers and bankers seeking to advance the interests of the City of London. A careful examination of specialist news reports on these negotiations reveals that the items where cooperation is envisaged are quite limited. Indeed, as the weeks and months go by, the regulatory alignment part of the transatlantic trade talks has all the makings of a Russian doll—it will get smaller and smaller.

Such are the difficulties in mustering the support of regulators that the US trade representative isn't planning on revealing to European counterparts until December, six months after the negotiations began, which regulations are actually on the negotiating table. Don't be surprised if there are delays in making this announcement. The US has sophisticated trade negotiators and they won't want to reveal they're bringing little to the table—if so, a dense smokescreen of constructive-sounding verbiage will be emitted.

Some might object to this argument by maintaining that regulators have been independent for many years, so what's new in this argument? The absence of novelty is precisely the point. Transatlantic trade talks have been attempted at different points over the past 25 years and they've all foundered. The roots of these failures are well entrenched. Unless something changes that persuades legislators to amend the legal frameworks governing regulations, it's difficult to see how the impasses of yesteryear won't repeat themselves. A betting analyst would expect these trade talks to produce insignificant benefits in so far as regulatory realignment is concerned.

The fallout from any failure to substantially align regulations on both sides of the Atlantic would stretch further than many realise. Having billed this negotiation as an opportunity to design a template for 21st century international trade rules—with the unsubtle implication that the large emerging markets would be expected to accept them in the WTO or elsewhere—another unsuccessful transatlantic trade negotiation would reveal clearly the limits of binding approaches to changing national regulations. If the two biggest trading powers can't agree ambitious new trade rules, then the cause of reciprocal trade liberalisation would be set back. With the WTO paralysed, this would imply that the principal policy-related vehicle for integrating markets in the global economy is unilateral reform—and the appetite for that varies markedly across the globe. Tariffs may become a thing of the past, but the fragmentation of the world economy would continue.

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