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open, competitive choice for IT users

OFE Public Policy Review

October 2013

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List of abbreviations

CoC	Code of Conduct
DG	Directorate General of the European Commission
EC	European Commission
ECP	European Cloud Partnership
EMPL	Employment and Social Affairs committee in the European Parliament
EP	European Parliament
EPP	European People's Party (European Parliament group)
FRAND	Free, Reasonable and Non-Discriminatory
GDPR	General Data Protection Regulation
JURI	Legal Affairs committee in the European Parliament
IMCO	Internal Market and Consumer Protection committee in the European Parliament
ITRE	Industry, Research and Energy in the European Parliament
LIBE	Civil Liberties, Justice and Home Affairs committee in the European Parliament
MEP	Member of the European Parliament
NIS	Network and Information Security
SEP	Standard-essential Patents
SIG	Special Interest Group
SLAs	Service Level Agreements
TTIP	Transatlantic Trade and Investment Partnership
UPC	Unified Patent Court
WG	Working group

Introduction

In line with its mission, OFE monitors public policy debates to identify policy items that represent opportunities and threats to the openness of IT. The aim of this monthly review is to provide a regular, concise and practical overview of these debates. We hope that it can encourage grounded, productive discussions on our strategic orientations, and would therefore welcome any feedback and input. The review is broader in scope than the focus of OFE activities, so as to include all policy debates potentially relevant to our mission. The "context" section of each item provides some background information, while the "update" section covers what has happened over the last month.

October has been particularly busy on the topics of Cloud (p. 5) and Data Protection (p. 9) and for both issues we have dedicated two pages of our monthly policy review. On Standardisation, a summary of the latest MSP meeting can be found (p. 7). The legislative procedure for the "Connected Continent" Regulation (p. 8) has already started and OFE will contribute in several ways. A parliamentary report could lead to the inclusion of private copying levies to cloud services (p. 11). The proposed amendments for the Cyber-security Directive have been disclosed (p. 12). The European Parliament is still working on its inquiry into US surveillance (p. 13). On Standards and Essential Patents, the Commission announced its decision on one of its investigations (p. 14). The last round of TTIP negotiations was canceled due to the US Government shutdown (p. 15). Some potential incompatibilities with European law have been spotted regarding the Unified Patent Court Agreement (p. 16). Lastly, ICANN will start to give permission for some of the new gTLDs (p. 17).

EU Cloud Strategy

Priority for OFE: high

Context: The EU cloud computing strategy, published in late 2012, is a "soft" document outlining the Commission goals and planned actions with regards to cloud computing. It focuses on three key aspects: data security, copyright, and standardisation. ETSI has been mandated by the Commission to coordinate a cloud standards roadmapping exercise and has set up an open web platform for this purpose. The strategy also proposes a European Cloud Partnership (ECP) composed of a high level Steering Board for strategic orientations and supported by an initial budget of €10 million for a pre-commercial procurement project called Cloud for Europe which will run from 2013 to 2016. DG Connect, lead on this by Ken Ducatel, is working on implementing the actions announced in the Communication and is maintaining an ongoing dialogue with the industry on this item through the Cloud-SIG (Cloud Special Interest Group) on SLAs, certification, codes of conduct (CoC) and Research (the latter being finished). Among these the CoC Working Group has been the most active. The code will consist of a set of mandatory requirements for organisations claiming conformance with it (on a voluntary basis) and is aimed particularly at SMEs facing difficulties in ensuring compliance with current data protection rules and customer trust. The first deliverables of the strategy are expected by late 2013. An initial mid-term review by the ECP board took place in July. There, the idea of a 'Schengen data charter' was brought up by companies such a Atos and SAP. This would have consisted in a "Charter" adopted under the enhanced cooperation procedure by a minimum of 9 countries, and would set common localisation requirements for data storage and processing.
In parallel to the Commission activities, the European Parliament is drafting an own-initiative Report as a response to the Commission's Communication. ITRE is the lead committee, with MEP Pilar del Castillo acting as Rapporteur. Both the JURI and the LIBE committees released and send their opinion report to the lead committee ITRE, which released their final list of amendments.
The implementation of the Cloud Strategy is closely linked to parallel debates on the proposed General Data Protection Regulation (see p. 9) and the Cyber Security Directive (see p. 12).

Update: The ITRE report (not yet officially released) was adopted on October 14. Some of the recommendations made by OFE to the Rapporteur and Shadows found their way into the text, which ended up being a fairly balanced compromise. The final vote in plenary is forecast for December 9.
On October 14 the Commission also organised a plenary meeting of its Cloud-SIG working groups (WG), providing a comprehensive recap of progress made over the past months and the next steps for each WG :

- **Certification** : Chairs reminded all that the scope is clearly limited to voluntary certification schemes dealing with security requirements exclusively at this stage (data protection was ruled as out of scope for the most part as it is dealt with under the CoC WG). The goal is not to create yet another standard but to make sense of what is out there : a list of all relevant existing schemes has been drafted and the group is working on a process for updating/adding new schemes. The current proposal to move forward is to develop a meta-framework to map the existing schemes against practical requirements. The 1st draft of the meta-framework should be finalised by summer 2014 and will be followed by a test run by the ECP.
- **Code od Conduct (CoC)** : Following David Bicket's retirement as editor of the code in September, the EC is looking for a new independent expert to pick up the role of editor/coordinator. The EC wants to keep a fast pace of progress even if that means a less inclusive process, and has decided to set up a drafting subgroup and reached out directly to 5 companies (Microsoft, Salesforce, SAP, Atos, Telefonica or Telecom Italia) to contribute without any wider consultation with the group. The next step is to get the CoC approved by art 29 working party - there is

still a lot of uncertainty about how achievable this goal is. There is a large consensus that the demand-side, particularly national CIOs are still insufficiently involved in this debate.

- **SLAs** : The EC clarified that aspects related to B2B (negotiable) contracts were dealt by DG Connect, while DG Justice handled the B2C "take it or leave it" contracts. Gartner has been contracted to produce a practical study on SLAs.
- **European Cloud Partnership** : The EC clarified this was an umbrella initiative including the national cloud projects. The 'Cloud for Europe' initiative will be officially launched in Berlin on November 14-15. Bidding will open in spring/summer 2014.

While the idea of a 'Schengen data charter' has for now been put on the shelf due to a lack of clear support from Member States, the launch of the Cloud for Europe is expected to see the adoption of a 'Berlin manifesto' driven by a similarly protectionist agenda. We are currently drafting and gathering support for an alternative manifesto in support of an Open Cloud for Europe.

Upcoming events & actions:

- Release of the OFE alternative manifesto (before November 14) ;
- Official launch of the Cloud for Europe in Berlin (November 14 and 15).

EU ICT Multi-Stakeholder Platform (MSP)

Priority for OFE: high

Context: Since November 2011 the European Commission has set up an expert advisory group on ICT standardisation policy, the ICT Multi-Stakeholder Platform (MSP). OFE is one of the members of this group which comprises 67 organisations including all EU and EFTA Member States, the European Standards Organisations (ESO), global standards bodies like OASIS, W3C, IETF, Ecma international, societal stakeholders like ANEC, EDF, and industry organisations like OFE, Digital Europe, ECIS. The main objectives of MSP are the development of the EU Rolling Plan for ICT standardisation (a work programme for ICT standardisation work), the evaluation of global ICT specifications which will be identified by the Commission for direct referencing in public procurement according to the procedure laid down in the EU Regulation 1025/2012, Articles 13 and 14, and general advice on all standards policy issues. OFE has been asked to chair the Task Force of the MSP on developing the EU Rolling Plan.

Update: The last meeting of the MSP was held on 17 October 2013 with a couple of focal topic items:

- **Cyber Security**: The chair of the Cyber Security Coordination Group set up by CEN/CENELEC, MEP Dr. Ehlert, gave a presentation on the work of the group. It was complained that global organisations like W3C and IETF are not present, nor in the scope of the CEN/CENELEC group. Moreover, it was stressed that coordination with the NIS Platform set up by DG CNCT is essential. A follow-up discussion between Dr. Ehlert, the Commission and involving the chair of the MSP task force on the Rolling Plan as agreed.
- **Smart Cities**: The MSP was informed about two new Co-ordination groups on smart cities standardsation: one in ETSI and one in CEN/CENELEC. OFE as MSP member made clear that there are too many coordination groups on smart cities and that it needs to be clear what a standards body can possibly do on smart cities standardisation given the fact that smart cities is a meta area already comprising complex systems standardisation topics like smart grid, eEnergy, eMobility, smart home, etc.
- **EU Rolling Plan**: The final draft of the EU Rolling Plan was presented to the MSP. For the first time, with this Rolling Plan, there is a concise document available on all activities around ICT standardisation and across all Commission DGs. The draft was accepted and the next steps towards finalisation of the Rolling Plan by December were agreed.
- **Identification of ICT specifications**: The first set of ICT specifications was recommended for identification. The set contains specifications from W3C, IETF and Ecma International. This process is in accordance with Articles 13 and 14 of Regulation 1025/2012. As next step the Commission will issue a public consultation on the MSP's recommendation and proceed towards a Commission Decision on the identification.

Upcoming events & actions:

- Regular meeting of the MSP task force on the Rolling Plan (phone meetings);
- Meeting of the MSP (December 5).

'Connected Continent' Regulation (Net Neutrality)

Priority for OFE: high

Context: On July 11, the draft Regulation for a European single market for electronic communications was leaked by civil society organisation EDRi. The official draft version of the Regulation was released on September 11 and OFE responded it with a Press Release, which was picked up by the specialised press. Our analysis pointed out the following:

- Article 23(5) would ban blocking, slowing down and degrading unless such restrictions are necessary to: "a) implement a legislative provision or a court order, or prevent or impede serious crimes; b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals; c) prevent the transmission of unsolicited communications to end-users who have given their prior consent to such restrictive measures; d) minimise the effects of temporary or exceptional network congestion provided that equivalent types of traffic are treated equally."
- The proposal would bless agreements between electronic service providers and content providers in Article 23(2) 2nd Sub-paragraph: "(...) providers of content, applications and services and providers of electronic communications to the public shall be free to enter into agreements with each other to transmit the related data volumes or traffic as specialised services with a defined quality of service or dedicated capacity". While the legal implications of this disposition are still unclear, it is likely that this would introduce a distinction between "specialised services" with guaranteed quality of service (and thus network discrimination) from the "open, best-effort, basic Internet."
- NRAs "(...) shall have the power to impose minimum quality of service requirements on providers of electronic communications to the public" (Article 24(2)).
- Article 24(1) introduces a formal distinction between specialised services and the open/non-discriminatory Internet, but with no clear definitions apart from requiring "the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology and that are not impaired by specialised services."
- Under article 23(1) 2nd Sub-paragraph end-users would be able to agree directly with providers of either electronic communications to the public or of information society services on the provision of such specialised services.

It is unclear whether the draft regulation will pass before the 2014 elections and many have raised concerns about rushing the debate on a crucial piece of legislation. Additionally OFA published its Net Neutrality EU - Country Factsheets,which got some press coverage. On September 26, OFE participated to a first round table discussion on net neutrality held by MEP Marietje Schaake, which set some landmarks in a still unfocused debate mixing human rights and economic aspects.

Update: MEP Pilar del Castillo was appointed as the main Rapporteur for the ITRE Report (lead committee) on the proposal for a regulation on a "Connected Continent". She will hold a public consultation for input in which OFE will participate. Additionally, OFA will co-chair a Round Table together with MEP Marietje Schaake on November 13 in the European Parliament in which Ana Olmos will present her findings.

Upcoming events & actions:

- OFA Round Table presenting Ana Olmos' research on net neutrality (November 13);
- OFE input to Pilar del Castillo's public consultation (November 5);
- Adoption of the legislative proposal (forecast for Easter 2014).

General Data Protection Regulation

Priority for OFE: medium

Context: This Commission proposal aims at setting up a new legal framework for the protection of personal data in the EU by proposing a more coherent data protection framework in the EU, backed by strong enforcement, in order to fight fragmentation in the way personal data protection is implemented across the Union. This proposal also ties in with current debates around cloud computing.
Recent leaks on the PRISM program have had a big impact on the debates around the GDPR, with for instance support given by ITRE Rapporteur Sean Kelly (EPP) to the introduction of 'Anti-net tapping Clause' in the EP Report. Commissioner Reding has been particularly vocal on the issue, asserting "Partners do not spy on each other" and that "the basic rights of EU citizens are non-negotiable".
All committees consulted for opinion (EMPL, ITRE, IMCO and JURI) have issued their final reports for the consideration of the lead committee LIBE.

Update: The Ministries for Justice and Home Affairs met to discuss the 'one-stop-shop' idea on October 7, and despite different national sensibilities was able to come to an agreement. In a press release the Council explains its support for a 'one-stop-shop' for data protection compliance, rather than the existing 28-member state compliance approach, as well as a consistency mechanism, both of which form the core pillars of the proposals. The Council suggested that consistency in the application of EU data protection rules could be achieved by entrusting central power with the European Data Protection Board, which would take over from the existing Art. 29 Working Party, to ensure a harmonised approach to the Data Protection Framework.
On October 21 the lead committee LIBE voted to approve all proposed compromise amendments and start negotiations with to the EU Council. The most notable changes would include :

- **Extended scope** : not only will EU data policy apply to data controllers, but will also be applicable to data processors in the EU, as well as those established outside the EU that offer goods or services to data subjects in the EU.
- **International data transfers** : restricting controllers or processors of EU data from disclosing that data to third-country administrative or judicial authorities without express permission granted by EU law. This could effectively nullify the US-EU Safe Harbor Framework currently in place, and may force companies to chose between violating US and EU law.
- **Pseudonymous data** : "personal data that cannot be attributed to a specific data subject without the use of additional information, as long as such additional information is kept separately and subject to technical and organisational measures to ensure non-attribution", will not fall under the scope of this Regulation.
- **Legitimate interests and consent** : processing of personal data where it is necessary for the purposes of the controller's "legitimate interests" will be allowed, except where such interests are overridden by the data subject's interests or fundamental rights and freedoms. Furthermore, consent is no longer valid when the purpose for the processing ceases or as soon as the processing is no longer necessary to carry out the purpose for which the personal data were originally collected.
- **Data subject rights** : individuals will be able to transfer data without hassle, and all matters impacting their data must be transparent, written out, and acknowledged by the data subject. Data controllers asked by data subjects to remove their personal data will have to comply and should also forward the request to other companies that maintain the same data on the individual (this replaces the "right to be forgotten").

- **Data Protection Officers** : a controller or processor must appoint a data protection officer when the controller is processing the personal data of more than 5,000 data subjects in any consecutive 12-month period, or where the core processing activities relate to processing sensitive personal data, location data, children's data, or employee data in large-scale filing systems.
- **Security breaches and fines** : Controllers and processors will now be required to notify national data protection authorities of security breaches, within 72 hours instead of the initially proposed 24. The Compromise Text increases potential fines to 5% of an enterprise's annual worldwide turnover or 100 million Euros (whichever is greater), versus the initially proposed 2%.
- **Supervisory Authorities**: the one-stop shop idea is replaced by a 'lead authority', whereby the lead must consult all other competent authorities, take the utmost account of their opinions, and endeavour to reach a consensus. Their actions will be coordinated by the European Data Protection Board, which is given powers to impose decisions on individual authorities if consensus cannot be found.

The European Council, meeting on October 24, agreed that "The timely adoption of a strong EU General Data Protection framework and the Cyber-security Directive is essential for the completion of the Digital Single Market by 2015.". Some analysts took this remark as a sign that the adoption of the GDPR would be pushed back to to 2015. However, both the Commission and the Parliament remain committed to reach an agreement before the next European elections in May 2014. Only the UK and Sweden seem to be favouring the delay to 2015 and are expected to be outvoted in the Council.

Upcoming events & actions:

- Trialogue negotiations between the European Parliament, the Council and the European Commission (ongoing);
- Final vote by Council and European Parliament (2014).

Castex report on private copying levies

Priority for OFE: medium

Context: This Parliamentary 'own-initiative' report has been launched by the EP in response to the Commission Communication on content in the Digital Single Market released in late 2012. It will draw on former Commissioner Vitorino's recent report on private copying, who was asked by the Commission to act as mediator to improve the consistency, effectiveness and legitimacy of the levy systems across Europe. He came up with a fairly balanced report and set of recommendations, encouraging in particular to clarify that "copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies". Debates on this issue will feed into the ongoing review of the EU copyright framework. It also has relevance to current debates around Cloud Computing: in its recent Cloud Strategy, the Commission noted that "questions arise on the possible collection of private copy levies for any private copying of content to, from or within the cloud". The lead report will come out of the JURI committee, with Francoise Castex (S&D) acting as Rapporteur; the ITRE committee will be putting out a opinion report.

Update: After a first exchange of views between MEPs before the summer, activity on this item has been picking up in October following the publication of the draft Report on October 10. The text leans heavily in favour of private copying levies and proposes inter alia to extend their scope to cloud services :

> *25. Takes the view that private copies of protected works made using cloud computing technology may have the same purpose as those made using traditional and/or digital recording media and materials; considers that these copies should be taken into account by the private copying compensation mechanisms.*

Close to 200 amendments have been tabled for consideration and were publicly released on October 21.
OFE is working in cooperation with other industry organisations to put out a position paper urging MEPs to keep private copying levies out of cloud services.

Upcoming events & actions:

- Next exchange of views in JURI (November 4);
- Debate and adoption in committees (tba);
- Forecast final vote in pleanry (January 13).

Cyber-security Directive

Priority for OFE: medium

Context: After lengthy delays, two documents, a strategy and a draft Directive ('High common level of network and information security across the Union') have been released in early February.
There are a number of concerns with the Directive, including that:

- the scope of the directive is too broad and risks being interpreted as a way for governments to regulate Internet traffic flows (e.g. it includes Internet search engines, social networking sites or even video gaming services);
- it calls on often ill-equipped European public authorities to duplicate the highly specialized work already being done by firms in the network information security market;
- it aims to set up rigid technology standards for dealing with constantly evolving cyber attacks;
- it instructs firms to notify public authorities of all incidents instead of calling for a two-way sharing of information;
- it instructs national authorities to publicize reported incidents when publicity could further undermine an organization's network security, as well as its reputation;
- a Directive is likely an ineffective instrument for a harmonized internal market, as it creates differences in each member state as to how the Directive is implemented including with regards to which market operators are within scope - there is no common EU definition of critical infrastructures that would apply (the list proposed in the Commission draft is non-exhaustive).

The Commission has also set up a NIS Public-Private Platform. This stakeholders dialogue will run parallel to and feed into the legislative debates on the Directive. It will operate through three working groups on risk-management practices (including awareness-raising), exchange of information on cyber incidents, and R&D issues. A first meeting of each of the working groups was convened in September.
The IMCO committee is responsible for the dossier in the European Parliament, with ITRE and LIBE to release an opinion report. Respective rapporteurs are Andreas Schwab (EPP), Pilar del Castillo (EPP) and Carl Schlyter (Green). The IMCO draft Report was released on July 7. Among notable changes to the Commission draft we can highlight the complete removal of information society services from the list of critical infrastructures concerned by the compulsory notification system (annex 2), more flexibility given to member states to have multiple competent authorities (but keeping a single point of contact), and more flexibility given to companies in providing evidence of compliance (no compulsory external audit). However it remains contentious that even critical infrastructure provides should be subject to mandatory breach notifications - although the case is stronger. And there are still no measure for information sharing back to the private sector.

Update: On October 2 the list of proposed amendments to the draft Schwab Report was made public. There has also been a slight reshuffling of competences of committees in the EP, with IMCO and possibly LIBE as well to take exclusive competences from ITRE, which would make their proposed amendments automatically included in the final Report. This is seen as a push by the Green group and particularly LIBE Rapporteur Carl Schlyter to put information society services back into the list of critical infrastructures concerned by the compulsory notification system (annex 2).
The working groups of the NIS Public-Private Platform continue their activities and have each released the minutes of their meeting, along with their agreed terms of reference.

Upcoming events & actions:

- Exchange of views in IMCO (November 5);
- Deadline for amendments in IMCO (7 November);
- Vote in ITRE (16 December)
- Forecast final vote in plenary (March 2014).

Parliament inquiry into US surveillance

Priority for OFE: low

Context: Announced in July of this year, LIBE committee announced it will be launching an "in-depth inquiry" into the US surveillance programmes, formally titled "US NSA surveillance programme, surveillance bodies in various Member States and impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs". Its results should be presented by the end of this year, with a committee vote for the report in December and the plenary vote in January. On September 5 Claude Moraes (S&D) was appointed as Rapporteur for the inquiry, and the first hearing took place. Other meetings of the inquiry took place on September 12, 24 and 30. Debates in this context are closely entwined with those on the new General Data Protection Regulation (see p.10).

Update : The 5th hearing held on October 3 focused on the allegations of "hacking" / tapping into the Belgacom systems (the EP's ISP) by intelligence services. At the 6th hearing held by the committee on October 7, the MEPs examined the Safe Harbour provisions, investigating whether personal data of E.U. citizens transferred to U.S. under the arrangements had received adequate legal protection. Rapporteur Claude Moraes announced at the end of the hearing that the report would recommend the suspension of the Safe Harbor Framework.
The 7th hearing held on October 14 focused on Court cases on EU law and Surveillance Programmes.
In an interesting twist of event, on October 29 the EPP group, which had previously blocked an attempt to suspend TTIP negotiations, announced that it was in favour of terminating the EU-US Safe Harbor agreement and negotiate new rules.

Upcoming events & actions:

- Next meeting of the inquiry (October 7);
- LIBE committee vote (December).

Litigations on licensing terms of standard-essential patents

Priority for OFE: low

Context: The Commission opened an investigation in April 2012 against Motorola Mobility (owned by Google) and concluded that it abused its dominant position by seeking and enforcing injunctions against Apple on the basis of mobile phone Standard Essential Patents (SEPs) in Germany. On May 6 2013, the Commission issued its Statement of Objections to Motorola Mobility stressing that SEPs should not act as blockers to competition. A statement of objections is effectively a warning and an invitation to the target to defend itself – after that defence has been heard, the Commission will come up with a final judgment. SEPs cover technology that is essential to certain standards and are supposed to be licensed by the patent-holder on so-called Fair, Reasonable and Non-Discriminatory (FRAND) terms (because this technology is so important, the patent holder is not supposed to try blocking rivals from using it as long as they are willing to pay a FRAND rate). In the case of Motorola, the SEPs in question cover part of the GPRS standard, which is in turn part of the rather important GSM cellular standard. The Commission's investigation on Motorola Mobility is still ongoing.
The Commission also opened an investigation against Samsung to asses whether the company had abusively used its SEPs to distort competition in European mobile device markets.
In parallel, DG Enterprise is currently working on a study on licensing of SEPs across all sectors and will consist of a list of best practices in order to reduce transaction cost in licensing of SEPs. The study will focus on four key aspects: long-term commitment to licensing terms, injunctions, FRAND and reciprocity. If the results are deemed unsatisfactory, the Commission has expressed its willingness to look into regulatory solutions. Currently the he Commission is conducting interviews with a number of stakeholders, but up to now the IT sector has not been consulted.

Update: The Commission announced its decision regarding the investigation against Samsung (Press release). Samsung has offered to abstain from seeking injunctions for mobile SEPs for a period of five years against any company that agrees to a particular licensing framework. Interested parties can now submit their comments within one month. Some opinions do not agree with the Commission's decision, since after those five years Samsung could abusively use its SEPs again. However, if the Commission concludes, in light of the comments received, that the commitments address the competition concerns, it may decide to make them legally binding on Samsung.

Upcoming events & actions:

- Commission's judgments on SEPs investigations (tba);
- Publication of the Commission study on licensing of SEPs (tba).

Transatlantic Trade and Investment Partnership (TTIP)

Priority for OFE: low

Context: The Transatlantic Trade and Investment Partnership (TTIP) is a possible future Free Trade Agreement between the US and the EU. Its objective is to break down all kinds of trade barriers, liberalize trade in goods and services and promote foreign direct investment between the US and the EU (e.g. public procurement).
One of the Commission's concern is the cooperation in standards by ensuring no potential conflict and that industry takes a leading role. Ken Ducatel (DG Connect) on June 12 stressed out the importance of identifying global standards and global identification schemes and the need to reach an agreement with the US for standards in procurement, which as he pointed out, was not the case today. On cyber-security, the Commission did not want diverging approaches between both territories and is aware that the diverging approaches from Member States on this issues could represent a problem in reaching an effective solution. However, US Press reported on 13 June that the European Commission, before the scandal on PRISM, made its proposed Data Protection Regulation weaker for rules for transferring data to law enforcement authorities outside the EU.
On July 16 DG Trade held a civil society dialogue in Brussels for the debrief of the first negotiation round. The objective of the meeting was to obtain input from all the different stakeholders. The major concern in the room was transparency (attendees feared the same secrecy of ACTA) and in that respect the Commission assured that it will make the text public as soon as it is agreed. On telecommunications the Commission admitted that both territories have different ideas and that it could be possible to have different chapters for each territory. On standards, it was also admitted that both the US and the EU have different approaches and there is still a need to know how to coordinate all the different European standard organisations with the ones in the US. Additionally, Karsten Gerloff (FSFE) asked what would be the effect on software patents and the Commission answered that they were not discussed in the first round.
Some worries still exist on the development of the Agreement, but very little of the negotiations is still know. To tackle this DG TRADE will organize another stakeholder briefing session for the second round of the TTIP negotiations which will take place in Brussels from 7 to 11 October. During this session, stakeholders will be briefed by the EU and US chief negotiators on the status of the negotiations and will have the opportunity to exchange views with chief negotiators of both sides.

Update: On October 3, the Commission published its response to claims about investor-state dispute settlement within the TTIP. The second round of TTIP negotiations, planned for October 7-11 in Brussels was canceled due to the US administration shutdown. On October 14, INTA committee held a public hearing to discuss the trade and economic relations of the TTIP. The EU and the US announced they will hold a second round of talks in Brussels from Monday 11th – Friday 15th November 2013. The talks in Brussels will be followed by a third round of negotiations to be held in Washington DC the week of the 16th December.

Upcoming events & actions:

- Second round of negotiations (November 11-15);
- Stakeholder briefing (November 15).
- Third round of negotiations in Washington (December 16).

The Unified Patent Court

Priority for OFE: low

Context: In 2012 the creation of a unitary patent protection in the EU was agreed to ensure a uniform protection for inventions across all Member States on a one-stop shop basis, providing huge cost advantages and reducing administrative burdens. To achieve this objective a Unified Patent Court (UPC) needs to be created. The UPC is a proposed patent court common to several member states of the European Union that would hear cases regarding infringement and revocation proceedings of European patents valid in the territories of participating states. The Court is to be established by the Agreement on a Unified Patent Court, which was signed in 2013 by 25 states (all EU member states except Croatia, which acceded to the Union after the agreement was signed, Poland and Spain) but which has not entered into force. Currently, the rules of procedure of the UPC are still in negotiations (15th draft). Back in December 2012, OFE issued a Press Release on the unitary patent focusing on the lack of open debate and how the draft legislation failed to address flaws in the current patent system in Europe.
On September 26 the New York Times published an open letter from 16 companies, including Google, Apple, Microsoft and Samsung addressed to European officials regarding the Public Consultation on the Rules of Procedure of the Unified Patent Court. They express their concern about two aspects of the draft rules of procedure of the future UPC: bifurcation and injunctions. A bifurcated system treats the question of whether a patent is valid separately from whether it's been infringed. Patent cases often involve the related issues of whether a particular patent is valid and, if so, whether it has been infringed. The UPC Agreement allows these questions to be decided by different courts in the same case, and according to the letter the draft rules give little guidance as to when or how this should or should not be done, which could mean some products get banned without a ruling on whether a patent is actually valid.
The companies also want to make sure injunctions (bans on products with unlicensed technology) can only be used in cases that deserve it. The fear is that if sufficient guidelines on when to grant injunctions are not provided "patent trolls" (companies that apply for or purchase patents in order to sue other companies for infringement) with even a single low-quality patent claim could force a company to pay excessive royalties or risk a ban across Europe.
A representative of the group involved in in setting up the new court system said that the pleading stage of cases in Europe would last about six months and include both infringement and validity.

Update: The ratification process is still ongoing at the national level, with for now only Austria having ratified the agreement among all signatory countries. While largely a formality, this might still be subject to debate in some countries, for instance in the UK where amendments to the law would be necessary to implement the UPC agreement.
On October 3 MEP Amelia Andersdotter (Verts/ALE) issued a parliamentary question addressing some potential incompatibilities of the UPC with existing European law. Brussels I Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in Member States. She asked the Commission whether it acknowledged that the future UPC agreement would alter existing European law and whether signing this particular agreement without the EU being part would be in breach of European law.

Upcoming events & actions:

- Public hearing on the draft rules of procedures (early 2014);
- Approval of the rules of procedures (tba);
- Ratification of the Agreement on a Unified Patent Court by Member States (tba).

ICANN's new TLDs programme

Priority for OFE: low

Context: In 2012 ICANN opened up applications for new generic top-level domains (gTLD). Some of these include generic names such as .blog, .music, and most relevant for our activities .open and .cloud. Closed registry applications would give total discretion to the winner of the bid to operate the gTLD at its own discretion. This means a generic environment could potentially become completely controlled by a single company. We believe this raises some serious competition and openness issues and have expressed so in a recent press release.
The public consultation opened by ICANN to collect views on the "closed generic" TLD applications closed on March 7 and received a large amount of contributions. OFE's response can be found here. Of particular interest is Google's response, in which the company pledges to amend its applications to some generic strings (specifically .app, .blog, .cloud and .search) so as to allow their use by the industry as a whole. Cloud Industry Forum has submitted a formal Community Objection to the .cloud closed applications, an initiative supported by OFE.
In April, ICANN's Governmental Advisory Committee (GAC) issued a recommendation that exclusive registry access for strings representing generic terms should serve a public interest goal. It also flagged a non-exhaustive list of strings that it considers to be generic terms and where the applicant is currently proposing to provide exclusive registry access, including .cloud (but not .open or .free). ICANN has resolved "to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for *generic strings* to a single person or entity and/or that person's or entity's Affiliates", pending further talks with the GAC. In spite of ICANN's resolution to hold back closed registry applications on generic strings, the application process for the .cloud string continued in parallel and five of the seven applicants have passed the Initial Evaluation, including Amazon, Symantec and Google. Amazon's application states that "all domains in the .cloud registry will remain the property of Amazon," while Symantec "intends to initially limit registration and use of domain names within the .cloud string to Symantec and its qualified subsidiaries and affiliates." In its application, Google states that it will retain ownership over the second-level domains in the .cloud TLD, intending the gTLD to be a space for categorization and classification of cloud services; others will be allowed to register third-level domains after going through an eligibility verification process.
Cloud Industry Forum raised an objection to ICANN and all three mentioned applicants have appealed against it. They are now moving in to a process of arbitration via an independent expert.
On August 30 ICANN's Initial Evaluation (IE) came to a close, although a 20% of applications have been delayed by a minimum of three months after security concerns about "name collisions". Regarding the .cloud string, the applications have been placed in a string contention set. A string contention occurs when two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and/or dispute resolution processes and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated. If these situations occur, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction.

Update: On October 9it was announced that all of the seven applicants had pledged to amend their application to the .cloud string to run it on a non-exclusive basis. It is expected that the first new domains will be soon become available after a period allowing trademark owners to secure their rights and all of the non-latin TLDs were allowed to run first.

Upcoming events & actions:

- Launch of an arbitration process for the .cloud string (tba);
- ICANN Board to address GAC Advice (see timeline);
- Next ICANN meeting in Buenos Aires (November 17-21).