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Regulating cross-border traffic in personal data: disputes between EU and US

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Background of research

- Interest in regulatory policy, esp. contrast between global markets and national regulation
- How are differences reconciled?
- Studies of banking regulation
- Politics and regulation of information

Outline

- Problem: use of internet causes data flows across national borders → differences in data protection
- How are differences reconciled?
- 3 case studies of EU–US disputes over privacy and data protection
- Theoretical argument about analytical approach in political science literature

Different approaches at data protection

USA

- Fragmented regulation; no comprehensive law
- Preference for private sector self-regulation
- No duty for state to protect individual; state as threat to privacy

European Union

- Comprehensive statutory regulation since 1970s
- Data protection offices with important competences
- State seen as protector; main threat from business

Three case studies

- “Safe Harbor“ agreement
  - Conflict after EU data protection directive (1995); requirement of “adequate level of protection” outside EU
  - Negotiations start late, but eventually compromise agreed
  - Innovative approach that follows neither US nor EU model
  - Much praise in academic and political debate (“model solution for the future”)

Three case studies

- PNR: access to flight passenger data
  - US interest: use of personal data in the fight against terrorism
  - Nov. 2001: “Aviation and Security Act” demands access to PNR
  - Dilemma for EU airlines: breach of EU data protection law vs. threat to withdraw landing rights in US
  - EU Commission largely gives in to US demands after negotiations

Three case studies

- SWIFT: access to financial transactions data
  - US interest: use of financial data in the fight against terrorism
  - Covert subpoenas of SWIFT data publicised by NYT in 2006
  - Data are financial backbone of the world economy
  - Strong criticisms from EU governments and EU industry (fear of industrial espionage from SWIFT data)

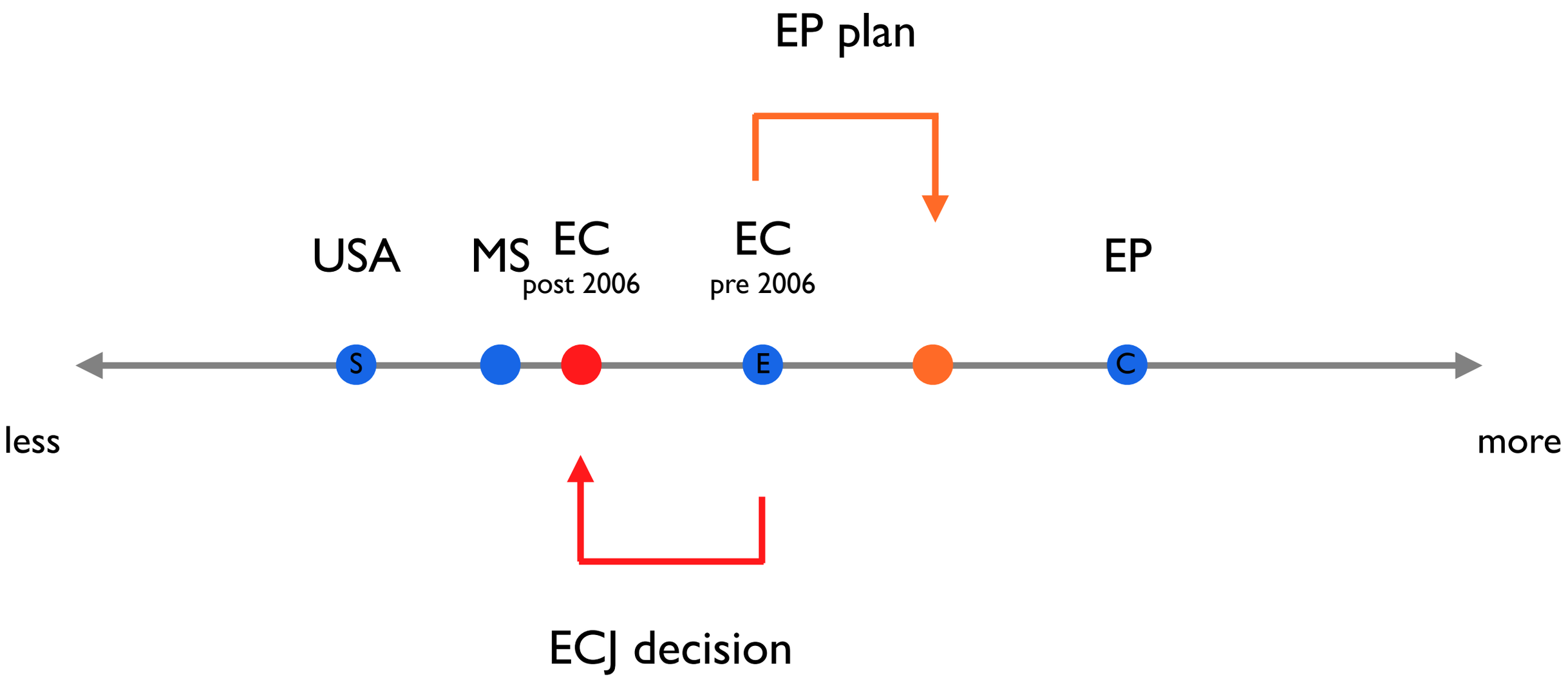
Comparing the three cases

- Substantial differences in US-EU interactions
  - Compromise and consensus in one case (“safe harbor”)
  - Not compromise but confrontation in two cases (PNR, SWIFT)
- How can we explain the differences?
  - “Safe harbor” agreement was hailed as “template for the future” in academia and politics
  - Why was it evidently not?

Different “frames” on the issue of transborder data transfer

- *Economic interests:* cost efficiency; profitability; increase in market share; not impede trade
- *Security interests:* minimise risk for lives and goods; use data to protect and enforce the law
- *Civil rights interests:* protect privacy and personal data; achieve freedom of information

Frames matter – through actors, actor constellations, and arenas



Conclusion

- Dominant approach in political science literature (constructivism) cannot explain 2 of 3 cases of disputes over transatlantic data traffic
- Needs to be augmented
  - *by frame analysis:* acknowledge that different actors view issue differently and act accordingly
  - *by arena analysis:* it matters *where* issue is negotiated – see change in PNR case from 1st to 3rd EU "pillar"
  - *by institutional analysis:* take into account formal decision powers of actors (e.g. EP veto power after Treaty of Lisbon); take into account conflicts between EP and EC / Council