

# OVERCOMING THE REGULATORY BARRIERS TO DOING DIGITAL BUSINESS - OSBORNE CLARKE

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## **Online business is inevitably international in reach but the way national regulators address issues can bring competitive advantages and disadvantages**

Las diferencias regulatorias entre España, la UE y Estados Unidos tienen un gran impacto en la competitividad de las empresas españolas, así como en la voluntad de las empresas extranjeras de invertir en el país, afirma Judit Barnola, especialista en tecnologías de la información de Osborne Clarke en Barcelona.

Differences in regulation between Spain, the EU and markets such as the US are having a direct impact not only on Spanish businesses' competitiveness but also the willingness of foreign companies to invest in the country, says Barcelona-based IT and digital business specialist Judit Barnola, a Lawyer with Osborne Clarke.

"Regulatory fragmentation is one of the main obstacles to cross-border transactions and US-based online companies notably see it as a barrier to entry into Europe, because of the additional cost of complying with national laws that regulate consumer or data protection rights."

When it comes to businesses such as social networking services the challenge is even greater because of the complexity of issues affecting privacy, data collection, retention and cross-border transfer, she says. Privacy has become a priority regulatory issue within the EU but which may have produced an overprotection of personal data.

"Efforts have been made to bridge national regulatory differences between the EU and US through a 'Safe Harbor' framework, for example, but this has not proved sufficient for European regulators in the social networking market. The EU has declared concern about the protection of users' data and the movement of personal information especially to the US."

The US has announced an intention to improve data regulation as a result of the growth of social networking and online services, she notes, but it remains pending. However almost all social networking sites have a Privacy Policy and the trend is towards a "best practice" for users regardless of where they are based, notes Barnola. But again such practices may not meet all EU privacy standards.

"A very relevant issue surrounds younger users' access to social networks. Spanish law stipulates a minimum age of 14, which domestic players like Tuenti adhere to, while sites such as Facebook adopt a minimum age requirement of 13. It means domestic operators are losing market share while the issue may be further complicated by pending EU regulation that will set a minimum EU-based social network user age at 16."

So long as there is a discord between US and EU legislation, European companies will be at a distinct competitive disadvantage when competing with US based social networking sites, she believes.

"However more fundamental differences also impact on the competitiveness of Spanish businesses: minor progress has been made in relation to the incorporation of online companies but Spain lags a long way behind the one or two days required to set up a new entity in the US. And any benefits do not generally apply if the company has an international component or a more complex structure," says Barnola

She increasingly splits her time between the firm's offices Barcelona and in Palo Alto in the heart of California's Silicon Valley.

The duplication of legal controls or incomprehensible requirements before local authorities – such as the Spanish requirement to present a foreign director's tax ID at a police station – are also difficult to explain to a foreign company willing to invest and create jobs in cities like Barcelona. Other handicaps relate to access to financial support.

"In the US, venture capital has existed for decades but remains relatively new in Spain and is not usually available for start-ups. Unfortunately, many Spanish technology entrepreneurs share the idea that they must go to Silicon Valley to find investors with the ability to understand their business models and pledge their support."

With no harmonised international way of operating, online businesses also create atypical legal challenges, she says. For example, in determining jurisdiction or which law applies to global networking sites.

"Moreover, it has to take into account that businesses selling products online will not avoid rules regarding national consumers whatever parties' choice of law – in particular, obligations related to consumer guarantees, unfair terms and distance selling contracts. Although we may think that even in the EU such obligations are more or less homogeneous this is still not so," concludes Barnola.