

Is There Anybody Out There?

Analyzing the Regulation of Children's Privacy Online in the United States of America and the European Union According to the TBGI Analytical Framework by Eberlein et al.

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This article analyzes the regulation of children's privacy online. This analysis is focused on the regulation of personal information collection in the United States of America (USA) and the European Union (EU). The analysis is conducted according to the Transnational Business Governance Interactions analytical framework proposed by Eberlein et al.¹ This article reviews the regulatory structure of the field in these two jurisdictions, including global organizations, according to Eberlein et al. components and questions. In the analysis, a map of the regulatory interactions within this global realm will be presented and discussed. Analysis of the influence of each interacting party and the degree of interaction between parties demonstrates that there is a clear dominance of the industry in the regulatory realm of children's privacy protection online. Therefore, it is suggested to include an analysis of the regulatory interactions (e.g., using the TBGI analytical framework by Eberlein et al.) when discussing new or amended regulatory measures in each one of the levels described in this article. This will allow a better understanding of the overall regulatory

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1. See generally Burkard Eberlein, Kenneth W. Abbott, Julia Black, Errol Meidinger & Stepan Wood, *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE (SPECIAL ISSUE) 1 (2014).

picture and may prevent bias towards more powerful actors, such as the industry.

“Today what we are experiencing is the absorption of all virtual modes of expression into that of advertising. . . . All current forms of activity tend toward advertising and most exhaust themselves therein.”²

In an October 6, 2015 decision, The Court of Justice of the European Union (CJEU) declared that the Commission’s U.S. Safe Harbour Decision is invalid.³ This decision, launched by an Irish law student, Maximillian Schrems, has struck down the fifteen-year-old Safe Harbour agreement that allowed the free flow of information between the USA and EU. The case was originally sent to the CJEU by the High Court of Ireland, after the Irish data protection authority rejected a complaint by Schrems, who argued that in light of Snowden’s revelations about the NSA, the data he provided to Facebook and transferred from the company’s Irish subsidiary to the U.S. under the Safe Harbour scheme was not, in fact, safely harboured.⁴

This article was written before the CJEU decision, but the analysis provided herein traces the roots of the regulatory “misconduct” leading to the “Safe Harbour” arrangement that was “born in sin” and unsurprisingly struck down fifteen years later. What would be the implications of the CJEU’s decision, whether USA Internet giants like Facebook, Google, and Twitter change their conduct and what would be the new arrangement between the EU and the USA in light of the decision, is yet to be seen. However, in light of the challenging embedded regulatory structure described in this article, a root change is needed in order to make a difference.

I. INTRODUCTION

In the online world, children’s privacy has turned into one of the most valuable commodities. The desire to sell, market, and advertise has overcome all moral values penetrating even the gentle fabric of regulation,

2. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* 87 (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (1981).

3. Court of Justice Press Release No 117/15, Judgment in Case C-362/14, Maximillian Schrems v Data Protection Commissioner (Oct. 6, 2015).

4. Sebastian Anthony, *Europe’s Highest Court Strikes Down Safe Harbor Data Sharing Between EU, US*, ARS TECHNICA (Oct. 6, 2015), <http://arstechnica.com/tech-policy/2015/10/europes-highest-court-strikes-down-safe-harbour-data-sharing-between-eu-and-us>.

aimed to place constraints and create boundaries between the corporation and children's most inner psychological mechanisms of well being and healthy development. As Kline stated: "The consumption ethos has become the vortex of children's culture."⁵

An illustration of this intrusive and cynical practice is provided by Steeves and Tallim's report of a fourteen-year-old girl taking the "Ultimate Personality Test" on the children's website emode.com. The website told the girl "that she values her image"; therefore, it recommended that she visit the website e-diets.com, one of their advertisers, to "prep her body for success."⁶

The online world is a challenge to privacy for all users. Children face this challenge in a much more profound way than other users, and their ability to identify the harm and cope with it is inherently limited. There is no dispute that measures to protect their online privacy should be implemented and enforced. However, as this paper will demonstrate, the interacting players in this regulatory field do not always have the benefit of the children as their main target.

In his book *Privacy and Freedom*,⁷ Alan F. Westin defines the meaning of information privacy as "the claim of individuals to determine for themselves when, how, and to what extent information about them is communicated to others."⁸ Privacy is not absolute, as there is an equally strong desire to participate in society. Therefore, individuals are balancing the desire for privacy with the desire to communicate with others.

Privacy is important, as we need it for personal autonomy, emotional release, self-evaluations, and protected communication.⁹ In order to achieve privacy offline, several privacy behaviors exist: we lock doors, lower voices, and close curtains. In the online world, personal privacy is

5. Stephen Kline, *Limits to the Imagination: Marketing and Children's Culture*, in *CULTURAL POLITICS IN CONTEMPORARY AMERICA* 299, 211 (Ian Angus & Sut Jhally eds., 1989).

6. Valerie Steeves & Jane Tallim, *Kids for Sale: Online Marketing to Kids and Privacy Issues* (2003), cited in Valerie Steeves, *It's Not Child's Play: The Online Invasion of Children's Privacy*, (2006) 3:1 UOLTJ 169, at 175.

7. ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967).

8. *Id.* at 7.

9. See generally WESTIN, *supra* note 7; C. Yang, S. Nay, & R.H. Hoyle, *Three Approaches to Using Lengthy Ordinal Scales in Structural Equation Models: Parceling, Latent Scoring, and Shortening Scales*, 34 *APPLIED PSYCHOL. MEASUREMENT* 122 (2010), <http://dx.doi.org/10.1177/0146621609338592>.

important also: next to the aforementioned aspects, we nowadays also need online privacy to foster our own authenticity.¹⁰

In order to achieve privacy online, different privacy behaviors exist.¹¹ However, in the online world we do not seem to show as many privacy behaviors as compared with the offline world.¹² Children need protection from the dangers of sharing personally identifiable information online because they are socially immature and naïve.¹³

The harm to children's privacy online can stem from several sources. Websites are seeking personal details to be used as a commodity that they can sell to third parties, mainly for advertising purposes. These websites employ automatic collection of the users information (e.g., cookies¹⁴), methods in which the children are "contributing" their personal information in order to sign up for a service or participate in a competition, or volunteer

10. See S. Trepte & L. Reinecke, *The Social Web as a Shelter for Privacy and Authentic Living*, in *PRIVACY ONLINE: PERSPECTIVES ON PRIVACY AND SELF-DISCLOSURE IN THE SOCIAL WEB* 61-73 (S. Trepte, & L. Reinecke eds. 2011), http://dx.doi.org/10.1007/978-3-642-21521-6_6.

11. See, e.g., A. Kobsa, S. Patil, & B. Meyer, *Privacy in Instant Messaging: An Impression Management Model*, 31 *BEHAV. & INFO. TECH.* 355 (2012); N.C. Kramer & N. Haferkamp, *Online Self-Presentation: Balancing Privacy Concerns and Impression Construction on Social Networking Sites*, in *PRIVACY ONLINE: PERSPECTIVES ON PRIVACY AND SELF-DISCLOSURE IN THE SOCIAL WEB* 127-42 (S. Trepte, & L. Reinecke eds. 2011), http://dx.doi.org/10.1007/978-3-642-21521-6_10 (users of social network sites can present only particular aspects of themselves); *id.* (limiting the audience via friends lists); J.E. Rosenbaum, B.K. Johnson, P.A. Stepman & K.C. Nuijten, *Just Being Themselves?: Goals and Strategies for Self-Presentation on Facebook*, Paper Presented at the 80th Annual Conference of the Southern States Communication Association, Memphis, TN (2010), http://www.benjaminkjohnson.com/wp-content/uploads/2010/09/Just_Being_Themselves_Final.pdf (maintaining different user profiles).

12. See Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, 11 *FIRST MONDAY* no. 9 (2006), <http://dx.doi.org/10.5210/fm.v11i9.1394>; Special Eurobarometer 359, *Attitudes on Data Protection and Electronic Identity in the European Union* (2011), http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf; Monika Taddicken, *The "Privacy Paradox" in the Social Web: The Impact of Privacy Concerns, Individual Characteristics, and the Perceived Social Relevance on Different Forms of Self-Disclosure*, 19 *J. COMPUTER-MEDIATED COMM.* 248 (2014), <http://dx.doi.org/10.1111/jcc4.12052>.

13. See Janine S. Hiller, France Belanger, Michael Hsiao, & Jung-Min Park, *Pocket Protection*, 45 *AM. BUS. L.J.* 417 (2008).

14. Fraction of data implemented by the website in the user's browser. This mechanism provides the website with the user's previous activity. See INTERNET ENGINEERING TASK FORCE (IETF), *HTTP State Management Mechanism*, <http://tools.ietf.org/html/rfc6265#section-3> (last visited Nov. 22, 2015), for more information.

that information when using social networking sites like Facebook, Twitter, and others.¹⁵

As is the case with many adults, children do not read the privacy statements in websites that they use.¹⁶ These privacy statements are often written in a legal language hard to understand even for adults.¹⁷ Although the law usually requires parental consent, children's websites often overlook, "detour," and try to avoid the need for such consent. When they do require it, they often do it in a way that causes much burden on the children and their parents.¹⁸

Moreover, because of children's lack of understanding of what it means to have their privacy breached (an abstract concept which is hard to explain), they often provide their information with no hesitation, failing to comprehend the implication of such act. As the online world is relatively new and privacy breaches within it are a phenomenon that grows over time, there is a lack of appropriate tools to educate children (and adults) in this respect, a fact that only increases children's vulnerability and amplifies the problem.

Marketers are employing invasive methods to turn children's privacy into a commodity. Online monitoring of children's online use and profiling based on collected information (i.e., creating a consumer profile) are some of these methods. The children are not aware of these methods nor do they

15. See, e.g., Kristina Irion, OECD, *Working Party on Information Security and Privacy, The Protection of Children Online: Risks faced by Children Online and Policies to Protect Them* (2011), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=dsti/iccp/reg\(2010\)5/final&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=dsti/iccp/reg(2010)5/final&doclanguage=en).

16. ANNA FIELDER, WILL GARDNER, AGNES NAIRN & JILLIAN PITT, *FAIR GAME? ASSESSING COMMERCIAL ACTIVITY ON CHILDREN'S FAVOURITE WEBSITES AND ONLINE ENVIRONMENTS 30* (Nat'l Consumer Council 2007), <http://www.childnet.com/ufiles/fair-game-final.pdf>; see also *30th International Conference of Data Protection and Privacy Commissioners, Resolution on Children's Online Privacy*, OFFICE PRIVACY COMMISSIONER CANADA (2008), https://www.priv.gc.ca/information/conf2008/res_cop_e.asp.

17. FIELDER, ET AL., *supra* note 16, at 23; see also JULIAN J. DOOLEY ET AL., *REVIEW OF EXISTING AUSTRALIAN AND INTERNATIONAL CYBER-SAFETY RESEARCH 146* (2009), <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan046312.pdf>; VALERIE STEEVES, *YOUNG CANADIANS IN A WIRED WORLD: PHASE II TRENDS AND RECOMMENDATIONS 17* (2005), <http://mediasmarts.ca/sites/mediasmarts/files/pdfs/publication-report/full/YCWWII-trends-recomm.pdf>.

18. The age threshold according to the federal privacy law in the United States' Children's Online Privacy Protection Act (COPPA), which determined the requirement for parental consent, is 13 years old. FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2015); see COPPA - CHILDREN'S ONLINE PRIVACY PROTECTION ACT, <http://www.coppa.org/coppa.htm>. In the European Union, it is required to obtain parental consent as long as minors do not have the capability to fully comprehend the situation and are not able to make an informed choice.

understand their intrusiveness.¹⁹ Consumer groups are concerned about potential “negative impacts on children’s future self image and well-being” due to the use of these techniques.²⁰

The protection of children’s privacy online is mainly regulated by two instruments: command and control implemented through legislation at the federal and/or state level, and self regulation driven by the internet industry. Self-regulation has produced industry standards such as the International Chamber of Commerce’s (ICC) Advertising and Marketing Communication Practice, the International Advertising Bureau UK and US codes, the Federation of European Direct and Interactive Marketing (FEDMA) code, and many more.

These regulatory instruments are either general in their application and encompass all marketing practices or have a more narrow scope, applying only to online marketing and covering all users or children in specific.²¹

This article analyzes the regulation of children’s privacy online (see Figure 1) especially in the context of personal information collection as a commodity, in the United States and the European Union according to the Eberlein et al. Framework. The article reviews the regulatory structure of this field in these two jurisdictions including global organizations, according to Elberlein et al. components and questions. In the analysis, a

19. *See generally* DECLARATION OF THE COMMITTEE OF MINISTERS ON PROTECTING THE DIGNITY, SECURITY AND PRIVACY OF CHILDREN ON THE INTERNET (2008), <https://wcd.coe.int/ViewDoc.jsp?id=1252427> (adopted by the Committee of Ministers at the 1018th meeting of the Ministers’ Deputies); THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN’S WELLBEING: REPORT OF AN INDEPENDENT ASSESSMENT (2009), <http://publications.dcsf.gov.uk/eOrderingDownload/00669-2009DOM-EN.pdf>; THERE OUGHT TO BE A LAW: PROTECTING CHILDREN’S ONLINE PRIVACY IN THE 21ST CENTURY (2009), http://www.cdpcj.qc.ca/Documents/Children_Privacy_Internet.pdf (discussion paper for Canadians by the Working Group of Canadian Privacy Commissioners and Child and Youth Advocacies). *See also* THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES: FORGING PARTNERSHIP FOR ADVANCING POLICY OBJECTIVES FOR THE INTERNET ECONOMY, PART II AND III 7 (2011), <http://www.oecd.org/internet/ieconomy/48685066.pdf>.

20. RESOLUTION ON MARKETING TO CHILDREN ONLINE, TRANS ATLANTIC CONSUMER DIALOGUE (2009), <http://tacd.org/wp-content/uploads/2013/09/TACD-INFOSOC-38-09-Marketing-to-Children-Online.pdf>.

21. An example for a general scheme is the ICC’s Advertising and Marketing Communication Practice. *See* ADVERTISING AND MARKETING COMMUNICATION PRACTICE: BUILDING CONSUMER TRUST THROUGH BEST PRACTICE MARKETING, INT’L CHAMBER OF COMMERCE (2011), <http://www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English>. Examples of specific to marketing to children are the Self-Regulatory Guidelines for Children’s Advertising by CARU or the non-binding Ethical Guidelines for Advertising to Children by European Association of Communication Agencies. *See* SELF-REGULATORY PROGRAM FOR CHILDREN’S ADVERTISING, CHILDREN’S ADVERTISING REVIEW UNIT (2009), <http://www.caru.org/guidelines/guidelines.pdf>; SELF-REGULATION, EUR. ASSOCIATION OF COMM. AGENCIES (2006), <http://www.eaca.eu/#!self-regulation/cbtf>.

map of the regulatory interactions within this global realm is presented and discussed. Finally, conclusions are drawn and suggestions are made.

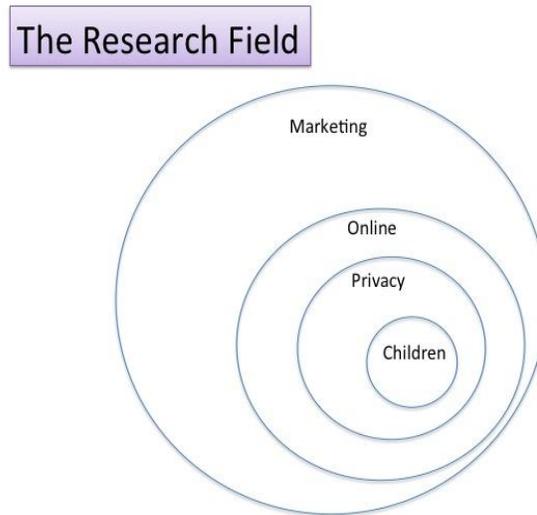


Figure 1: The Research Field

II. TBGI ANALYTICAL FRAMEWORK

The TBGI analytical framework will be used to analyze the regulation of children’s privacy online in the USA and the EU. The article will demonstrate that with the assistance of the TBGI analytical framework, hidden layers of regulation and regulatory interactions are revealed and underscore the regulatory process that is usually invisible.

More specifically, as a result of employing the TBGI analytical framework towards the regulation of children online privacy in the USA and the EU, the problematic nature of the discussions held between these two jurisdictions is exposed. Interestingly, the recent development described in the prologue, directly corresponds with the “problematic” of these discussions and their regulatory outcome.

Transnational business governance (TBG) describes systematic efforts to regulate business activities that encompass a high degree of non-state

authority in the implementation of regulatory capacities internationally.²² The Eberlein et al. framework is unique in focusing on the analysis of regulatory interactions and providing a theoretical structural tool to analyze a regulatory field from the perspective of the entities interacting within it.

TBG schemes involve different interacting actors, pursuing varieties of interests, values, and beliefs.²³ The Eberlein et al. analytical framework include six components:

- (i) framing the regulatory agenda and setting objectives;
- (ii) formulating rules or norms;
- (iii) implementing rules within targets;
- (iv) gathering information and monitoring behavior;
- (v) responding to non-compliance via sanctions and other forms of enforcement;
- (vi) evaluating policy and providing feedback, including review of rules.

For each component, Eberlein et al. identifies six questions that are crucial in analyzing interactions:

- (1) who or what is interacting;
- (2) what drives and shapes the interactions;
- (3) what are the mechanisms and pathways of interaction;
- (4) what is the character of the interactions;
- (5) what are the effects of interaction;
- (6) how do interactions change over time.

The Eberlein et al. framework is flexible, thus allowing (and even recommending) employing some, and not all, of the components and

22. See generally BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., Cambridge Univ. Press 1999) (1997); Thomas N. Hale & David Held, *Editors' Introduction: Mapping Changes in Transnational Governance*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS 1, 1 (Thomas Hale & David Held eds. 2011); TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye eds., Harvard Univ. Press 1972) (1971).

23. See Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND J. TRANSNAT'L L. 501 (2009); Julia Black, *Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation*, 47 PUB. LAW 62 (2003); JULIA BLACK, MAPPING THE CONTOURS OF CONTEMPORARY FINANCIAL SERVICES REGULATION (2003), <http://www.lse.ac.uk/accounting/CARR/pdf/dps/disspaper17.pdf>.

questions in analyzing a given regulatory field. Therefore, only the relevant components and questions will be included in the following section.

In its strongest form, the Elberlein et al. framework seeks to shift the paradigm of regulatory analysis by focusing on the regulatory interaction rather than on the regulation itself. This is a powerful and influential shift, as the focus on analyzing regulatory interactions enables the actors involved in the regulatory eco-system (e.g., regulators, industry, academics) to identify deviations in the regulatory process. These insights allow pinpointing the cause for the regulatory process derail thus shifting it towards better and more efficient regulation to protect the vulnerable party from the potential deleterious effects of the harm. This point is demonstrated well in Section 3.3 below, regarding the EU-US debate on the regulation of personal data transfer.

In light of Kuhn's²⁴ seminal work on paradigm shifts, the framework's architects and advocates should not be coy in situating it in the right place to gain recognition and influence based on its added value in identifying and even amending cases of impaired regulatory processes leading to unwanted results. The first step would be to omit the words "Transnational," "Business," and "Governance" from the framework definition, thus allowing it to be used in the context of the entire regulatory field.

Moreover, the framework creates an opportunity to place law in its natural position, as a field of regulation. This simple and accurate statement will relax the tension artificially created between these allegedly separate fields and restore the important proportions often overlooked by those mistakenly arguing to the contrary, that regulation is a branch of law. The implications of such restorative and correctional measures, among others, on legal and regulatory education and the regulators and regulations of the future, cannot be overstated.

III. CHILDREN'S PRIVACY ONLINE – REGULATORY INTERACTIONS ANALYSIS

The following section reviews the regulatory scheme of children's online privacy in the USA and the EU (including global organizations) according to the Eberlein et al. TBGI Framework, using relevant components and questions. The general regulatory scheme is shown in Figure 2.

24. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (Univ. of Chi. Press, 2012) (1962).

Figure 2 is constructed in three columns: the USA, the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD), and the EU. The legend includes three main regulatory schemes: law, industry, and community, each in its own color. The UN and OECD column is a symbol for global regulation while the USA and EU columns include regulation that is specific to these two jurisdictions. For example, while the Interactive Advertising Bureau (IAB) is a global organization dealing both with the USA and the EU, its background color is white as it is global, and its fill color is red as it belongs to the law scheme.

The Children's Advertising Review Unit (CARU), being a "Safe Harbor" under the USA's Children's Online Privacy Protection Act (COPPA) and an industry organization (as will be detailed in the coming section), is blue for industry and dark blue for federal. It is also tending to the left side (i.e., a USA entity) while the Federation of European Direct and Interactive Marketing (FEDMA), its EU equivalent, is tending to the right. Finally, Figure 2 is illustrative and non-exhaustive, aiming to provide an overview of the regulatory structure of children's online privacy regulation.

The goal of Figure 2 is twofold. On one hand, it illustrates the structure of the regulatory regime in the jurisdictions at play and the parties operating within this regime. On the other hand, the Figure is an illustration of the complexity and multiplicity of actors and positions involved in this regulatory sphere. These complexity and multiplicity of interests, actors, and factors implies that while the intentions can be positive, the results are bound to be negative. Inherently, this regulatory structure is poorly designed.

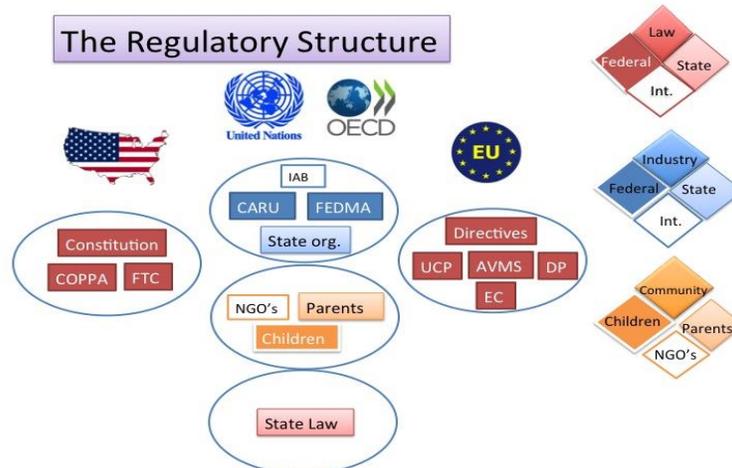


Figure 2: Overview of the structure of children's online privacy regulation

A. *Global Organizations*

The regulation of children's privacy online by global organizations is analyzed according to the first component of TBGI Framework: Framing the regulatory agenda and setting objectives. This component will be addressed using the TBGI Frameworks six questions.

(i) Framing the regulatory agenda and setting objectives

Data protection law's normative basis rests on human rights treaties. Relevant treaties are the Universal Declaration of Human Rights (UDHR)²⁵ and the International Covenant on Civil and Political Rights (ICCPR).²⁶ The only data protection binding international treaty is the Council of Europe Convention 108.²⁷

Calls for an international convention dealing with data protection and privacy have been made. For example, such a call came at the 27th International Conference of Data Protection and Privacy Commissioners held in 2005. The Conference declared the "Montreux Declaration," appealing the United Nations "to prepare a legal binding instrument which clearly sets out in detail the rights to data protection and privacy as enforceable human rights."²⁸ Internet companies also made similar appeals. In 2007 Google called for the creation of "global privacy standards."²⁹ However, according to Bygrave, as of today "there does not exist a truly global convention or treaty dealing specifically with data privacy."³⁰

25. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

26. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

27. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, Jan. 28, 1981, 28.I.1981, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078b37>.

28. THE PROTECTION OF PERSONAL DATA AND PRIVACY IN A GLOBALIZED WORLD: A UNIVERSAL RIGHT RESPECTING DIVERSITIES, MONTREUX DECLARATION (2005), <https://icdppc.org/wp-content/uploads/2015/02/Montreux-Declaration.pdf>.

29. Peter Fleischer, *Call for Global Privacy Standards*, PUB. POL'Y BLOG (Sept. 14, 2007), <http://googlepublicpolicy.blogspot.com/2007/09/call-for-global-privacy-standards.html>.

30. Lee A. Bygrave, *Privacy Protection in a Global Context— A Comparative Overview*, 47 SCANDINAVIAN STUDIES IN L. 319, 333 (2004), <http://folk.uio.no/lee/publications/Privacy%20in%20global%20context.pdf>.

The Convention on the Rights of the Child was adopted by the General Assembly of the UN on 20 November 1989.³¹ This convention has been ratified by 193 countries (excluding the USA, Somalia and South Sudan).³² Article 16 of the convention deals with the child's right to privacy.³³

The UN issued its Guidelines concerning Computerized Personal Files in 1990. These guidelines take the form of a non-binding guidance document.³⁴ The UN General Assembly has requested "governmental, intergovernmental and non-governmental organizations to respect those guidelines in carrying out the activities within their field of competence."³⁵

The OECD is an international organization based in Paris that deals with economic and social policy and currently has 34 member countries, including many EU member states, Canada and the USA. Discussions of privacy related issues began in the OECD in 1970, and culminated in the publication of the OECD Privacy Guidelines in 1980.³⁶ The Guidelines are a non-binding set of principles that member countries may enact.³⁷

While representing the industry, the IAB, a global organization with multinational members from the Forbes 500, holds the international ties so to speak, being the only one except the UN and the OECD to have this capacity and thus influence.

An interview with Senior Director of Policy at the IAB was conducted by the author to help understand its role. During the interview, the Senior Director stated, "IAB does not have a specific policy with regard to children's privacy online and tends to be active when new regulation is suggested representing its members to provide feedback to the government.

31. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

32. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf> (shows which countries ratified the treaty and their respective reservations)

33. Convention on the Rights of the Child, *supra* note 32 at 4-5; *see also* TOWARDS A BETTER INTERNET FOR CHILDREN? POLICY PILLARS, PLAYERS AND PARADOXES (Brian O'Neill, Elisabeth Staksrud & Sharon McLaughlin eds., Nordicom 2013).

34. Guidelines for the Regulation of Computerized Personal Data Files, G.A. res. 44/132, 44 U.N. GAOR Supp. (No. 49) at 211, U.N. Doc. (Dec. 14, 1990), <http://www.refworld.org/pdfid/3ddcafaac.pdf>.

35. United Nations, General Assembly, Recalling its Resolution 44/132 of 15 December 1989, A/63/332 (Dec. 14 1990), <http://www.un.org/documents/ga/res/45/a45r095.htm>.

36. CHRISTOPHER KUNER, TRANSBORDER DATA FLOW REGULATION AND DATA PRIVACY LAW 33 (2013).

37. *See* OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA, OECD, ¶ 25 (2013), <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm>.

An example would be IAB providing industry feedback on COPPA when being reviewed.³⁸

Within global organization, the interaction is between the organization itself, the members of the organization, and external entities such as other global organizations, industry, and interest groups. As there is a common understanding that children's privacy protection is a worthwhile cause, the main question is to what extent and using which measures the protection should be facilitated.

The parties to this interaction use formal as well as informal discussion, public pressure, and persuasion to promote their position. The interactions character is one of cooperation but below the surface there is plenty of competition between the competing interests of the parties interacting. The effects of the interaction are twofold: on one hand, the cooperation is promoting harmonization of the regulation on a global scale therefore promoting the regulation effectiveness, but on the other hand, the struggle between competing interests prevent progress in setting a clear agenda, thus weakening the regulatory protection altogether.

It seems that the nature of the interactions does not change over time but the increase in awareness to the harms associated with privacy breaches as well as the industry progress in taking advantage of personal data as a commodity tend to create more understanding and consensus that the protection of children's online privacy is vital.

B. The United States

The regulation of children's privacy online in the USA is analyzed according to the following components: framing the regulatory agenda and setting objectives, and formulating rules and norms. As this article deals with the macro federal and global level, states role is beyond its scope.

(i) Framing the regulatory agenda and setting objectives

The U.S. Constitution does not have an express grant of the right to privacy.³⁹ Nonetheless, through a long line of cases, the U.S. Supreme Court has established and recognized a number of privacy rights embedded in the Constitution's First,⁴⁰ Fourth,⁴¹ Fifth,⁴² and Ninth Amendments,⁴³ and

38. Interview with Senior Director of Policy, Interactive Advertising Bureau (IAB) (June 2014) (on file with the author).

39. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

40. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

in the “concept of liberty guaranteed by the first section of the Fourteenth Amendment.”⁴⁴

The Constitution and the U.S. Supreme Court are interacting. As the Constitution is a static factor (almost impossible to be amended), the U.S. Supreme Court through the cases brought before it, drives the interaction and shapes it in its interpretation of the Constitution in the context of privacy. The U.S. Supreme Court is not free of political influence that in turn shapes the said interaction. As the Constitution is mainly static, the mechanisms and pathways of the interaction are limited as well as the character of the interaction.

The interaction affects the regulatory capacity and performance in setting the principles of the scope of the regulation and the means allowed to be used in implementing and enforcing the regulation. The interaction itself does not tend to change over time as the Constitution is mainly static. Nonetheless, different U.S. Supreme Court judges allow different levels of interpretation.⁴⁵

peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

41. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

42. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

43. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

44. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV; *see also Roe*, 410 U.S. at 152.

45. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 397 (Charisse Kiino et al. eds., 8th ed. 2013); RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 208 (2d ed. 2013).

(ii) Formulating rules and norms

In order to prevent Internet businesses from breaching the privacy rights of children,⁴⁶ Congress enacted in 1998 the Children's Online Privacy and Protection Act (COPPA).⁴⁷ The Federal Trade Commission (FTC) is required by COPPA to create specific rules for the regulation of online collection of personal information from children under the age of 13 years old.⁴⁸ On April 21, 2000, the FTC's Final Rule became effective and enforceable.⁴⁹

An Internet operator may be able to satisfy COPPA requirements by following alternative sets of self-regulatory guidelines that have been created by certain industry groups and self-regulatory programs known as "safe harbors."⁵⁰ In order to become safe harbors, interested organizations must submit their self-regulatory guidelines to the FTC.⁵¹ The FTC will then publish the interested organizations suggested guidelines for public comment, and decide if the suggested guidelines meet the FTC's Rule criteria.⁵² The safe harbor's guidelines must provide "substantially the same or greater protections" that create the same or better protections as the requirements detailed in COPPA.⁵³

The safe harbor's guidelines must also contain effective methods of independently assessing a website's compliance with the guidelines.⁵⁴ The FTC has approved a number of safe harbors, including the Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU), the Entertainment Software Rating Board (ESRB), and True Ultimate Standards Everywhere (TRUSTe).⁵⁵

While Congress enacted COPPA and the FTC articulated its principles and administers it, other actors are involved in this regulatory interaction, mainly industry organizations like CARU and the ESRB through the "Safe

46. Rachael Malkin, *How the Children's Online Privacy Protection Act Affects Online Business and Consumers of Today and Tomorrow*, 14 LOY. CONSUMER L. REV. 153, 155 (2002).

47. 15 U.S.C. §§ 6501-6505 (2012).

48. FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2015).

49. *Id.*

50. *Id.* § 312.11(a).

51. *Id.* § 312.11(b).

52. *Id.* at § 312.11(b)(2).

53. *Id.* at § 312.11(b)(1).

54. *Id.* at § 312.11(b)(3).

55. See Press Release, Jodie Bernstein, Director of the FTC's Bureau of Consumer Protection, TRUSTe Earns "Safe Harbor" Status (May 23, 2001), <http://www.ftc.gov/opa/2001/05/truste.htm>.

Harbor” option, as well as online companies approaching children, parents, and finally the children users.

The interactions in the context of the safe harbors between the FTC and the industry organizations is driven by the FTC’s desire to allow self-regulation on one hand and the industries wish to self-regulate itself as a mean of avoiding “top-down” regulation by the FTC. It would be reasonable to assume that the more informal interaction within this regulatory realm (i.e., between the FTC, industry, parents, and children) are driven and shaped by the interests of each actor. Nonetheless, it should be noted that parents and children interests are not necessarily identical as children strive for more engagement even at the price of their privacy, while parents take a more careful approach.

When it comes to the interaction between industry organizations administering the safe harbors and the FTC, the mechanisms and pathways are, at least in principle, simple and clear. The safe harbor is supposed to comply with COPPA, and the FTC oversees the safe harbor operators that in turn oversee the online companies’ compliance. With the other actors (i.e., parents and children), the mechanisms and pathways are less clear and can take the form of advocacy groups and other informal dimensions.

The character of the interactions vary. Among the organizations providing safe harbors and between these organizations and the FTC there is an element of competition, as they all offer an option to comply with COPPA. However, at least on the surface, the dominant character of the interaction is one of coordination as all the parties manifested goal is to protect children’s privacy. The character of the interaction between parents and children and the rest of the actors, mainly the industry, can be defined as chaos, since forces, not always predictable, are pulling in different directions.

The effects of the interaction on the regulatory capacity and performance of actors in the given regulatory space is twofold. The interaction between the FTC and industry’s safe harbors are supposed to enhance regulatory capacity and performance, but may, at the same time, erode the capacity and performance of both interacting actors. This complex nexus may also occur when interacting with parents and children, pushing in opposite directions, thus creating confusion.

C. The European Union

The regulation of children’s privacy online in the EU is analyzed according to the following components: framing the regulatory agenda and setting objectives, and formulating rules and norms. Each component is

addressed using the framework six questions, as mentioned above. As this article deals with the macro federal and global level, member states role is beyond its scope.

(i) Framing the Regulatory Agenda and Setting Objectives

Directive 2005/29 on unfair business-to-consumer commercial practices (The UCP Directive), one of the cornerstones of EU consumer policy, explicitly recognizes that children constitute a group of particularly vulnerable consumers, and as such deserve special protection.⁵⁶

This special protection is confirmed by Point 28 of Annex I of the UCP Directive which provides that “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” is an unfair commercial practice and should therefore be prohibited.

It is only in the absence of more specific rules that UCP Directive applies.⁵⁷ Specifically, in respect to advertising to children, Point 28 of the Annex explicitly states that it is “without prejudice to Directive 89/552.”

The Television Without Frontiers Directive (The TVWF Directive)⁵⁸ has now been replaced by the Audiovisual Media Services Directive (The AVMS Directive).⁵⁹ The TVWF Directive created binding minimum standards for all the member states and contained provisions restricting the amount of advertising to which children were exposed.⁶⁰

Nevertheless, television advertising to children was not altogether banned and restrictions imposed were unlikely to be effective in curbing significantly their exposure, with the exception of tobacco products and medicines and medical treatments available only by prescription, whose advertising was prohibited. The TVWF Directive suggested that children were perceived as particularly vulnerable, but the provisions relating to advertising to children were insufficient to alleviate the growing concerns associated with the commercialization of childhood.

The EU was given a chance to reassess its legislative framework during the revision process of the TVWF Directive by the AVMS Directive. The reform led to three major changes: the extension of the scope of the TVWF

56. Anandine Garde, *Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of . . . Commercial Operators?*, 19 INT'L J. CHILD. RTS. 526 (2011).

57. Council Directive 2005/29, art. 4, 2005, O.J. (L 149) (EC).

58. Council Directive 89/552. 1989 O.J. (L 298) (EC).

59. Council Directive 2010/13, 2010 O.J. (L 95) (EC).

60. “[C]hildren’s programmes, when their programmed duration is less than 30 minutes shall not be interrupted by advertisements.” Council Directive 89/552. 1989 O.J. (L 298) (E.C.).

Directive to new media (i.e., the Internet); the extension of its scope to new marketing techniques (i.e., product placement); and the extension of its scope to new problems (i.e., food marketing).

As the AVMS Directive is a measure of minimum harmonization (as was the TVWF Directive), Member States are entitled to apply stricter requirements for audiovisual media service providers established on their territories.⁶¹

The privacy rights of minors are not mentioned explicitly in the Data Protection Directive⁶² and the Electronic Communications Directive.⁶³ The Electronic Communications Directive sets privacy rules for the telecommunications industry that implement principles from the Data Protection Directive.⁶⁴ A reform to the Data Protection Directive rules was suggested by the European Commission in 2012 to increase online privacy rights and enforce Europe's "digital economy."⁶⁵

While the EU parliament is framing the regulatory agenda and setting objectives, in practice it is interacting with the member states, the EU Court and global organizations mentioned in the next section. The Directives formulation and its interpretation and harmonization are not done in a vacuum and is influenced by these interactions.

These interactions are driven and shaped by the party's interests, some of which are correlating and some contrasting. For example, The EU parliament's interest in harmonization can be contested by member states different perceptions of the subject matter.

The mechanisms and pathways of interaction are twofold: before and after the enactment of the Directives. Before the enactment of the Directives, the interacting parties are operating to influence the legislation, and after the enactment, they are operating through interpretation of the legislation and the implementation of it. The interactions character is mainly of cooperation, however, with the different perceptions of the subject matter, competition becomes a dominant character.

61. Article 4 of the AVMS Directive states that "Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law." Council Directive 2010/13, 2010 O.J. (L 95) (E.C.).

62. *See generally* Council Directive 95/46, 1995 O.J. (L 281) (EC); *see* JOHN T. SOMA ET AL., *PRIVACY LAW IN A NUTSHELL* 299 n.201 (2d ed. 2014).

63. *See generally* Council Directive 2002/58, 2002 O.J. (L 201) (EC); *see* SOMA ET AL., *supra* note 62, at 268 n.123.

64. Council Directive 2002/58, *supra* note 63; SOMA ET AL., *supra* note 62, at 269.

65. *See* Press Release, Vice-President Viviane Reding, EU Justice Commissioner, Reding Statement on Comprehensive Reform of Data Protection Rules (Jan. 25, 2012), http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en.

The effects of the regulatory interaction on the regulatory capacity and performance of actors depends on the specific interaction and the period in which it occurs. The influence of industry, for example, on the formulation of the Directive is different in its effect than the interpretation of courts and member states after the Directive is affirmed. There is also a difference between member states interpretation and an EU Court ruling, as the former relates to a specific member state while the later relates to all member states.

(ii) Formulating Rules and Norms

Modeled after the OECD principles, a main part of the Data Protection Directive is the strong restrictions on the transfer of EU residents' data outside of the EU. Under these restrictions, without an agreed solution, the EU-USA trade would be drastically impacted. Therefore, in 1998 negotiations commenced between the U.S. Department of Commerce (DOC) and the EU Commission with respect to the steps that could be taken to avoid USA businesses (which include most of the internet giants) from being cut off from access to EU residents' data.⁶⁶

While the parties agreed that improvements in data protection were necessary, they were divided with respect to the best solution. The USA supported a solution suggested by an FTC report finding that given the fluid, evolving nature of the "information economy," self-regulation by industry is the best method to achieve maximum protection with minimal constraint on future development.⁶⁷

The EU held the opposite extreme, arguing that anything less than comprehensive data protection legislation was insufficient. During 1998 and into 1999, the DOC submitted multiple proposed self-regulation schemes (referred to as "safe harbors"), all rejected by the EU Working Party on the Protection of Individuals with Regard to the Processing of Personal Data (Working Party), stating that it "deplore[d] that most of the comments made in . . . previous position papers do not seem to be addressed in the latest version of the US documents."⁶⁸

66. SOMA ET AL., *supra* note 62, at 298.

67. *Id.* at 298 n.199. For the text of the report, see F.T.C., SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS (1999), <https://www.ftc.gov/system/files/documents/reports/self-regulation-privacy-online-federal-trade-commission-report-congress/1999self-regulationreport.pdf>.

68. Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, Opinion 7/99 on the Level of Data Protection Provided by the "Safe Harbor" Principles as Published Together with the Frequently Asked Questions and Other Related Documents on 15 and 16 November 1999 by the U.S. Department of Commerce, 5146/99/EN/final at 3 (Dec. 3, 1999),

Nonetheless, by the summer of 2000 the DOC had worn down the Commission's resistance to agree to some form of self-regulation.⁶⁹ According to Soma,⁷⁰ "[w]ith extensive behind the scenes lobbying, and despite the strenuous objections of the Working Party, the Commission issued a decision on July 26, 2000 confirming the adequacy of the draft Safe Harbor proposal submitted by the DOC on July 21 of that year."⁷¹

The EU Commissioner and the U.S. Department of Commerce are the primary actors in this interaction. Since all the major internet corporations are based in the USA, the interaction is driven by this American dominance. The Commissioner is driven by interests of stricter regulation while the DOC tends towards an industry based self-regulation, similar to the safe harbors employed by COPPA.

While the formal mechanisms of these interactions are discussions and drafts submitted by the parties, it is clear that informal exchange and communication is an important part of this interaction. From the description of the interaction above, it is clear that the interaction character was one of competition rather than cooperation, as would be expected in this case.

IV. CONCLUSION

Analyzing a regulatory field using the Eberlein et al. analytic framework and focusing on the interactions between the regulatory entities brings to mind Marshal McLuhan's famous saying in the context of media ecology: "The Medium is the Message." As it is the form in which the regulation is formulated, resulting from the competing forces driving the interacting parties involves, which sets the tone and at the end of the day determines the regulatory structure, the agenda, the rules, and the compliance.

As illustrated in Figure 3, the web of ties and influences in the regulatory sphere of the regulation of children's privacy in the EU and USA and beyond are complex. Many actors are involved in the regulation of the field of children's privacy online but instead of reaching an expected result of highly regulated field that will protect children's privacy, we end up with too much regulation that provides poor protection.

<http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1999/wp27en.pdf>; see SOMA ET AL., *supra* note 62, at 299 n.200.

69. SOMA ET AL., *supra* note 62, at 299.

70. *Id.*

71. Commission Decision 2000/520/, art. 1(1), 2000 O.J. (L 215) 7, 8 (EC), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000D0520&from=en>; see SOMA ET AL., *supra* note 62, at 299 n.201.

Moreover, it can be inferred that this global regulatory framework tends towards the industry being the leading global player, supported by multinational corporations. If we judge the influence of each interacting party by the web of ties and the amount of interactions it has with the other parties involved, there is no doubt that there is a clear dominance of the industry in this regulatory realm of children's privacy protection online.

As said above, while other parties usually tend towards a stricter protection of children's privacy online, the industry's natural tendency would be to oppose strict regulation since a large portion of its revenue is dependent on the use of children's information as a commodity.

Therefore, it is suggested to include an analysis of the regulatory interactions (e.g., using the Eberlein et al. framework) when discussing new or amended regulatory measures in each one of the levels described in this article. This will allow a better understanding of the overall regulatory picture and may prevent a bias towards more powerful actors, such as the industry.

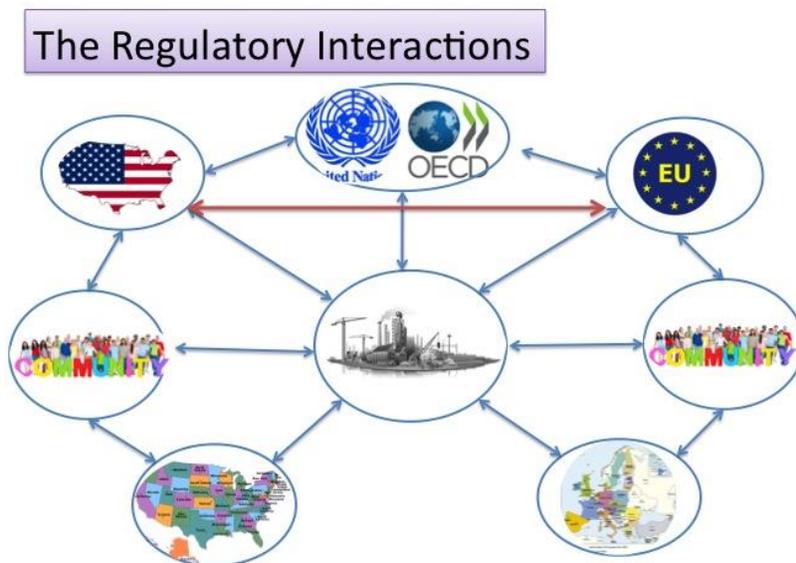


Figure 3: The Regulatory Interactions involved in children's online privacy

The events described in section 3.3(ii), *supra*, regarding the negotiations between the USA and the EU regarding data transfer outside of the EU echo's this article's conclusion. There is no surprise that these events in which the US, led by its powerful internet industry, forced the EU

to adopt soft measures of self-regulation, which had surfaced fifteen years later in the EU high court decision described at the beginning of this article.

These events and their reappearance eventually after so many years underscore the problematic nature of the regulatory structure of interactions and the regulatory interactions itself in this field as was discussed in this article using the analysis of the TBGI analytical framework.

The high court decision overturning the forced and unjust agreement reached between the USA and the EU due to imbalance between their power in the field of data and the Internet, is an illustration of the inevitable end result in a poorly structured regulatory sphere. However, it is still to be seen how the court's decision will change the regulatory structure in this field.