



MASTER THESIS

Children's online privacy and data protection by self-regulation adopted on the
EU level:
a reality or an illusion?

LLM Program	Law and Technology
Supervisor	Prof. P.J.A. de Hert
The second reader	MPhil. W.M.P. Steijn
Author	L. Jasmontaité
ANR	163728
Department	TILT
Date	October, 2012

Acknowledgements

The writing of this master thesis has been by far the most significant academic challenge that I have ever faced. It required a lot of commitment, patience, and creativity. I believe that the writing of this thesis was a transition point to developing expertise in the fields of self-regulation and children's data protection. I have to admit that the final outcome of my research project would not have been possible without support, trust and advice of many people, whom I owe my deep gratitude.

First of all, I would like to express my sincere thanks to Professor Paul de Hert, who undertook my thesis supervision despite his many other academic engagements, and who encouraged me to reach beyond my limits and provided me with useful critiques and thought-provoking questions. Also, I would like to thank MPhil. Wouter Steijn for being an exceptionally responsive second reader, who provided me with extensive comments and remarks.

My grateful thanks are extended to Dr. Colette Cuijpers for her help in developing thesis proposal, to Dr. Veronica Donoso, who was open for a consultation on several occasions, and to Ms. Kristin Bilberg from the Safer Internet Team, who found time to clarify matters in relation to this research project.

Finally, I wish to thank my beloved parents and Piotr for their endless support and encouragement throughout my work.

Dėkoju mylimiems tėveliams už begalinę paramą ir palaikymą rašant šį magistrinį darbą.

Lina Jasmontaitė
October 2012

Abstract

Following the rationale of the current EU legal framework protecting personal data, children are entitled to the same privacy and data protection rights as adults. Yet this framework seems to be of a lesser importance to children as it appears that children's online privacy and data protection matters are addressed by self-regulatory measures. Therefore, this thesis presents an attempt to examine the extent to which self-regulatory initiatives developed on the EU level can ensure children's online privacy and data protection. In order to attain this goal, this thesis develops five chapters. The first chapter provides a conceptual framework of the research project. The second chapter reflects on the legal framework addressing children's rights in the EU and the EU's competence to act within this field. The third chapter analyses the origins and use of self-regulation in the EU policies. The fourth chapter analyses two self-regulatory initiatives developed on the EU level, which address children's online privacy and data concerns. The fifth chapter, based on the findings of each chapter, concludes that currently it is hard to measure effectiveness or capacity of the current self-regulatory arrangements protecting children's online privacy and personal data. However, it is reasonable to believe that self-regulation can enhance children's online privacy and data protection.

Contents

Acknowledgements	2
Abstract	3
List of abbreviations.....	7
1 Chapter.....	9
Setting the scene	9
1.1 Chapter overview.....	9
1.2 Background of the problem	9
1.3 Research questions, terms and methods.....	11
1.4 Research strategy and data collection.....	12
1.5 Data sources	13
1.6 Scope and limitations	13
2 Chapter.....	14
Legal framework protecting children’s online privacy and data in the EU	14
2.1 Chapter overview.....	14
2.2 Law and children: how two relate to each other?	14
2.3 Historical development of children’s law.....	15
2.4 The recognition of children’s rights as human rights	16
2.5 The reasons for specific legal treatment of children.....	17
2.5.1 Scientific facts on children’s physiological development	17
2.5.2 A common-sense.....	19
2.5.3 The myth	19
2.5.4 Interim conclusion	19
2.6 Children’s rights in the EU.....	20
2.7 Children’s rights to privacy and data protection in the EU.....	22
2.7.1 In the search of children’s right to privacy	22
2.7.2 The development of the right to data protection	24
2.7.3 How does the right to privacy relate to data protection in the EU legal order?	25
2.7.4 Where do the right to privacy and data protection meet each other in the context of children?	26
2.8 The EU legal framework for children’s rights to privacy and data protection in the online environment	27
2.9 The legal framework on data protection to children	29
2.10 What causes the complexity of children’s privacy and data protection in the online environment?	30
2.11 Conclusion.....	32

3	Chapter.....	34
	Self-regulation in EU: its origins, concept and use in the online environment.....	34
3.1	Overview.....	34
3.2	Why self-regulation is used in order to protect children's online privacy and data in the EU? 34	
3.2.1	The initial governance of the Internet.....	34
3.2.2	The positive attitude of the EU policy documents.....	35
3.2.3	The EU legal framework governing online environment.....	38
3.2.4	Contextual circumstances.....	39
3.3	But what does self-regulation mean in the European context?.....	40
3.3.1	An academic concept of self-regulation.....	40
3.3.2	The EU definition of self-regulation.....	42
3.4	Can self-regulation be effective in the online environment?.....	43
3.4.1	Self-regulation can be effective in the online environment.....	44
3.4.2	Self-regulation protecting children's privacy and data can be effective in the online environment.....	46
3.4.3	Self-regulation cannot be effective in the online environment.....	47
3.4.4	Self-regulation protecting children's privacy and data online cannot be effective in the online environment.....	48
3.5	Is there an ultimate solution ensuring effectiveness of self-regulation addressing children's online privacy and data protection?.....	49
3.6	Is there any ultimate solution for self-regulation addressing privacy matters?.....	51
3.7	Conclusion.....	53
4	Chapter.....	55
	Analysis of the EU self-regulatory initiatives safeguarding children's online privacy and personal data.....	55
4.1	Chapter overview.....	55
4.2	The state of the art of self-regulation governing online.....	55
4.3	The Safer Social Networking Principles.....	57
4.3.1	The background of the SSNP.....	57
4.3.2	The functioning of the SSNP.....	58
4.3.3	The effectiveness of the SSNP.....	59
4.3.4	The SSNP's relation to Directive 95/46/EC.....	60
4.4	The Coalition to make the Internet a better place for kids.....	61
4.4.1	The background of the CEO Coalition.....	61
4.4.2	The Functioning of the CEO Coalition.....	62

4.4.3	The effectiveness of the CEO Coalition	63
4.5	Background and functioning of the ICT principles.....	64
4.6	The link between the SSNP, the CEO Coalition, the ICT Principles, and the legal framework for privacy and data protection	65
4.7	The Communication of 2012 sets incentives to act	65
4.8	The EDPS opinion on the Communication of 2012	67
4.9	Conclusion.....	69
5	Chapter.....	71
	Conclusion	71
5.1	Chapter overview.....	71
5.2	A summary of the main findings	71
5.3	The final message.....	72
5.4	Limitations of the thesis	73
5.5	Possible topics for future research	73
Annex I	75
	Transcript of interviews with Dr. V. Donoso	75
Annex II	92
	The letter from the Safer Internet Team.....	92
Annex III	94
	Functioning schemes of self-regulatory initiatives addressing children's data protection and privacy concerns in the online environment	94
Annex IV	95
	Complexity of framework for children's rights.....	95
	Bibliography	96

List of abbreviations

Article 29 Working Party	Working Party, which was set up under Article 29 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data
CARU	Children's Advertising Review Unit
CEO Coalition	Coalition to make the Internet a better place for kids
CoE	Council of Europe
COPPA	Children's Online Privacy Protection Act
EASA	European Advertising Standards Alliance
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EDPS	European Data Protection Supervisor
EU	European Union
DPD	Directive 95/46/EC
DPEC	Directive on privacy and electronic communications
FEDMA	European Federation of Direct Marketing
ICT	Information and communication technology
ICT principles	Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU
INPO	Institute of Nuclear Power Operations
ISP	Internet Service Provider
MS	Member States

NGO	Non-governmental Organization
OECD	Organisation for Economic Co-operation and Development
SSNP	Safer Social Networking Principles for the EU
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
USA	United States of America

1 Chapter

Setting the scene

1.1 Chapter overview

The purpose of this chapter is to provide a conceptual framework of the thesis, or in other words, to set the scene. This will be done by applying recommendations suggested by Curry-Sumner and Kristen in “Research Skills: Instruction for Lawyers”, Bryman in “Social Research Methods”, and Bowen in “Preparing a Qualitative Research-Based Dissertation: Lessons Learned”.¹

The chapter is structured in the following way. First, the chapter presents the background of the problem related to children’s online privacy and data protection. The subsequent part introduces the central research question and its sub-questions. Based on the information needed to answer sub-question, the chapter foresees methods to attain an intended goal – the answer. While pursuing this, the chapter establishes and defines central concepts in operational terms. The following parts reflect on the purpose of the study, research strategy, data collection and sources, which are used throughout the work. The chapter is concluded with a part setting the scope and limitations of the thesis.

1.2 Background of the problem

Advancement in the information and communications technology (ICT) sector has dramatically changed everyone’s life. The intensity of communication and digitalization of private and public data bases and their placement in ‘the cloud’ has triggered a situation where most individuals are no longer capable of adequately managing their personal data, and thus, their digital dossiers. Despite the fact, that this information is perceived as a valuable asset for e-business.² This situation not only causes the collision of private and public interests, but also, increases privacy and security risks for every internet user.

Children in this regard require special attention as they form an important category to be considered for the following reasons. First, they constitute the most vulnerable category within society as they lack capacity to identify online risks.³ Second, children often become data subjects from the very inception of their lives and without their consent. This happens

¹ Curry-Sumner, I., F. Kristen, et al. (2010) Research skills: Instruction for lawyers. Bryman, A. (2008) Social Research Methods, Oxford University Press. Bowen, G. A. (2005) "Preparing a Qualitative Research-Based Dissertation: Lessons Learned" The Qualitative Report **10**(2), from <http://www.nova.edu/ssss/QR/QR10-2/bowen.pdf>.

² Palfrey, J. and U. Gasser (2008) Born Digital New York, Basic Books. P. 39.

³ Ibid. P. 57.

when parents share information about a (future) child on the social media sites or blogs. Third, the development of a child born in the digital age is captured in detail by databases of public and private actors containing various registrations. For example, a new-born has a medical profile, is registered in the database of the residents' register service, later he or she is included in the database of a kinder-garden, school, sports center and etc. Fourth, empirical data shows that children are getting online by themselves at very early age. In 2008 sixty percent of 6-10 year olds used internet applications.⁴ A more worrisome fact is that the age at which children get online continues to decrease as new applications are developed for tablets, smart phones, and other handled devices, which target minors.⁵ Finally, addressing issues related to children's privacy and data protection in the online environment is of a decisive importance as children amount to twenty percent of the overall European population and constitute a significant part of the Internet users, which should enjoy the same fundamental rights as adults.⁶

Empiric evidence shows that children's online privacy and data protection are the most worrisome aspects related to children's online safety, which eventually impact the overall trust in the online environment.⁷ In the EU, despite the sensitivity of the topic, children's privacy and data protection in the online environment to a large extent are addressed by private parties in a form of self-regulation. Thus far, two soft law documents, namely the Safer Social Networking Principles for the EU and Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU, have declared the need to protect children's safety online. Provided that the European Commission (EC) with the Proposal for General Data Protection Regulation has recently drawn more attention to the most vulnerable group of the European society – children, the added value of these self-regulatory initiatives is in question.⁸ In view of this situation and growing concern over children's online privacy and data protection, it is timely to review and analyze the current EU approach to the online safety, which is based on self-regulation.

⁴ Davidson, J., J. Grove-Hills, et al. (2011) Online Abuse: Literature Review and Policy Context The European Commission Safer Internet Plus Programme. **European Online Grooming Project** <http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Literature-Review.pdf>. P. 6; OECD (2011) The Protection of Children Online: Risks Faced by Children Online and Policies to Protect Them. OECD Digital Economy Papers 179 <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kgcjf71pl28.pdf?expires=1336130816&id=id&accname=guest&checksum=69BCBC4FFE71FD41EB32726A0C4A0514>.

⁵ Davidson, J., J. Grove-Hills, et al. (2011) Online Abuse: Literature Review and Policy Context The European Commission Safer Internet Plus Programme. **European Online Grooming Project** <http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Literature-Review.pdf>.

⁶ Stalford, H. and H. Sax (2009) Developing indicators for the protection, respect and promotion of the rights of the child in the European Union. Summary Report European Union Agency for Fundamental Rights .

⁷ Livingstone, S., K. Ólafsson, et al. (2011) Social networking, age and privacy London EU Kids Online <http://www2.lse.ac.uk/media@lse/research/eukidsonline/shortsns.pdf>. The EC (2010) A Digital Agenda for Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Brussels The European Commission

⁸ The EC (2012) Proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

1.3 Research questions, terms and methods

The central research question of this thesis aims to examine the extent to which self-regulation adopted on the European Union (EU) level can ensure children's online privacy and data protection.

Provided that definitions form the fundamental element of legal argumentation,⁹ it is necessary to establish the central concepts in operational terms. In the context of this thesis, children are regarded as human beings below the age of 18 years.¹⁰ For purposes of language variety, the plural expression is interchangeably used with a child and a minor. The term "data protection" covers the right to the protection of personal data concerning an individual person as set in Article 8 of the Charter of Fundamental Rights of the EU. The term "privacy" covers the right to respect for person's private and family life, home and communications as set in Article 7 of the Charter of Fundamental Rights of the EU. The concept of self-regulation is understood as "a) a flexible type of regulation model; b) a set of rules developed and accepted by those who are taking part in an activity; c) a regulatory process".¹¹ On several occasions, the term "caregivers" is used. This inclusive term refers to parents, other family members, teachers, mentors and coaches.

In order to attain the main objective of the thesis - answer the central question, this thesis is divided into four chapters. Each chapter is based on sub-questions, which provide necessary information to answer the central question. The following paragraphs will introduce sub-questions per chapter and methodology, which will be used in order to provide answers.

The second chapter will analyze the development of legal framework protecting children's rights to privacy and data protection. This will be done by considering accredited scholars and researchers work on the topics related to rights of the child, privacy and data protection. The knowledge gathered will be presented in a form of a literature review. In order to attain coherence of the research the review will address issues from a historical perspective. The chapter will aim at answering the following questions:

1. How do the concepts "children" and "law" relate to each other?
2. Why do children require specific legal protection in relation to privacy and data protection rules?
3. What is the legal framework ensuring children's online privacy and data protection?
4. What causes the complexity of children's privacy and data protection in the online environment?

⁹ Macagno, F. (2010) "Definitions in law " *Bulletin Suisse de Linguistique Appliquée* 2, from <http://ssrn.com/abstract=1742946>. P. 200.

¹⁰ The UN (1989) "Convention on the Rights of the Child", from <http://www2.ohchr.org/english/law/crc.htm>. Article 1.

¹¹ Mifsud Bonnici, J. P. (2008) *Self-Regulation in Cyberspace* P. 23.

The third chapter will focus on the current EU policy, which aims at fostering self-regulation of parties engaged in the online environment. The ultimate goal of the chapter will be to prepare a thorough analysis of the situation, which will answer the following questions:

1. Why self-regulation is used to protect children's online safety?
2. What does the term "self-regulation" mean?
3. What are features enhancing effectiveness of self-regulation?
4. How can self-regulation address the issue of children's safety effectively in the cyberspace?

The fourth chapter will provide the analysis of a case study, which compares three self-regulatory initiatives addressing children's privacy and data protection concerns on the EU level, namely the Safer Social Networking Principles (SSNP), the Coalition to make the Internet a better place for kids (CEO Coalition) and the Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU (ICT Principles). The chapter will analyze, whether these self-regulatory initiatives contribute to the protection of children's online privacy and data protection. If positive answer is established, the extent to which impact is possible will be determined. In addition to this, the chapter will reflect on the main achievements, drawbacks and relation to the current legal framework of these self-regulatory initiatives addressing the issue of children's online safety. The chapter will use a comparative approach, which will enable to identify commonalities (common trends) and differences among three self-regulatory initiatives. As limited literature is available on the self-regulatory initiatives in question, information will be gathered by applying additional qualitative research methods, such as interviews with a person directly involved in the functioning of the initiatives.

The fifth chapter will summarize and discuss the overall findings in relation to the central question, which is posed in the beginning of this section. This chapter will reflect on the limitations of the study and foresee several topics for future research.

1.4 Research strategy and data collection

The research strategy of this master thesis has been determined by the type of the study. As typical for a legal research, this thesis will be based on a literature study, using sources provided by library archives. As the main purpose of this desk research is explanatory, it will be mainly based on the existing literature and material produced by others.¹² Given the chosen research strategy, data collection and synthesizing obtained sources will be the two key elements of the thesis. Available literature will constitute the main source of knowledge and data, in particular, if it provides objective descriptions of a question at stake.¹³ Due to the overwhelming amount of literature on privacy and data protection issues, it is expected to

¹² Verschuren, P. and H. Doorewaard (2009) "Designing A Research Project". P. 178.

¹³ Ibid. P. 123.

come across unreliable and biased opinions during the research process. In order to prevent a negative impact of one sided views, the credibility of data will be assessed in the collection process. The main criteria for qualifying data as an adequate information source will be judged on the robustness of publication (e.g. has the material been published in an independent peer-review journal or a book? Whether conclusions drawn derive from credible arguments or information provided in the article?).

Provided the novelty of the thesis topic and the lack of literature on two European self-regulatory initiatives, which will be at length addressed in the fourth chapter, the literature review will be complemented by additional methods to collect data, which will allow a more precise analytic induction. In particular, this research project foresees a semi-structured in-depth interview and a (consultation) letter as additional methods, which can enrich answers to the sub-questions of the fourth chapter.

1.5 Data sources

As the research strategy implies, this thesis will be built on the existing literature in the field, such as scholarly articles, books, studies and reports. While establishing, analyzing and evaluating legal frameworks, relevant legislation and policy documents on the international and the EU levels will be considered. In addition to this, the relevant case law will be reviewed. The thesis will also make use of other primary data sources namely an interview with Dr. V. Donoso, who is actively engaged in the debate on children's safety online, and a letter from the Safer Internet Program. These data sources respectively can be found in Annexes I and II. It has been decided to consult these information sources as only limited literature is available on two self-regulatory initiatives addressing children's privacy and data protection matters in the online environment. Finally, in chapters reflecting on the state of the art of specific topics, information available on media sources will be consulted. Media will be an important data source contributing to the description of reality, yet it will be used only in order to supplement theoretical background.¹⁴

1.6 Scope and limitations

The scope of the thesis is delineated by the construction of the thesis central question. In particular, the central question refers to self-regulation adopted on the EU level. This implies that children's rights to privacy and data protection will be analyzed and evaluated on the EU level, leaving national legislation aside. While defining general situations or concepts, thesis does not intend to present a global overview, it covers so called 'Western mindset', which is attributed to the Member States (MS) of the EU, the USA and Canada. In several cases, where it will be deemed necessary, the thesis will touch upon the jurisprudence developed under the jurisdiction of the Council of Europe, the European Court of Human Rights (ECtHR). This thesis focuses on the state of art of the issues at stake; therefore, it includes only necessary references to historical development.

¹⁴ Ibid. Pp. 118-119.

2 Chapter

Legal framework protecting children's online privacy and data in the EU

2.1 Chapter overview

The main challenge of this chapter is to provide an analysis of the current legal framework protecting children's online privacy and data and its development in the EU. In order to achieve this objective, the chapter is organized in the form of a funnel. Firstly, it discusses generic issues related to children's law, such as the relation between law and children and children's law relation to the framework of human rights. Then, the chapter suggests three reasons for children being subjects to specific legal measures in comparison with adults. This is followed with section explaining complexity of the legal framework addressing children's rights in the EU, and the EU's competence to act within this field. Subsequently, the chapter considers the legal framework for children's rights to privacy and data protection. The final part of the chapter attempts to provide a list of reasons causing complexity of children's privacy and data protection in the online environment.

2.2 Law and children: how two relate to each other?

Before introducing the legal framework protecting children online privacy and data, it is necessary to understand the connection between law and children. The concepts of law as a social construct governing and organizing people's behavior and children, perceived as 'human beings in the process', unavoidably relate to each other in the social context. This relation is not that obvious for most of society members. Children have not reached adulthood, and thus, they lack legal autonomy and capacity to act on independently. Furthermore, based on physical and physiological immaturity children have limited liability in criminal and civil cases in most of the legal systems. Finally, conventionally children are described as being irrational, and naïve in their way of thinking and decision making.¹⁵ According to Arkadas-Thibert, this traditional conceptualization seems to be in a changing mode.¹⁶ Various initiatives¹⁷ encourage children to participate in governance matters on local, regional and international levels. Children tend to have responsible and proactive attitude to their participatory rights, which subsequently leads to the fact that children are increasingly recognized as individual agents, who are capable on acting independently on their own

¹⁵ Arkadas-Thibert, A. (2012) Review of legal protection indicators in early childhood. Commissioned by UNESCO within the framework of the Holistic Early Childhood Development Index P. 3.

¹⁶ Ibid.

¹⁷ For example, the European Youth Parliament and city councils.

person.¹⁸ Nevertheless, law is reluctant to adapt these mindset changes in society, and it grants caregivers with the right of children's legal representation. In Palfrey's and Gasser's words, law is deemed to be the last resort to address issues related to children.¹⁹

In order to grasp the essence of the relationship between law and children, it might be useful to consider abstractions provided in legal philosophy. Following Tebbit's suggestion, law can serve either as an instrument governing people's behavior or as a measure ending certain conflict within a society and enacting an order.²⁰ In the context related to children this would mean that law can be used either in order to shape society's behavior to children in a desirable way or can "solve" children's problems by enacting certain legal measures. Indeed, it is possible to argue that both of Tebbit's proposed perspectives have played a role while establishing a legal framework protecting children. The following section will illustrate this argument with historical background.

2.3 Historical development of children's law

Bainham, the expert of children's law, claims that while analyzing legal sources it becomes apparent that children constitute a legal category, which has overcome the biggest developments.²¹ Indeed, a child till the end of 19th century was regarded rather as an object of legal relationship than a legal subject possessing individual rights.²² In particular, this was visible in family law cases related to divorce and inheritance matters, where a child had no say.²³ Bainham asserts that children's legal status, and thus, the relationship between law and children, has been evolving because it reflects social changes that the society has been undergoing, such as the liberalization of divorce and the adoption processes.²⁴ However, though the state of 'object' status in family law matters was an important aspect when considering the development of children's rights, it was not the only reason to develop a legal framework protecting children on the international level. The worrisome situation of children working in noxious conditions, massive abuse by adults and threat to the demographic situation generated conflicts within society members on national levels' and required a prompt action setting minimum standards enhancing children's welfare.²⁵ As this idea found support on the intergovernmental and international levels, subsequently, the League of Nations adopted the Declaration of Geneva (1924). This declaration was the first international document in relation to children's legal status. The document aimed at providing incentives for the contracting parties to enact national legislation focusing on the

¹⁸ Arkadas-Thibert, A. (2012) Review of legal protection indicators in early childhood. Commissioned by UNESCO within the framework of the Holistic Early Childhood Development Index

¹⁹ Palfrey, J. and U. Gasser (2008) Born Digital New York, Basic Books. P. 12.

²⁰ Tebbit, M. (2007) Philosophy of Law: An Introduction, Routledge. P. 11.

²¹ Bainham, A. (2005) Children: The Modern Law, Jordan Publishing Limited. Chapter 1.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

welfare principle and the primary needs of a child.²⁶ However, this initiative was not implemented and any other developments did not take place till the aftermath of the Second World War.

Following these two distinct lines of developments, it can be colligated that law on children or children's law in its contemporary meaning has synthesized two opposing views of legal philosophy. First, children as a legal category emerged in the minds of people with an assistance of liberalizing family law, and then, by the continuous international recognition of separate rights that children are entitled to, their rights have gradually developed into a separate legal framework.

2.4 The recognition of children's rights as human rights

Currently, it is widely acknowledged that children and adults are entitled to the same human rights, which are provided in the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948).²⁷ However, this acknowledgement on the international level was not provided or given by law. It developed gradually with an assistance of academic debates, recognition of human rights in general, and a growing body of case-law.

One of the most important factors, which influenced the recognition of children's rights as part of human rights framework, was the heated scholarly debate on the nature of children's rights. This debate showed a paradox of children's rights as it presented two opposing positions. On the one hand, the proponents of child liberationist model claimed that children have "far greater ability for self-determination than most societies cared to admit", and thus, they should be entitled to the same individual rights as adults.²⁸ Whereas, on the other hand, the supporters of the child protectionist model insisted that children cannot be entitled to any human rights as they lack legal autonomy, which is granted at the age of maturity.²⁹ Provided that liberationist point of view opposed the findings related to children's cognitive capacities, this position received a lot of criticism. Nevertheless, as Fortin notes, it was the liberationist model that "generated reassessment of children's capacity for autonomy and responsible action" and contributed to the recognition that children's rights are human rights.³⁰

The adoption of legal instruments was the other influential factor that had an impact to the recognition of children's rights as human rights. Van Bueren and Geraldine distinguish three phases, which signify evolution of human rights including children's rights within the international community. In the first phase the need of legal protection to all human beings, including children, was recognized on the international level.³¹ In the second phase specific

²⁶ Ibid. Pp. 732-733.

²⁷ Ruxton, S. (2005) What about us? Children's rights in the European Union: next steps, European Children's Network.

²⁸ Fortin, J. (2005) Children's Rights and the Developing Law, Cambridge University Press. P. 5.

²⁹ Ibid. P. 5.

³⁰ Ibid. P. 5.

³¹ Lievens, E. (2010) Protecting children in the digital era: the use of alternative regulatory instruments, Nijhoff Publishers. P. 265.

rights were awarded to adults and children as ‘human beings in the process’.³² The third and final stage marks the possibility to implement and claim one’s rights. The latter is more difficult to achieve for children than for adults as the implementation of laws is mostly ensured by the judicial branch, to which children have a limited access. Children have limited legal autonomy, and thus, they need a legal representative to bring the claim.

Woodhouse, the world wide recognized scholar on children’s rights, suggests viewing this gradual development towards the recognition of children’s rights as human rights through a different lens. In particular, Woodhouse relates the development of children’s rights to the growing body of case-law elaborating on notions related to children’s rights. The scholar asserts that introduction of “children’s dignity rights”, which must be read in conjunction with the notion of “needs based rights”, has led to the recognition that children are individual persons, who are on “a journey to autonomy”.³³ Provided that they are on this journey, they should be entitled to the same claim to rights and dignity as autonomous adults.³⁴ Woodhouse bases her statements on the study of the national case-law. Yet her proposed perspective might find a wider applicability because not only the national courts, but also, international courts, such as the ECtHR, have continuously contributed to the extension of human rights to children.

It should be noted that although children’s rights are recognized as human rights, children due to social objectives children are subjects to a positive discrimination. This means that minors are exposed to differential legal treatment, which should improve children’s legal protection. The following section will explain the rationale behind this situation.

2.5 The reasons for specific legal treatment of children

The reasons to assign specific legal protection to children can be divided into three groups, namely scientific facts, common sense and myths. Scientific facts derive from the literature on the physiological development synthesizing child development research. Common sense relates to long term policy objectives of a welfare-state, whereas myths tend to occur within the clusters of society.

2.5.1 Scientific facts on children’s physiological development

The scientific knowledge, which is gathered in the field of physiological development, constitutes the core on which argument for children’s specific protection is built. Following

³² Ibid. P. 265.

³³ Woodhouse, B. (2001) "Children's Rights" University of Pennsylvania Law School, Public Law Working Paper No. 06, from <http://ssrn.com/paper=234180>.

³⁴ Ibid.

exhaustive research findings, it is acknowledged that children are prone to risky behavior or not adequate decision making as their cognitive development is still unfinished.³⁵

Myers, the internationally recognized psychologist, in conformity with Piaget's theory, distinguishes four developmental stages based on children's cognitive capacities.³⁶ Infancy is the first stage of a child's development. The newborn is very vulnerable, in the sense that it is fully dependent on the caregivers. This period is followed by the early childhood, which starts at the age of 2 and covers the pre-school period, approximately till the age of 5-6.³⁷ In scientific terms this developmental stage is referred to as preoperational period. At this point a child's cognitive abilities develop rapidly.³⁸ The child learns to adapt surrounding environment, develops social ties, advances language and thinking skills. The following stage is called the later childhood or concrete operations period and covers age group from 7 to 12.³⁹ At this stage children loose egocentrism and their neural networks, which are responsible for cognitive functioning, extensively develop in the brain.⁴⁰ This period is followed by adolescence, or in scientific terms, the period of formal applications, which is marked by the increasing capacity to conduct abstract reasoning.⁴¹ At this age children become more mature not only physically, but also, socially.⁴² Puberty, the increased importance of peer groups, and cognitive advancement are the main features of this period. From the brief description of the development stages provided above it becomes clear that children based on their needs require special level of legal protection at different age groups. For example, a three month infant has primary needs of care and nourishment, whereas a child in the stage of a later childhood needs to be educated in order to develop one's mental capacities.

This approach based on physiological development research findings seems to find its way to the recognition in the national law through the measures taken on the international level. In this regard, the UNCRC is of a decisive importance because of the following statement. "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."⁴³ Finally, reflecting on the findings of development research is of a crucial importance for a legislator as it enables to understand differences between cognitive capabilities and needs of children at different age groups.

³⁵ Livingstone, S., L. Haddon, et al. (2011) Risks and safety on the Internet: the perspective of European Children

<http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/EUKidsOnlineIIReports/D4FullFindings.pdf>.

³⁶ Myers, D. G. (2009) *Psychology*, Worth Publishers. P.181.

³⁷ Ibid. Koren, M. (1998) *Tell Me! The Right of the Child to Information*, NBLC. P. 19

³⁸ Myers, D. G. (2009) *Psychology*, Worth Publishers.

³⁹ Ibid. Koren, M. (1998) *Tell Me! The Right of the Child to Information*, NBLC.

⁴⁰ Myers, D. G. (2009) *Psychology*, Worth Publishers. P. 183.

⁴¹ Ibid. P. 185.

⁴² Ibid. P. 185.

⁴³ The UN (1989) "Convention on the Rights of the Child", from <http://www2.ohchr.org/english/law/crc.htm>.

2.5.2 A common-sense

The second group of reasons presents sensible facts in favor of children's specific legal protection. Indeed, it is a common-sense to monitor parental responsibility and impose legal measures for licentious parents avoiding or neglecting parental duties. This common-sense derives from future implications of children's negative experiences and aligns ethical reasoning. In particular, communitarian and utilitarian outlooks can be considered. According to these standpoints, a whole society will be better-off, if a child is brought in a well-care. Therefore, it is sensible by the means of law to prescribe age of compulsory education and define circumstances in which social care must be awarded in the benefit of a child. Following this common sense approach, law in most of the cases provides a minimum standard, which ensures the same starting point for any child in the society.

2.5.3 The myth

'Western world' believes in a myth that childhood is a golden age. Franklin in his work "The Rights of Children" has described this phenomenon by the following features. First, he notes that childhood is considered to be in a special period of one's life, in which a child due to its "innocence and weakness" needs to be protected from "the harshness and adversity of adult life".⁴⁴ Second, he suggests that the myth has encompassed the idea that "the child is spared the responsibilities and anxieties of economic life, the world of work and the many worries which are to be inherited to upon maturity".⁴⁵ Finally, Franklin notes that the golden age period is associated with "unconstrained freedom, a time for play, education and learning".⁴⁶ This myth cannot escape harsh criticism as it presents the ideal picture of the childhood rather than a real situation based on empiric data about children's lives. Nevertheless, it has been of a great influence while developing a legal framework protecting children. Its weight is hard to deny in the light of the UNCRC preamble, where it is explicitly stated that the United Nations (UN) had proclaimed that childhood is entitled to special care and assistance.⁴⁷

2.5.4 Interim conclusion

This section has demonstrated three possible explanations for children's specific legal treatment. These reasons, namely scientific facts, common sense and myths, present different basis to adopt legal measures assigning preferential treatment of children. These reasons are of wide applicability, and therefore, can provide ground for specific legal framework protecting children's online privacy and data.

⁴⁴ Franklin, B. (1986) The rights of children Oxford [etc.], Blackwell. P. 4.

⁴⁵ Ibid. P. 4.

⁴⁶ Ibid.

⁴⁷ The UN (1989) "Convention on the Rights of the Child", from <http://www2.ohchr.org/english/law/crc.htm>.

2.6 Children's rights in the EU

As it was established that children's rights constitute a part of human rights framework, it is appropriate to discuss children's rights in the EU. Noteworthy, the original European Community Treaties focused on achieving economic goals and did not refer to fundamental human rights, including children's rights. However, by means of the case-law developed by the European Court of Justice (ECJ), human rights, and thus, children's rights, subsequently, were recognized as part of the general principles of the EU law.⁴⁸

The principal changes in this respect have taken place since the adoption of the Maastricht Treaty (1992), when for the first time human rights were incorporated among treaty provisions.⁴⁹ Regarding children's rights, the biggest step was taken by the EC in the following two communications, namely "Communication on Strategic Objectives 2005-2009" and "Communication Towards an EU Strategy on the Rights of the Child". The former document noted that "a particular priority must be effective protection of the rights of children, both against economic exploitation and all forms of abuse, with the Union acting as *a beacon to the rest of the world* [emphasis added]".⁵⁰ In order to achieve this goal the latter policy document proclaimed the need "to establish a comprehensive EU strategy to effectively promote and safeguard the rights of the child in the European Union's internal and external policies and to support Member States' efforts in this field".⁵¹ Provided the developments that have followed, it is possible to claim that these policy documents prepared the soil for the children's rights being included among the EU competences.

Indeed, with the enforcement of the Lisbon Treaty children's rights are gaining a momentum within the EU. For the first time in the EU history, the establishing treaties include children's rights among the Union's objectives.⁵² Additionally, children's rights are explicitly recognized in Article 24 of the Charter of Fundamental Rights of the EU, which seems to be built on the notions developed under the UNCRC, such as protection of child's best interests, well being, freedom to expression, and the right to caregivers.⁵³ This dual inclusion in legally binding instruments signifies not only a political will to develop a policy framework addressing children's needs, but also, a commitment for further and greater integration of human rights in general. However, in order to place children's rights within the EU legal system it is important to understand the boarder context and the complexity of interaction between domestic, European and international law, which is depicted by Article 6 of the TEU.

⁴⁸ Graig, P. and G. De Burca (2008) EU Law, Oxford Univeristy Press.

⁴⁹ Ibid. Pp. 379-382.

⁵⁰ The EC (2006) "Communication Towards an EU Strategy on the Rights of the Child" Retrieved 2012 03 25, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:EN:PDF>. P. 2.

⁵¹ Ibid. P. 2.

⁵² (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>. TEU Article 3.

⁵³ The EU (2000) "The Charter of Fundamental Rights of the European Union", from http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

Article 6 of the TEU, which has a pivotal role, defines this interaction in the following way. First, Article 6 paragraph 3 declares that general principles of the Union's law originate in the constitutional traditions of the MS and in the ECHR.⁵⁴ This means that the EU legal system draws inspiration from practices which are widely accepted on national and international levels. Second, this Article provides legal basis for the Union's accession to the ECHR, which consequently means that the EU has decided to make a commitment to follow obligations originating in the international law. Yet the role of the international law should not be overestimated as the interpretation of Article 6 should be done in the light of principles developed by the case-law of the ECJ. In particular, the principle of direct effect, which was established by the *Van Gend en Loos* case, and the principle of supremacy, which was introduced in the *Flaminio Costa v ENEL* case, have to be considered.⁵⁵ Following the principle of direct effect, the EU legally binding measures automatically become part of national legislation and create rights to individuals, which can be claimed in the national courts.⁵⁶ Whereas the supremacy principle has established that the EU is "a new legal order of international law for the benefit of which the States had limited their sovereign rights".⁵⁷ That is to say, that the EU laws prevail over the national ones.

In order to provide a more consistent analysis of the legal framework on children's rights in the EU, it is valuable to start from the units constituting the EU, namely the MS, which are contracting parties on both the EU and international arenas. The international level can be divided into two segments, namely the UN, which is the global actor, and the Council of Europe, which performs on the regional level. All of the MS of the EU are members of the UN and the CoE. The latter can be claimed of a bigger importance to the EU as even before the EU's accession procedure to the CoE has started, being a member of this international organization and adhering to the ECHR has been a prerequisite for joining the EU. Following this, the MS of the EU, in addition to the provisions provided in the establishing treaties of the EU, are bound to their international obligations deriving from conventions, treaties and declarations developed by the CoE and the UN.⁵⁸

Continuing this analysis, a fact that children's rights are provided in the Charter of Fundamental Rights of the EU, which has the same legal status as the establishing treaties, suggests the following. The EU while aiming to contribute to the goals of the MS, which are already embedded in the international and national measures, tends to specify its commitments. Although at this point it might seem that there is a collision of different legal orders proclaiming children's rights, it should be noted that international agreements set "a

⁵⁴ (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Lisbon Treaty*. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>, *ibid*.

⁵⁵ Graig, P. and G. De Burca (2008) *EU Law*, Oxford University Press.

⁵⁶ *Ibid*. Pp. 268-271.

⁵⁷ *Ibid*. Pp. 345-346.

⁵⁸ See Annex IV for a schematic visualization.

floor rather than a ceiling”, and thus, the EU actions “can provide more extensive protection”.⁵⁹

Finally, the interpretation of Article 6, as well as objectives set in Article 3 of the TEU, does not expand the EU competences to take actions. These provisions rather provide the ground to supplement actions of the MS. Based on this, it can be concluded that as regards the rights of the child, the EU is directly bound by the obligations set by internal EU regulatory measures, the Charter of Fundamental Rights of the EU, the CoE legal order, and at the same time, it is indirectly bound to the UNCRC as all the MS have ratified this legally binding document. These findings are of a crucial importance in view of children’s rights. The following paragraphs will address children’s rights to privacy and data protection in the EU legal framework.

2.7 Children’s rights to privacy and data protection in the EU

While considering the legal framework of children’s rights to privacy and data protection in the EU, it should be noted that although these two rights in many cases, especially in the online environment, closely relate to each other, they have developed under different circumstances, and thus, they constitute two separate rights. The following sub-sections will provide a review of each right in relation to children.

2.7.1 In the search of children’s right to privacy

The origins of the right to privacy in its contemporary notion can be traced back to the end of the 19 century, the publication of Warren and Brandeis seminal work titled "The Right to Privacy". This article proved to be a spark which provoked scholarly debates on the issue in both sides of the Atlantic Ocean. Yet the political will to adhere to this right arose only in 1950. The Universal Declaration of Human Rights was the first international document referring to the right of privacy. The UDHR in Article 12 has forbidden “arbitrary interference” with one’s privacy, family, home, correspondence and outlawed defamation and libel.⁶⁰ It should be noted that the UDHR symbolizes a positive improvement leading towards the recognition of the right to privacy. Yet it was a policy document, and thus, it lacked legally binding power. In this respect, the European Convention of Human Rights and Fundamental Freedoms is of a greater value. Although the ECHR had less signatories and primary addressed countries present within the European region, it was a legally binding instrument. The ECHR in Article 8 has reiterated the wording of the UDHR in the statement that “everyone has the right to respect for his private and family life, his home and his

⁵⁹ Graig, P. and G. De Burca (2008) *EU Law*, Oxford Univeristy Press. Pp. 385-386.

⁶⁰ The UN (1948) "The Universal Declaration of Human Rights" Retrieved 2012 05 15, from <http://www.un.org/en/documents/udhr/>.

correspondence”.⁶¹ Given the different nature of the ECHR, subsequently, this provision was incorporated into domestic laws of European countries.

The meaning and content of this right in the European continent has been developed by the case-law of the European Court of Human Rights. Although this court interprets the ECHR in a dynamic way, or as referred by the court itself “as a living instrument”, it is well-established that the right to privacy encapsulates relational privacy, which includes sexual preferences, spatial privacy, which includes the right to be left alone in a private space, health privacy covering the medical files of persons, and finally informational privacy, which relates to the protection of personal data.⁶²

The existing case law leaves no doubt that the right to privacy is applicable to children and adults in the same way, provided that the ECHR in Article 1 foresees an obligation of contracting parties, countries, “to respect human rights of *everyone* [emphasis added]”.⁶³ As everyone is a broad concept, it is deemed to include children as well. This interpretation can be supplemented by Article 14, which sets the prohibition of discrimination “on any grounds [...] or other status”. It must be noted that this explicit recognition of privacy to children was developed relatively late, in 1979. In this regard, *Marckx v Belgium* is one of the important judgments as it was the first children’s case which was brought to the court.⁶⁴ In this case the applicant, the representative of a child, claimed that that Belgian government infringed Article 8 in conjunction with Article 14 of the ECHR by imposing discriminatory legal status of a child born out of wedlock.⁶⁵ Despite this ice-breaking case, the number of children’s cases remained insignificant till the ratification of the UNCRC, which awarded children with a comprehensive list of substantive rights, which also included the right to privacy.

It can be argued that the UNCRC had a major contribution to increasing awareness of existing children’s rights, which subsequently led to the increase of adjudications concerning children’s rights to privacy, which most of the times occurred in the context of physical punishment and abuse.⁶⁶ Noteworthy, the ECtHR in the subsequent case law on children interpreted the right to privacy as established in Article 8 of the ECHR, in the light of the UNCRC. That is to say, that the Court looked for guidance and support for its reasoning in the most elaborate legal document on children’s rights.⁶⁷ The right to child’s informational

⁶¹ The Council of Europe (1950) “Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14”, from <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁶² Hert, P. J. A. d. and S. Gutwirth (2009) Data protection in the case law of Strasbourg and Luxembourg : constitutionalisation in action *Reinventing Data Protection?* Y. P. GUTWIRTH S., P. DE HERT, J. NOUWT & C. DE TERWANGNE (eds), Springer http://works.bepress.com/serge_gutwirth/10 P. 9.

⁶³ The Council of Europe (1950) “Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14”, from <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁶⁴ Kil Kelly, U. (2000) The Impact of the Convention on the Cse-law of the European Court of Human Rights *Revisiting Children's Rights : 10 Years of the UN Convention on the Rights of the Child* D. Fottrell, Kluwer Law International

⁶⁵ ^The European Court of Human Rights *Marckx v Belgium* (1979) Retrieved http://www.equidad.scjn.gob.mx/IMG/pdf/Caso_Marckx_v-_Belgica_Ingles_-2.pdf.

⁶⁶ Kil Kelly, U. (2000) The Impact of the Convention on the Cse-law of the European Court of Human Rights *Revisiting Children's Rights : 10 Years of the UN Convention on the Rights of the Child* D. Fottrell, Kluwer Law International

⁶⁷ Ibid. P. 93.

privacy, which is far most important aspect of privacy in the context of this thesis, can be derived from the adjudication made in the case *K.U. v Finland*, where the state failed to adopt measures ensuring the “physical moral welfare of a child”, who’s personal data was spread in the online environment without his consent.⁶⁸

In the EU context, the right to privacy also plays an important role. In particular, within the enforcement of the Lisbon Treaty, the right to privacy has been rewarded a greater importance than ever before. It has been recognized as the fundamental right of the EU legal system by the European Charter, which is applicable to European citizens, including children. Provided this information, it appears that at the moment, the right to privacy in the EU legal order is based on the following grounds. First, given the provisions of the EU Charter, it is a fundamental right, and second, it is a normative value to which the EU legal order has to adhere to as the EU seeks to accede the ECHR, and become a party of the CoE.

2.7.2 The development of the right to data protection

The right to data protection can be called a European invention as so far it is recognized as a fundamental right in the EU context. Many times the right to data protection is associated with the right to privacy as they are intrinsically interrelated. However, it should be noted that this right to data protection constitutes an individual and independent right. The birth of this right was fostered by the developments in the ICT sector, which allowed automatic processing of personal information at ever greater scale, in the 70’s.⁶⁹

The Council of Europe was the first international organization concerned with these developments. The CoE, after a study concluding that neither the European Human Rights Convention, nor the domestic law of the contracting members, had yet developed an adequate protection to the right of informational privacy in the emerging digital context, adopted resolutions establishing principles of data protection in private and public sectors, namely Resolution 22 (73), and Resolution 29 (74). The second attempt to bring transparency to the processing of personal data was made by the international Organization for Economic Cooperation and Development (OECD). This organization adopted Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data in 1980. As various regulatory measures were scattered through different fields and because they were soft-law documents, which did not impose any legal obligations, the need for a more comprehensive tool was felt.⁷⁰ The scattered measures at that time were not sufficient to live up to the needs of the parties engaged in the data processing. In a response to this situation the Treaty of

⁶⁸ ^The European Court of Human Rights *K.U. v Finland* (2008) Retrieved.

⁶⁹ Andrade, N. N. G. d. (2010) *Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights Privacy and Identity Management for Life: 6th IFIP WG PrimeLife International Summer School* S. D. Fischer-Hübner, P.; Hansen, M.; Leenes, R.; Zhang, G. Helsingborg, Sweden, Springer **352** <http://ssrn.com/abstract=2033225>. P.91.

⁷⁰ The Council of Europe Explanatory Report on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data <http://conventions.coe.int/treaty/en/Reports/Html/108.htm>.

Strasbourg, also known as Convention no. 108 was adopted by the CoE in 1981. Although it reiterated basic principles, which have been already established by the OECD, such as the limitation on the collection and use of personal data, data quality, purpose specification, security safeguards, openness of databases, individual participatory rights, and accountability, it still remains one of the most significant treaties on data processing. This Convention is widely recognized and has made an influential impact on shaping data processing regimes in other legal systems, such as the EU.

The EU has made a major contribution to the advancement of data processing law by developing a harmonized legal framework governing acquisition, maintenance and use of personal data.⁷¹ The EU claimed its competence to enact harmonizing measures on data processing on the basis that the free flow of data across the MS would have a positive impact on the completion of the internal market.⁷² However, it should be noted that developing a framework diminishing inconsistent policies on the processing of personal data turned out to be a challenging and lengthy process. The compromise between the stakeholders actively engaged in lobbying activities was hard to achieve.⁷³ It took more than 8 years for the provisions related to data processing to become compulsory for any data processing and benefit data subjects. The negotiation process of the DPD took 5 years, and then, as usual, the MS were awarded with a 3 year transition period. At the moment, the EU is proud not only to proclaim the principle that all personal data should remain private, unless it is gathered for a legitimate purpose by private or public sector,⁷⁴ but also, to include it among the fundamental rights of the EU legal order, which are set in the European Charter.

Although, till lately none of the provisions in relation to data protection have explicitly addressed children as a specific category, this does not exclude children from the possibility of becoming data subjects. Following the Article 29 Working Party opinion, children are exposed to the same legal framework protecting personal data as adults.⁷⁵

2.7.3 How does the right to privacy relate to data protection in the EU legal order?

The careful analysis of the provisions developed by the Council of Europe and the EU, respectively in Convention no. 108 and the DPD, as well as the case-law developed by the ECtHR, allows the following deduction. Privacy is the primary fundamental right from which the right to personal data protection has been extracted due to advancements in the ICT sector. This relation was not that obvious from Explanatory Report on the Convention no. 108, where the CoE just briefly referred to the privacy right, in particular, privacy test established in Article 8.2 of the ECHR, as means to justify restrictions imposed on obtaining

⁷¹ Pearce, G. and N. Platten (1998) "Achieving Personal Data Protection in the European Union" *Journal of Common Market Studies* 36(4): 529-547.

⁷² Ibid. P. 532.

⁷³ Ibid.

⁷⁴ Ibid. P. 544.

⁷⁵ Article 29 Working Party (2008) Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools) P. 4.

personal data.⁷⁶ Further confusion was brought by the Explanatory Report, which concluded that although the European countries have established laws on privacy, tort, secrecy or confidentiality of sensitive information, there is “a lack of general rules on the storage and use of personal information”, which would allow individuals to exercise control over their personal data.⁷⁷ This line of thought development could possibly imply that the CoE has intentionally aimed at distinguishing two rights. The intrinsic interaction between the privacy and data protection is deemed to be better captured by the EU in the DPD which proclaims the protection of the right to privacy while processing of personal data as the objective of the Directive.⁷⁸ This correlation has been also confirmed by the case-law of the ECtHR, which has established that “storing information about persons can constitute an interference with their right to respect for private life as established by Article 8 of the ECHR”.⁷⁹

2.7.4 Where do the right to privacy and data protection meet each other in the context of children?

Although the DPD is applicable to both manual and automated methods of data processing, there is no doubt that today the Internet and ICT provide the core medium in which personal data is constantly being processed and stored by automated means. Data subjects, meaning individuals, including children, tend to disclose large amounts of information relating to their own person to parties running in private and public sectors. This subsequently causes privacy and data protection concerns, especially that data in the digital form is easy to share or transfer between various networks. At the same time, possessing data grants informational power for private and public actors, which as noted by the aforementioned Explanatory Report, can negatively affect the position of individuals in the decision making process, if they have shared their data.⁸⁰

Despite the growing concern about security and privacy risks involved in the processing of the personal data in the online environment, the trend of uploading personal information on the Internet continues to grow and even outlives expansion. In particular, that social media networks and ‘cloud’ computing services provide endless and free of any charge possibilities to store large amounts of personal information online. The youth does not remain indifferent to these developments. At the moment it is estimated that “38% of 9-12 year olds and 77% of

⁷⁶ The Council of Europe Explanatory Report on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
<http://conventions.coe.int/treaty/en/Reports/Html/108.htm>. Paragraph 19.

⁷⁷ Ibid.

⁷⁸ (1995) "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data" L 281 L 281 Article 1.

⁷⁹ González Fuster, G., P. J. A. d. Hert, et al. (2011) D.2.5. Recommendation Report: Situating Privacy and Data Protection in a Moving European Security Continuum Converging and Conflicting Ethical Values in the Internal/External Security Continuum in Europe (INEX) VUB P. 3.

⁸⁰ The Council of Europe Explanatory Report on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
<http://conventions.coe.int/treaty/en/Reports/Html/108.htm>. Paragraph 2.

13-16 year olds use the Internet in Europe and [that] 59% of all children have their own SNS profile.”⁸¹ In the context of children’s Internet use, it can be observed that, on the one hand, online services may be regarded as children empowering tool, but on the other hand, they may endanger personal privacy or data, as the content, once uploaded online can be retrieved by the third parties and used against the primary intentions of the data subject.⁸² Palfrey and Gasser in their book “Born Digital” construct an illustrative example of personal information abuse. The following paragraph will summarize the plot of this hypothetical case.

*Concerned parents of a teenage-girl who suffers from epilepsy decide to implant a radio frequency identification chip under the skin of the child as one day it may save her life. This measure is taken as the girl refuses to wear an indentifying bracelet which could be a reference point in emergency situations. In preparation for the procedure parents sign a privacy agreement, according to which the medical institution is allowed to share medical history with the third parties, which are not identified at the moment of signing the agreement. What are possible implications of this action, which initially serves in the best interest of their child? Many negative outcomes can be foreseen. The girl might become a victim of targeted marketing, or when she reaches maturity, she can be charged higher insurance rates.*⁸³

2.8 The EU legal framework for children’s rights to privacy and data protection in the online environment

As discussed above, the European Charter provides two separate provisions for the rights to privacy and data protection. The application of those rights is extended to the online environment. Both of these rights are regarded as fundamental human rights within the EU legal system and apply to children and adults alike. However, the EU legal framework for children’s rights to privacy and data protection in the online environment is more complex. It is a layered system, which combines several distinct legal systems, which were addressed in the section 2.6. The analysis provided in the section 2.6 makes it clear that although the EU legal order seeks to place itself under the umbrella of the CoE by acceding to the ECHR, the EU, if needed, can provide more specific protection for certain rights.

Following this rationale, it can be claimed that within the EU, the primary source for children’s right to privacy is the ECHR and the case law of the ECtHR. The EU by acceding to the CoE, commits to follow the case-law of the ECtHR, according to which, the right to privacy, as embedded in Article 8 of the ECHR, is recognized for children alike for adults. The secondary source for children’s right to privacy is the MS domestic laws. All of the MS of the EU have already developed laws protecting the right to privacy, first and for most, because they are parties to the ECHR. Provided this, the European Charter, which also

⁸¹ Livingstone S., Ólafsson K., et al. (2012) Towards a better internet for children. [EU Kids Online](http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20III/Reports/EUKidsOnlineReportfortheCEOCcoalition.pdf) <http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20III/Reports/EUKidsOnlineReportfortheCEOCcoalition.pdf>. P. 8.

⁸² Hert, P. J. A. d. and N. Purtova "Status and Review of the European Data Protection Regime"

⁸³ Paragraph is based on Palfrey and Gasser 2008. Pp. 65-66.

proclaims the right to privacy is the third legal source. This being said, it can be claimed that the right to data protection receives more attention in the EU context than privacy. The right to data protection is included not only in the EU Charter, but also in the establishing treaties. Article 16 of the TFEU claims that “*everyone* [emphasis added] has the right to the protection of personal data concerning them”.⁸⁴ Given the wording of this provision, the following reasoning must be held true. The right to data protection should be recognized for children and adults alike.

Provided the descriptions in sub-sections 2.7.1 and 2.7.2, the content of these two rights seems to be clear. However, their application in relation to children is more complicated than to adults. Application of children’s rights to privacy and data protection should be compatible with Article 24 of the EU Charter, which focuses on the notion of the best interests of the child, which for this reason can be claimed to be borrowed from the UNCRC. Although the EU is not obliged to follow the provisions of the UNCRC, the application of the right to privacy and data protection should be interpreted and applicable in the light of provisions set in the UNCRC. All the EU MS have ratified this international agreement.

Children’s rights to privacy and data protection should be extended to the online environment; especially, especially that empiric evidence proves that children are no longer capable to distinguish between “online” and “off-line” environments.⁸⁵ Moreover, the limitation of those rights only to the “off-line” world, would be unreasonable as for children of today the digital environment constitutes an integral part of the reality they live in.⁸⁶ And despite the fact, that many children do not comprehend that they are data subjects and that while uploading their personal data (e.g. pictures, videos) they are processing their personal data, within the scope of the DPD, the Directive provides rules applicable to their behavior. It should be noted that the provisions of the Directive do not have direct application because directives, in general, are legal measures, which are “binding, as to the result to be achieved, upon each Member State to which it is addressed, [...] [and] leave to the national authorities the choice of form and methods”.⁸⁷ That is to say, that every MS implements directive by enacting laws at a domestic level. For this reason, thus far, there are 27 national laws governing processing of personal data, which are equally applicable for children and adults. As a result of this minimum harmonization approach, substantial differences and fragmentation exist among the national data processing regimes.⁸⁸ This situation is expected to change, once the General Data Protection Regulation is adopted. The following section will examine the DPD applicability to children.

⁸⁴ (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

⁸⁵ Palfrey, J. and U. Gasser (2008) Born Digital New York, Basic Books.

⁸⁶ *Ibid.* Pp. 1-15.

⁸⁷ (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>. TFEU Article 288.

⁸⁸ Viola, M. d. A. C. (2012) Review of the Data Protection Directive: Is There Need (and Room). For a New Concept of Personal Data? European Data Protection: In Good Health? S. L. Gutwirth, R.; De Hert, P.; Poulet, Y.

2.9 The legal framework on data protection to children

Neither the DPD, nor the Directive on privacy and electronic communications, which constitute the current legal framework on data protection, include provisions referring to children. However, provided opinions of the Article 29 Working Party and the EDPS, there is no doubt that children fall under the scope of this legal framework. Furthermore, the DPD Article 1, while defining the objective of the directive, states that it aims at protecting the fundamental rights and freedoms of natural persons or, in other words, living human beings.⁸⁹ A child, although awarded limited legal autonomy to act, is regarded as a natural person. For this reason, any child, who processes data, is entitled to become a subject of the DPD provisions. In particular, the provisions on the general rules of the lawfulness on the processing of personal data, criteria for legitimate processing, information to be given as a data subject, and many others can be considered.

The same line of reasoning is explicitly supported by the Article 29 Working Party in Opinion 2/2009 on the protection of children's personal data, which is also referred as General Guidelines and the special case of schools. The Guidelines also emphasize the need to focus on children as a special category in regards to data processing by declaring the following: "If our societies are to strive for true culture of data protection in particular, and defense of privacy in general, one must start with children, not only as a group that needs protection, or as subjects of the rights to be protected, but also because they should be made aware of their duties to respect the personal data of others."⁹⁰ The Article 29 Working Party while addressing issues related to the processing of personal data in the education sector emphasizes the importance of the best interests of the child principle. According to the Guidelines, this principle means that "a person who has not yet achieved physical and psychological maturity needs more protection than others".⁹¹ For this reason, a child as a 'human being in a process' should be entitled to special and adequate legal rules, which at the same time would protect child's vulnerability and ensure child's right to development.⁹² Although the Article 29 Working Party addresses the specific situation concerning school data and academic records at education institutions, children's data alike adults' are being captured by many other public and private databases, these might include various government registries, files of medical history, and applications developed for social purposes. Therefore, children should be entitled to the protection of their privacy and personal data.

Nevertheless, despite of the wide scope of protection offered by the legal framework for data protection in the EU, practical difficulties stand in the way of the implementation of this framework. They relate to the following facts. First, children lack capacity to recognize risks

⁸⁹ (1995) "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data " L 281 L 281

⁹⁰ Article 29 Working Party (2008) Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools)

⁹¹ Ibid.

⁹² Ibid. P. 4.

or possible abuse of their personal data; and second, in order to ensure their data protection rights or to bring a claim, if it was mishandled, children need a legal representative.

2.10 What causes the complexity of children's privacy and data protection in the online environment?

Provided that “studies on children's use of the net are necessary to take into account while developing policies”,⁹³ it is possible to claim that the main factor complicating the protection of children's privacy and data in the online environment is an obvious lack of empirical research on the issues related to data protection and privacy.⁹⁴ Although in 2009 it was roughly estimated that there were 441 empirical studies on children's internet use within the EU region, only few of them address concerns related to privacy or data protection specifically.⁹⁵ Most of the research so far has been focussed on the impact of the undesirable online content, such as pornography, hate speech, information about pro-anorexia, self-harm, drug taking or suicide, and on children's uses of the internet. Moreover, it appears that most of the research addresses issues which either has caught “a momentum” because of a highly publicized events, such as cyber-grooming, or issues, which are deemed to be important by adults, such as harmful content or interaction.⁹⁶ To this, it must be added that the available empiric data is claimed to be fragmented, unrepresentative and hard to compare as studies mostly target different age groups of children in relation to their ICT use, focus on a domestic level and employ different definitions of risk.⁹⁷ In this respect, the positive change has taken place on the EU level with the publication of the EU Kids Online II survey and its findings. Thus far, it is the most elaborate study which allows conducting a comparison of children's recent uses of the internet applications across the EU MS.

Alongside this apparent need of more data on online risks and privacy threats faced by children, the complexity of children's online privacy and data protection is caused by the Internet itself. Indeed, the Internet offers a medium for a various forms of communication, which is extremely dynamic. This can be best explained by the use of a recent example provided in the OECD paper titled “The protection of Children Online”. This report notes that in the period of 12 months the major shift has taken place in the online environment as “users have switched from chat applications to social networks”.⁹⁸

The other factor that complicates protection of children's privacy and data online relates to the general debate on the privacy protection in the EU, which is very well captured by Lugaresi in the article “Principles and Regulations about Online Privacy”. According to this

⁹³ OECD (2011) The Protection of Children Online: Risks Faced by Children Online and Policies to Protect Them. *OECD Digital Economy Papers* 179 <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kgcjf71pl28.pdf?expires=1336130816&id=id&accname=guest&checksum=69BCBC4FFE71FD41EB32726A0C4A0514>. P. 13.

⁹⁴ Ibid. P. 13.

⁹⁵ Ibid. Pp. 8, 13.

⁹⁶ Ibid. P. 15.

⁹⁷ Ibid. Pp. 13-14.

⁹⁸ Ibid. P. 14.

legal scholar, privacy, though recognized as a fundamental right of the EU legal order, has a different scope and meaning in comparison with the privacy concept developed within the international law, and, in particular, within the CoE framework.⁹⁹ Following EU documents “the protection of privacy is often adjusted to meet the needs of personal data protection”.¹⁰⁰ Consequently, this ‘adjustment’ limits the scope of privacy to informational privacy. Yet the fact that privacy is understood differently and in a narrower way in the EU has been never confirmed in the EU legislation; no definition is assigned to privacy or online privacy in the EU.¹⁰¹ This reluctance to clarify and define privacy in the EU has led to the conceptual misunderstanding of privacy as a right. As the supporters of privacy regard the scope of this right as it is established in the ECHR, whereas in the reality privacy is protected only to extent it relates to the processing of personal data.

The third aspect that complicates children’s data and privacy protection in the online environment is two-folded and touches upon children’s developmental stages and a technological convergence, which allows children to access online applications via a number of different means (smart phones, e-readers, tablets, and other handled devices), in different circumstances (school, home, public spaces, and etc.) for various purposes. This wide accessibility leads to a situation, where it is hard and even impossible to monitor children’s activities and information that they share with others, and thus, it becomes hard to minimize risks of this engagement. Furthermore, children do not represent a coherent group within a society. As discussed above, children belong to different age groups, which have different needs and preferences, and therefore, they subsequently require different approach and attitude to their online activities. The EC has also reflected on these aspects and noted that in the current state of affairs “it is not possible to find a one-size-fits-all solution for all children or for their safety online”.¹⁰²

The fourth and final aspect that causes complexity in relation to children’s privacy and data protection in the online environment relates to the current EU policy on this issue. Thus far, the EU has entrusted online safety issues in the hands of private actors. Therefore, this approach is perceived in a controversial way by many proponents of privacy and data protection.¹⁰³ Proponents of the current policy approach believe that private parties are better placed as regards the knowledge about undergoing technological developments in order to build up measures, which would protect children in the online environment. Whereas

⁹⁹ Lugaesi, N. (2002) "Principles and Regulations about Online Privacy: 'Implementation Divide' and Misunderstandings in the European Union" SSRN eLibrary, from <http://ssrn.com/paper=333440>. Pp. 2-5.

¹⁰⁰ Ibid. P. 5.

¹⁰¹ Ibid. Pp. 5 -12.

¹⁰² The EC (2012) "Communication on the European Strategy for a Better Internet for Children " **196 final**, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>. P. 10.

¹⁰³ For example, the EDPS criticises this approach in The EDPS (2012) Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "European Strategy for a Better Internet for Children" http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf.

opponents of this view claim that self-regulation lacks accountability, legitimacy, openness, and for this reason, it is not an adequate tool to cope with the challenges of the online environment. In this regard, the EC aims at establishing somewhat more balanced approach with the EU Safer Internet Program. Following the official statement of this program, which has been running since 1999, it seeks to achieve the following objectives “to promote the safer use of the Internet and other communication technologies, particularly for children and young people; to educate users, particularly children, parents, carers, teachers and educators in this regard; [and] to fight against illegal content and harmful conduct online”, by fostering and providing impetus or assistance for the development of self-regulatory initiatives.¹⁰⁴ Currently, self-regulation as regards its effectiveness in achieving these goals is questioned.

2.11 Conclusion

This chapter explained generic issues related to children’s law, such as the relation between law and children and children’s law relation to the framework of human rights. The chapter found out that the development of children’s rights is correlated with changes taking place within society. Then, the chapter established that children’s law has synthesized two opposing legal philosophy views, following which law can either shape people’s behavior in a desirable way, or it can end the conflict within society. Due to the level of abstraction offered by these views, they can be extended to the issues related to children’s online privacy and data protection issues.

The chapter suggested three reasons for children to be subjected to specific legal measures in comparison with adults. Scientific facts deriving from research on children’s cognitive development, a common-sense approach and the myth of childhood as the golden age form the ground based on which children should be exposed to preferential legal treatment.

The chapter described and analyzed the complexity of the legal framework addressing children’s rights in the EU, and the EU’s competence to act within this field. It was established that children’s rights are gaining a momentum within the EU legal order with the enforcement of the Lisbon Treaty, which for the first time over the EU existence, has included children’s rights among the EU objectives. The chapter has also demonstrated that the legal framework surrounding children is complex and layered. It combines measures developed on the international, domestic and the EU level. As it has appeared this complexity is also inherent to the issues of children’s privacy and data protection.

The most significant findings of the chapter relate to the legal framework governing children’s privacy and data protection. It was found that the legal framework consisting of the DPD and the DPEC is applicable to children and adults alike. However, this framework is

¹⁰⁴ The EC (2012) "ACTIVITIES: Safer Internet Programme: Policy" Retrieved 2012 05 07, from http://ec.europa.eu/information_society/activities/sip/policy/index_en.htm.

believed to be of a lesser importance for children as they lack capacity to recognize cases of personal data abuse and legal autonomy to impose their rights.

The final part of the chapter provided four reasons causing the complexity of children's privacy and data protection in the online environment. The first reason relates to finding that there is no sufficient empirical data on online privacy risks and threats to children. It might be speculated that because of the lack of research on these topics, thus far, no coherent and adequate regulatory measures have been developed on the EU level. This part asserts that technological convergence and the fact that children do not constitute a coherent social group are the additional aspects that complicate proper implementation of the current legal framework on children's online privacy and data protection. In addition to this, the chapter demonstrated that the debate on children's online privacy and data protection can be coupled together with the general debate on privacy in the EU. As the latter debate shows that misunderstanding about privacy and online privacy occurs because the definitions of those terms are absent and privacy is protected only to the extent it relates to the protection of personal data. Finally, the implementation of the current legal framework protecting children's online privacy and data protection is in a way set aside with the Safer Internet Program. This program focuses on the promotion of self-regulatory initiatives developed by private parties. The following chapter will address two self-regulatory initiatives developed under the scope of the Safer Internet Program, which aim to enhance children's online privacy and data protection.

3 Chapter

Self-regulation in EU: its origins, concept and use in the online environment

3.1 Overview

The third chapter aims at achieving three major goals. First, the chapter seeks to explain origins and reasons of the current EU policy approach fostering self-regulation of private parties, which are engaged in the online environment. Second, the chapter discusses the notion of self-regulation, and depicts its perception within the European context. Third, the chapter attempts to introduce the most important features of self-regulation that would ensure its effectiveness and tangible contributions to the solution of a specific problem. In order to attain this objective, the chapter provides a thorough overview of both successful and unsuccessful self-regulatory initiatives in the online environment. Following the topic of the thesis, the chapter focuses on initiatives that specifically address children's data and privacy protection. The last part of the chapter considers possible solutions out of the situation, where private parties engage in self-regulatory initiatives, which fail to attain intended objectives.

3.2 Why self-regulation is used in order to protect children's online privacy and data in the EU?

One may reasonably wonder about the rationale behind several self-regulatory initiatives aiming at enhancing children's online safety, which are founded under the EU Safer Internet Program. If the EU has developed a legal framework protecting privacy and personal data, why is it so that private actors, independently or in support with the EU, keep on developing various self-regulatory measures, such as the Safer Social Networking Principles or the CEO Coalition, tackling almost the same objectives as laws? Although there is no straightforward answer to this question, provided the literature review, four reasons, which have led to the preference of self-regulation, can be pointed out.

3.2.1 The initial governance of the Internet

The first reason requires considering the initial governance of the Internet. Provided that the Internet was established primarily for the purposes of sharing knowledge among limited networks of researchers and state intelligence services, set of rules for online activities, or in other words, "internal regulatory systems" were developed by private parties.¹⁰⁵ Bonnici, de Vey Mestdagh, Rijgersberg, Koops and Prins regard this rule setting as a form of self-regulation.¹⁰⁶ In opposition to this widely accepted view, Lessig in his writings, which have

¹⁰⁵ Mifsud Bonnici, J. P. (2008) *Self-Regulation in Cyberspace* P. 9.

¹⁰⁶ See: Mestdagh, K. d. V. and R. Rudolf Rijgersberg (2009) *Internet Governance and Global Self-Regulation: Building Blocks for a General Theory of Self Regulation*. Self-regulation and the Future of

provided an incentive for worldwide debates on the Internet governance, has argued that initially the Internet was governed by the code, which represents technical measures, such as hardware and software, which “codifies values”, and which are dynamic and constantly changing (as they are developed by humans).¹⁰⁷ In essence, two views seem to be close related; the element of human is the core link. Yet Lessing’s statement gives a greater weight to technology itself.

To sum up this section, it is possible to derive a conclusion, that although authors, mentioned above, provide opposing views as regards the initial form of the Internet governance, it becomes evident that whatever governance form was embedded in the Internet, it had no relation with state regulation. Provided this deeply rooted understanding, self-regulation is taken for granted as being the primary measure to address online matters. Provided this, it comes by no surprise that children’s online privacy and data protection is addressed by self-regulation.¹⁰⁸

3.2.2 The positive attitude of the EU policy documents

As for the second reason, it is possible to argue that the dominant use of self-regulation for the online environment was set forth in the EU policy documents reflecting the debate on the Internet governance, which took place in the 90’s. Bonnici, in support of this statement, asserts that the content of three policy documents is of a great importance, namely the Communication on Illegal and Harmful Content on the Internet (1996), the Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services (1996), and the European Council Resolution on Illegal and Harmful Content (1997).¹⁰⁹ The qualitative analysis of these policy documents leaves no doubt that there is a better solution than self-regulation which could cope with challenges imposed by the borderless Internet. The following paragraphs highlight the most important aspects of each policy document.

The Communication on Illegal and Harmful Content on the Internet notes that “the Internet [...] is radically different from traditional broadcasting [...] [or] traditional telecommunication service”.¹¹⁰ It combines the two and because of this unique characteristic it causes regulatory challenges.¹¹¹ The Communication emphasizes that due to “the technical features of the Internet [...] certain types of control [are] ineffective”.¹¹² For this reason, the

the Regulatory State: International and Interdisciplinary Perspectives M. Hertogh and P. Westerman <http://www.rug.nl/gcl/congressen/Selfreg%20C9%20INTERNET%20GOVERNANCE%20AND%20GLOBAL%20SELF%20REGULATION.pdf>. Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace, and Koops, E. J. L., A.M.B.; Nouwt, J.; Prins, J.E.J.; Schellekens, M.H.M. (2006) Should Self-Regulation Be the Starting Point?.

¹⁰⁷ Lessig, L. (2006) Code version 2.0 New York, Basic Books. Pp. 78-79.

¹⁰⁸ Online dispute resolution systems and technical standards can be pointed out as other examples.

¹⁰⁹ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 14.

¹¹⁰ The EC (1996) Communication on Illegal and Harmful Content on the Internet <http://aei.pitt.edu/5895/>.P. 8.

¹¹¹ Ibid.P. 8.

¹¹² Ibid. P. 12.

Communication, while discussing possible ways of identifying and combating illegal and harmful content, assigns an important role to the Internet access providers and host service providers, in other words, the ISPs. Most importantly, this policy document urges “general move towards self-regulation and encourages the setting-up of a European network of associations of Internet Access Providers [as] this co-operation could further be extended to the wider international level [and] [...] could usefully co-ordinate their approach, in particular regarding technical solutions”.¹¹³

The publication of the Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services accompanied the aforementioned Communication on Illegal and Harmful Content on the Internet. Thus, it comes by no surprise that the two documents share the same positive spirit towards the use of self-regulation. In particular, Green Paper notes that “the development of new services requires a flexible framework”¹¹⁴ and establishes a preference for the “bottom-up rather than top-down solutions that obviate the need for prior censorship and increase the potential effectiveness of self-regulation”.¹¹⁵ In addition to this, this soft-law document foresees the positive impact of self-regulation while claiming that it could help to overcome limits of domestic regulation and develop self-regulatory measures on the European level.

Provided the ambitious statements of the Green Paper, it can be claimed that at the time of publishing this document, the EC remained very modest in its declaratory statement that this policy document purely has been aimed at stimulating the debate on the Internet governance.¹¹⁶ Because subsequently, this document had a major impact on the Resolution of the Council and of the Representatives of the Governments of the Member States, which in support of the Green Paper declared that the MS should aim at achieving the following objectives: “encourage and facilitate self-regulatory systems including representative bodies for Internet service providers and users, effective codes of conduct and possibly hot-line reporting mechanisms available to the public; encourage the [development of] provision for users on filtering mechanisms and the setting up of rating systems”.¹¹⁷ The Resolution also assigned the specific role to the EC. In particular, it provisioned that the EC should “ensure the follow-up and the coherence of work on [...] [self-regulation], foster coordination at Community level of self-regulatory and representative bodies; promote and facilitate the exchange of information on best practice in this area; foster research into technical issues, in particular filtering, rating, tracing and privacy-enhancing, taking into account Europe's cultural and linguistic diversity; [and] consider further the question of legal liability for Internet content”.¹¹⁸

¹¹³ Ibid. P. 14.

¹¹⁴ The EC (1996) "Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services". P. 3.

¹¹⁵ Ibid. P. 4.

¹¹⁶ Ibid. P. 3.

¹¹⁷ The Council (1997) "Resolution of the Council and of the Representatives of the Governments of the Member States on illegal and harmful content on the Internet ", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997X0306:EN:HTML>.

¹¹⁸ Ibid.

In order to present a thorough policy picture explaining the rationale behind the currently prevailing self-regulatory regime three aforementioned documents, proposed by Bonnici, should be supplemented by the following Communications titled “International Policy Issues Related to Internet Governance”, “Action Plan on Promoting Safe Use of the Internet”, and “The Organization and Management of the Internet: International and European Policy Issues 1998-2000”. In much the same way these documents are important as the aforementioned trio. These Communications have further developed the concepts of self-regulation and co-regulation, and thus, they are important in view of the current EU policy focusing on self-regulation.

The Communication on International Policy Issues Related to Internet Governance,¹¹⁹ has noted that “[the initial voluntarily Internet governance] structures are no longer appropriate to the size, growth rate and contemporary use of the Internet” and that these “arrangements [...] [should] shortly come to an end”.¹²⁰ This Communication has claimed the EU’s competence to participate in decision making process related to the online environment issues. It explained that “it [...] [is] necessary to ensure that the responsibilities of the public authorities towards society and the economy at large are effectively linked to the functions of any industry-led self-regulatory bodies”.¹²¹ Consequently, this Communication allowed to observe that the EU, actually, supports co-regulation as being the proper regulatory model to govern online activities.

The same idea regarding the fight against illegal content is further advanced in the Communication for Action Plan on Promoting Safe Use of the Internet. In particular, this policy document claimed that “the fight against illegal content needs industry co-operation in restricting circulation and a fully functioning system of self-regulation aiming at a high level of protection, which must go hand-in-hand with effective law-enforcement by the Member States and third countries”, whereas the fight against harmful content can be dealt by means of codes of conduct among the ISPs.¹²² Following this, it can be claimed that this Communication foresees two forms of self-regulation. It claims the need of self-regulation supported by law enforcement bodies (co-regulation) for the fight against illegal content and the need of codes of conduct (self-regulation) for tackling issues arising from harmful content. The latter should be supported by technological solutions and parental awareness.¹²³ This distinguishing line was ironed away as the Communication on the Organisation and Management of the Internet stated that “for the time being [...] the nature of the Internet and

¹¹⁹ This Communication was developed in a response to The United States Administration's Green Paper “A Proposal to Improve Technical Management of Internet Names and Addresses”, which aimed at addressing issues related to the internet governance.

¹²⁰ The EC (1998) “Communication from the Commission to the Council “International Policy Issues related to Internet Governance”. P. 6

¹²¹ Ibid. P. 9.

¹²² The EC (1997) “Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Social Committee of the Regions “Action Plan on promoting safe use of the Internet”, from <http://aei.pitt.edu/5894/1/5894.pdf>. P. 2.

¹²³ Ibid. P. 3.

the speed of events preclude [...] that the current self-regulatory structure buttressed by active public policy oversight is the best available solution”.¹²⁴

This analysis of these six policy documents, lead to the conclusion that primarily because of the wide acceptance and use of term ‘self-regulation’ in the EU policy documents, it is preferred as a measure to regulate diverse issues related to the online environment. Furthermore, it appears that self-regulation in the EU context is understood in a complex and dynamic way. Therefore, findings of this section confirm Bonnici’s observation that “the term ‘self-regulation’ in Europe often refers to ‘codes of conduct’ or to a type of regulation by private parties in conformity with and backed up by a state legal framework and legislation”.¹²⁵

3.2.3 The EU legal framework governing online environment

The third block of reasons, which might have had influence on the currently prevailing self-regulatory approach towards the online issues, relates to the provisions of the EU directives. In several cases they point out self-regulation, usually in the form of codes of conduct, as a preferred solution in certain circumstances. For example, Article 27 of the DPD explicitly refers to the codes of conduct. The Article calls for incentives and support of both the MS and the EC for the industry to set-up of codes of conduct at national level, which could contribute to the proper implementation of the data protection regime.¹²⁶ In this regard, the code of conduct developed by the European Federation of Direct Marketing can be used as an illustrative example. Although the FEDMA was acting on the basis of the provision which specifically addressed the national level, it developed the first European level initiative encapsulating national positions on the direct marketing. The European Data Protection authority, namely the Article 29 Working Party, has recognized the added value of this initiative to the data protection regime, as being comprehensive tool, which is in compliance with Article 27 of the DPD.¹²⁷

The use of codes of conduct also finds support under the provisions of the Electronic commerce (E-commerce) directive. Yet this directive dismisses the national level and refers to codes of conducts which could be developed by various stakeholders only at the EU level.¹²⁸ As this directive suggest very different approach to the development of self-

¹²⁴ The EC (2000) "Communication from the Commission to the Council and the European Parliament "The Organisation and Management of the Internet: International and European Policy Issues 1998-2000" " 202, 202. P. 9.

¹²⁵ Mifsud Bonnici, J. P. (2008) *Self-Regulation in Cyberspace* P. 23.

¹²⁶ (1995) "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data " L 281 L 281 Article 27.1.

¹²⁷ Working Party 29 (2003) Opinion 3/2003 on the European code of conduct of FEDMA for the use of personal data in direct marketing
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp77_en.pdf. Pp. 2-4.

¹²⁸ (2000) "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal

regulation, at this point, one could reasonably wonder, what are the underlying reasons behind the preference of different self-regulation level? Does this distinction signify the difference between the scope of the E-commerce directive, which aims at maximum harmonization, and the DPD? Or whether within the period of five years, it has become clear that self-regulation on the EU level might be a more valuable regulatory tool? Consulted literature does not provide an answer to any of those questions.

3.2.4 Contextual circumstances

The fourth block of reasons explaining the acceptance of self-regulation as a regulatory tool on the EU level might be comprised on the contextual circumstances, which are pointed out by several authors. Senden in her article capturing the legal framework of self-regulation and co-regulation asserts that stagnation of legislative processes related to the completion of the internal market in the 80's and institutional crisis of 1998 are the main factors which drew attention to the need to review methods of the EU governance.¹²⁹ Senden suggests that increased attention and interest in the use of alternative regulatory tools, such as self-regulation or co-regulation, is the direct outcome of the fundamental debate on the EU governance.¹³⁰ The most problematic aspects of this debate were issues arising from the ever-growing EU competences, efficiency and legitimacy of its actions.¹³¹ All these issues were addressed in the White Paper on Good Governance, which was the most important output of the debate, and which marked the change in governance methods. Following this new governance agenda as set in the White Paper, every legislative measure, in addition to five principles of good governance,¹³² had to adhere to subsidiarity and proportionality principles.¹³³ These principles served as benchmarks, following which the EU was allowed to take action, which was not prescribed by its exclusive competences only if this action can be better achieved on the EU level, and only if the taken action is proportional to its intended goals.¹³⁴ Given this high pole, the use of self-regulation was deemed to align the rationale of new governance. If a self-regulatory measure is invoked, all of new governance requirements were met. Information related to self-regulation is open for the public, all interested stakeholders and third parties can participate in the development of a measure, stakeholders are believed to act in accordance with the set guidelines, and most importantly, self-

Market", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT>. Article 16.

¹²⁹ Senden, L. (2005) "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?" Electronic Journal of Comparative Law 9(1), from <http://www.ejcl.org/91/art91-3.html>. Pp. 2-4.

¹³⁰ Ibid. Pp. 2-4.

¹³¹ Ibid. Pp. 2-4.

¹³² The EC (2001) "The White Paper on European Governance", from http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf. P. 10. (Openness, participation, accountability, effectiveness, and coherence)

¹³³ Working Group on Consumer Consent (2009) From legitimacy to informed consent: mapping best practices and identifying risks LSE Pp. 352-353.

¹³⁴ (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>. Article 5 paragraphs 3 and 4 of the TEU.

regulatory measure is in compliance with the core principles of the EU legal order, namely subsidiarity and proportionality. Self-regulation, being a soft-law instrument, does not impose legal obligations on the parties; it addresses only certain groups within society. Finally, self-regulatory measure because of its nature fits well with the requirement of proportionality. It is always an adequate measure to address problems of a great concern, which may not fall with the EU competences.

This point of view might be enriched by the insight proposed by Nowak and van den Hoogen. These authors claim that self-regulation was positively regarded and recognized by the EU institutions as a regulatory policy tool because of “an ideological and scientific climate favoring decentralized and market friendly approaches”.¹³⁵ In particular, Nowak and van den Hoogen develop their argument on the basis the New Public Management School, which became widely recognized in the 90’s, and which has promoted the use of self-regulation as an advantageous choice enhancing efficiency of regulatory measures and reducing public spending.¹³⁶ In addition to these two opinions, it can be added that, in general, acceptance of self-regulation as a regulatory measure is regarded as continuous policy, which has started with product standardization ensuring full functioning of the internal market, and which is capable of living up to its intended goals.¹³⁷

3.3 But what does self-regulation mean in the European context?

As the diverse terminology used in the sections above suggests, self-regulation is an inclusive concept, which encapsulates codes of conduct and various forms of private regulation. This finding seems to support currently prevailing view that ‘self-regulation’ is a catch phrase, a term referring to alternative and unconventional ways of regulation rather than to a precise definition.

3.3.1 An academic concept of self-regulation

Many scholars have attempted to define the notion of self-regulation. For instance, Ukrow, presenting the German legal school, has suggested that self-regulation is “a regulatory activity carried out by specific organizational units in order to avoid or eliminate incorrect behavior within their internal structures or within the structures from which they operate”.¹³⁸

¹³⁵ van den Hoogen, T. and T. Nowak (2009) The Emergence and Use of Self-regulation in the European Decision Making Process: Does It Make a Difference? . Self-regulation and the Future of the Regulatory State: International and Interdisciplinary Perspectives M. Hertogh and P. Westerman Pp. 126-127.

¹³⁶ Ibid. P.126.

¹³⁷ Ibid. P.126.

¹³⁸ Koen de Feyter S. I. S. (2003) Self-regulation World Bank, IMF and Human Rights Sfeir-Younis A., Koen de Feyter S. I. S., Hunt P. et al, Enfield Publishing & Distribution Company P. 79. Ukrow’s definition is also recognized in Koops, E. J. L., A.M.B.; Nouwt, J.; Prins, J.E.J.; Schellekens, M.H.M. (2006) Should Self-Regulation Be the Starting Point?

Whereas the common law scholars Baldwin and Cave avoid constructing a precise definition and in their book “Understanding Regulation”, which serves as the fundamental point of reference for the ones interested in the regulatory theory, set out three variables, which capture self-regulatory arrangements. First, Baldwin and Cave note that self-regulation is of the governmental nature, as private parties are delegated power to act in the interests of public policy, and then, they claim this feature to be accompanied by “the extent of the role played by self-regulation” and by “the degree of binding legal force” attached to a self-regulatory measure.¹³⁹ Opposing to Baldwin’s and Cave’s view, Black, the expert on regulation, regards the concept of self-regulation being separated from the state based regulation.¹⁴⁰ Black suggests that the term ‘self-regulation’ can be “used to describe the disciplining of one’s own conduct by oneself, regulation tailored to the circumstances of particular firms, and regulation by a collective group of the conduct of its members or others”.¹⁴¹ Black takes the scholarly debate one step further than Baldwin and Cave and asserts that ‘one’¹⁴² refers to a collective body, and while doing so, Black distinguishes self-regulation from individual regulation.¹⁴³ Black’s point of view is to a large extent supported by the American scholar Ogus, who claims that a term self-regulation refers to “a private ordering which emerges independently of state intervention”.¹⁴⁴ In this regard, a more elaborated definition is proposed by Bonnici, who suggests that notion of self-regulation encapsulates “a) a flexible type of regulation model; b) a set of rules developed and accepted by those who are taking part an activity; c) a regulatory process”.¹⁴⁵ Noteworthy, Bonnici’s proposed definition offers a relatively safe harbor for scholars having different views on self-regulation. This view has been adopted to define self-regulation in the context of this thesis.

The most recent attempt to define self-regulation is made by Coglianese and Mendelson in their article presenting the state of the art on self-regulation. In this article two distinguished scholars recognize that at the present there is no universally accepted definition of self-regulation. The scholars attribute this situation to the ambiguity of self-regulation, which is inherent in general to the concepts in the field of regulation.¹⁴⁶ Interestingly, they claim that “conceptual imprecision” of definitions capturing self-regulation is of tangible use as they help to point out the main characteristics of self-regulation.¹⁴⁷ In particular, Coglianese and Mendelson develop their argument by presuming that self-regulation as a regulatory tool should be analyzed through the lens consisting of four elements, namely target, regulator,

¹³⁹ Baldwin, R. and M. Cave (1999) Understanding Regulation: Theory, Strategy and Practice New York, Oxford University Press. Pp. 125 -126.

¹⁴⁰ Black, J. (1996) "Constitutionalising Self-Regulation " The Modern Law Review **59**(1), from <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1996.tb02064.x/pdf>. P. 27.

¹⁴¹ Ibid. P. 26.

¹⁴² In this context ‘one’ refers to ‘self’.

¹⁴³ Black, J. (1996) "Constitutionalising Self-Regulation " The Modern Law Review **59**(1), from <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1996.tb02064.x/pdf>.

¹⁴⁴ Ogus, A. (1999) "Self-regulation", from <http://encyclo.findlaw.com/9400book.pdf>. P. 589.

¹⁴⁵ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 23.

¹⁴⁶ Coglianese, C. and E. Mendelson (2010) Meta-Regulation and Self-Regulation The Oxford Handbook of Regulation M. Cave, R. Baldwin and M. Lodge <http://ssrn.com/abstract=2002755>. P. 148.

¹⁴⁷ Ibid. P. 148.

command and consequences.¹⁴⁸ Based on this presumption two scholars suggest that “self-regulation refers to any system of regulation in which the regulatory target – either the individual-firm level or sometimes through an industry association that presents targets – imposes commands and consequences upon itself”.¹⁴⁹ Following Coglianese’s and Mendelson’s point of view, the most important characteristics of self-regulation are “the close connection between the regulator and the target” and “the degree to which some outside threat reinforces voluntary, collective efforts at self-control”.¹⁵⁰

Provided that self-regulation is used, and thus, analyzed in diverse fields and areas, such as advertising, good manufacturing, and various professions based on the public trust, the debate on the concept of self-regulation could be extended further by prepositions of other recognized scholars.¹⁵¹ Yet it is timely to consider the EU’s position on the definition of self-regulation. Maybe it will appear that the EU has come up with a more coherent concept?

3.3.2 The EU definition of self-regulation

Although at the European level the use of a term self-regulation can be traced back to the early 70’s,¹⁵² the more important role to self-regulation within the EU governance was assigned with publication of the White Paper on Good Governance in 2001. It should be noted that this document did not invoke the use of self-regulation per se, but by establishing policy ideas, such as “partnership agreements” and “collaboration with networks”,¹⁵³ it subsequently attached a more significant role to alternative regulatory measures, and thus, self-regulation. Just shortly after the introduction of the White Paper on Good Governance the definition of self-regulation was proposed in the Report from the Commission on European Governance. According to this report, “self-regulation concerns a large number of practices, common rules, codes of conduct and voluntary agreements which economic operators, social players, NGOs and organized groups establish on a voluntary basis in order to regulate and organize their activities [...] [and] unlike co-regulation, self-regulation does not involve a legislative act”. A more comprehensive concept of self-regulation in comparison with the first attempt was developed in the Inter-institutional Agreement on Better Lawmaking, which has set guidelines for the better coordination of legislative process among the three major EU institutions, namely the EC, the EU Parliament and the Council.¹⁵⁴ Following this document, “self-regulation is defined as the possibility for economic

¹⁴⁸ Ibid. P. 148.

¹⁴⁹ Ibid. P. 150.

¹⁵⁰ Ibid. P. 161.

¹⁵¹ Black, J. (1996) "Constitutionalising Self-Regulation " *The Modern Law Review* **59**(1), from <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1996.tb02064.x/pdf>. P. 25. Koen de Feyter S. I. S. (2003) Self-regulation *World Bank, IMF and Human Rights* Sfeir-Younis A., Koen de Feyter S. I. S., Hunt P. et al, Enfield Publishing & Distribution Company P. 79.

¹⁵² For instance, the initial lobbying activities were conducted under the self-regulatory agreements.

¹⁵³ The EC (2001) "The White Paper on European Governance", from http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf. Pp. 17-18.

¹⁵⁴ The Council, The European Parliament, et al. (2003) "Interinstitutional Agreement on Better Lawmaking", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF>. Paragraph 3.

operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)".¹⁵⁵ This document assigns the EC as being a responsible actor for monitoring and ensuring that "self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicizing of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms [meaning self-regulation and co-regulation] will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market".¹⁵⁶ In years that have followed more insight to the notion of self-regulation was provided by the European Economic and Social Committee in the opinion on Simplification. The EESC observed that "self-regulation does not equate to self-enforcement; it must be in conformity with, and backed by, the law; it must be founded in a community of interest between Business and the Public; it must be enforceable, verifiable and auditable; it must also be effective, with clear means of recourse, particularly across borders. Self-regulation is not a panacea (nationally-based self-regulation may, in some instances, add barriers to the free and circulation of services and regulations imposed by business associations can have an adverse impact on firms which are not members of the association, particularly SMEs) but in the right conditions it can be a useful instrument to avoid cumbersome law-making."¹⁵⁷

Based on descriptions spread over the EU policy documents, it is possible to shape the EU's definition of self-regulation. Self-regulation, in general, is understood as a voluntary agreement of an organized group setting guidelines at the European level, which are in compliance with the legal framework. Despite this seemingly common understanding of the notion 'self-regulation', currently, the EU institutions are reluctant to use the exact term 'self-regulation' and rather refer to terms 'simplified regulatory environment' and 'alternative regulatory tools'.¹⁵⁸

3.4 Can self-regulation be effective in the online environment?

There are many examples in the off-line setting showing that self-regulation can effectively address a number of diverse issues, ranging from treatment of chemical waste, nuclear power safety to thickness of fashion models. The most popular example in this regard is the creation of the Institute of Nuclear Power Operations.¹⁵⁹ The success of the INPO is explained by

¹⁵⁵ Ibid. Paragraph 22.

¹⁵⁶ Ibid. Paragraph 17.

¹⁵⁷ European Economic and Social Committee (2002) "Opinion on 'Simplification'" C 48/28, C 48/28, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_048/c_04820020221en01300141.pdf. P. 134.

¹⁵⁸ See The EC Communication on Smart Regulation (2010).

¹⁵⁹ Lagace, M. (2007) Interview with M. Toffel "Industry Self-Regulation: What's Working (and What's Not)?" Working Knowledge: Research and Ideas Harvard Business School Coglianese, C. and E.

Coglianesi and Mendelson. According to these scholars, despite the fact that the INPO is based on four vague regulatory norms, it represents a case proving that self-regulation can work under certain conditions. In particular, they claim that “self-regulation tends to work best when the industry being regulated is small, relatively homogeneous, and interconnected, as well as the implicit threat of outside regulation provides industry with the incentive needed to regulate itself”.¹⁶⁰ If this assumption suggested by Coglianesi and Mendelson is accepted as credible, can the applicability of this assumption be extended to the online environment? In this regard, two things are worth considering. First, whether self-regulation can overcome the underlying features of the online environment, such as de-materialization, deterritorialization, and global scope, and second, whether it can effectively protect children’s privacy and personal data. Currently, it is still hard to provide unambiguous answer to these questions. In particular, it is hard to determine effectiveness of self-regulatory measures taken in the online environment. There are no empiric data in this field allowing to spot changes. For the purposes, of this thesis the term ‘effective’ refers to moderately positive evaluation. The following sections will discuss both possibilities by a series of illustrative examples.

3.4.1 Self-regulation can be effective in the online environment

In order to provide examples illustrating the capacity and effectiveness of self-regulation in the online environment this section discusses self-regulatory examples which at length are analyzed in Bonnici’s timely contribution on the cyberspace regulation. In particular, the section examines two cases - the administration of the Domain Name System and SquareTrade.

The administration of the Domain Name System thus far is deemed to be the most successful example of self-regulation in the online environment.¹⁶¹ It has been successfully running for the last 30 years. As Bonnici has noted, due to the importance of the DNS to the functioning of the Internet, interference of various states in the issues related to the DNS is unavoidable, yet self-regulation is the dominant regulatory form of the DNS.¹⁶² Bonnici while reviewing the administration of the DNS¹⁶³ finds out that self-regulation in this context serves for multiple purposes. First, it regulates activity which is “a critical resource in the current structure of the internet”, and which, in general, lacks coherent regulation by any other recognized authority. Second, it “serves a political function” as it is an adequate response to “the need of regulation and slowness and inability of states to agree to common regulatory

Mendelson (2010) Meta-Regulation and Self-Regulation The Oxford Handbook of Regulation M. Cave, R. Baldwin and M. Lodge <http://ssrn.com/abstract=2002755>. P. 154.

¹⁶⁰ Coglianesi, C. and E. Mendelson (2010) Meta-Regulation and Self-Regulation The Oxford Handbook of Regulation M. Cave, R. Baldwin and M. Lodge <http://ssrn.com/abstract=2002755>. P. 154.

¹⁶¹ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 77.

¹⁶² Ibid. Pp. 78, 101.

¹⁶³ In particular she examines three groups: the Internet Cooperation for Assigned names and Numbers, domain name registries and domain name registrars.

positions”.¹⁶⁴ In addition to this, self-regulation of the DNS helps to overcome technical and transnational difficulties. Bonnici claims that self-regulation not only “offers a regulatory solution to a predominantly technical environment that is difficult to regulate without proper understanding of how the technical side of the DNS is structured and functions”, but also, it helps to overcome transnational issues of territorial jurisdictions, which oppose the global nature of the DNS.¹⁶⁵ Furthermore, Bonnici has asserted that due to the flexibility offered by the self-regulation, it is possible to develop localized rules, which deal with allocation of second and third level domain names.¹⁶⁶ The main reason of success brought by the use of self-regulation to the DNS administration, Bonnici has attributed to the “centralization and concatenation” of self-regulation. Bonnici has provided a claim that this is the most peculiar feature of DNS regulation, following which each group functions on the basis of rules developed on the higher level.¹⁶⁷ This means that the administration of the DNS is predominately based on trust.

Bonnici also has reflected on the use of self-regulation in the online dispute resolution systems. The scholar has pointed out SquareTrade¹⁶⁸ as being by far the most successful example of self-regulation, which addresses disputes arising in the online environment.¹⁶⁹ Bonnici has noted that SquareTrade, as it is typical for online dispute resolution, is placed in a more favorable position than state institutions to deal with online disputes.¹⁷⁰ In particular, this is visible, when it comes to the establishment of a platform, which would overcome traditional problems related to the limits of jurisdictions, and which at the same time would offer direct negotiation or mediated resolution for the conflicting parties.¹⁷¹ SquareTrade functions on the basis of the internal and procedural rules, which following the contractual obligations are set in consultation with the representatives of eBay. The biggest advantage of this arrangement is that SquareTrade, as the online dispute resolution system, offers a specialized forum for online disputes, which may award adequate remedies for the parties involved, and then, enforce its decisions through the cooperation with the eBay platform.¹⁷² The last, but not the least, positive feature of SquareTrade is that it enhances overall trust among the internet users, who are participants of the online market. This subsequently, contributes to a wider use of online services.¹⁷³

¹⁶⁴ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 78.

¹⁶⁵ Ibid. P. 100.

¹⁶⁶ Ibid. P. 100.

¹⁶⁷ Ibid. P. 82.

¹⁶⁸ SquareTrade was initially developed as a platform resolving disputes arising between buyers and sellers in the eBay. In particular, it deals with non-delivery of goods, services, issues arising because of payments or selling practices. The wide use and recognition of this service led to its further growth and expansion to other online business which could also make use of the online dispute resolution systems.

¹⁶⁹ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 159.

¹⁷⁰ Ibid. Pp. 154-157.

¹⁷¹ Ibid. Pp. 161-162.

¹⁷² Ibid. Pp. 153-156.

¹⁷³ Ibid. P. 161.

3.4.2 Self-regulation protecting children's privacy and data can be effective in the online environment

The American legal scholar Rubinstein in the article titled "Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes" points out the optional Safe Harbor Program running in the USA as a successful self-regulatory practice dealing with children's privacy in the online environment. It should be noted that the Safe Harbor Program has been established with the adoption of Children's Online Privacy Protection Act as an alternative to the statutory rules. For an initiative to become the Safe Harbor Program and come into practice the Federal Trade Commission (public authority) has to approve guidelines developed by the ISP independently or collectively.¹⁷⁴ Therefore, it might be assumed that some authors would qualify the Safe Harbor Program as co-regulation rather than self-regulation. To date, there are five approved Safe Harbor Programs.¹⁷⁵

The Children's Advertising Review Unit because of a large number of contracting parties is believed to be one of the most influential developments of the Safe Harbor Program.¹⁷⁶ The CARU, in its mission statement, claims to serve as "children's arm of the advertising industry's self-regulation program and evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its Self-Regulatory Guidelines for Children's Advertising and relevant laws [and the COPPA, in particular]".¹⁷⁷ In order to establish the Safe Harbor Program the CARU had to ensure and prove that its guidelines are in compliance with the following requirements: "1) meet or exceed the five statutory requirements [...] set in COPPA; 2) include an "effective, mandatory mechanism for the independent assessment of compliance with the guidelines" such as random or periodic review of privacy practices conducted by a seal program or third-party; and 3) contain "effective incentives" to ensure compliance to with the guidelines".¹⁷⁸ The main activities of the CARU consist of constant monitoring of media sources, including the online environment, targeting and directed to children.¹⁷⁹ The assessment based on quantitative data allows concluding that the safe harbor program of the CARU meets its intended goals. Over the period of 8 years the CARU reported 200 infringement cases to the Federal Trade Commission, which led to a number of investigations and substantial fines.¹⁸⁰

¹⁷⁴ Rubinstein, I. (2010) "Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes" New York University Public Law and Legal Theory Working Papers 181, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510275. P. 395.

¹⁷⁵ Based on the information provided in the FTC letter to Aristotle International, for more info please see < <http://ftc.gov/os/2012/02/120224aristotlecoppa.pdf>>.

¹⁷⁶ Initially, the CARU was founded in 1974 to promote responsible children's advertising as part of a strategic alliance with the major advertising trade associations through the National Advertising Review Council. For more info please see < <http://www.caru.org/about/index.aspx>>.

¹⁷⁷ The Children's Advertising Review Unit (2012) "About the Children's Advertising Review Unit", from <http://www.caru.org/about/index.aspx>.

¹⁷⁸ Rubinstein, I. (2010) "Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes" New York University Public Law and Legal Theory Working Papers 181, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510275. P. 395.

¹⁷⁹ Ibid. P. 396.

¹⁸⁰ Ibid. P. 396.

Furthermore, the CARU guidelines provide an example of an important practice and it proves that self-regulation, if enforced by the public authorities, can be shaped in a way, it avoids so called “free rider” problems.¹⁸¹

To conclude, it should be noted the Safer Harbor Programs are not the only option to address children’s online privacy and data concerns through alternative regulatory measures in the USA. In addition to the encouragement of the Safe Harbor Programs, the Federal Trade Commission promotes the use of licensing system. The most successful example of licensing program is TRUSTe. This seal program, identifying high standard of information practices on websites directed at children,¹⁸² was developed as soon as of the COPPA was enacted. Thus far, it declares itself as being “the largest FTC-approved COPPA Safe Harbor certification provider”.¹⁸³ This seal is widely used for marking websites and numerous applications that are focusing on children.

Finally, it should be noted that in the USA, there seems to be a wide acceptance of alternative regulatory tools by the big market players, which are actively engaged in the development and promotion these tools. For example, Yahoo and Disney accurately follow and participate in the latest developments related to children's online privacy. They are supporters of the CARU initiative and as well they are seal holders of TRUSTe.¹⁸⁴ Although empirical data is absent, it might be speculated that combined use of alternative regulatory tools, namely self-regulatory guidelines and seal programs, enhance children’s online privacy more than only commitment to self-regulatory initiatives.

3.4.3 Self-regulation cannot be effective in the online environment

An illustrative example supporting the claim that self-regulation cannot be effective in the online environment lies with the EU’s attempt to prevent occurrence of an unwanted content. Two reasons can be pointed out in order to explain this situation. First, the EU lacks competence to monitor the online content. For this reason it has been encouraging both the MS and private actors to take adequate measures fighting unwanted content.¹⁸⁵ Certainly, this approach helps to reach and involve a number of diverse actors, and thus, seems to be a reasonable step taken by the EU. However, to date, it rather provides a soil for many difficulties. Given that “the regulation of content touches upon [territorial] values, norms and

¹⁸¹ Ibid. P. 398.

¹⁸² In this context children refer to youth under the 13 years old.

¹⁸³ Eurocommerce (2001) "The European Code of Conduct for reliable and trustworthy electronic shopping for Europe", from <http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/050-private-act.pdf>.

¹⁸⁴ Euro-label (2012) "The European Code of Conduct" Retrieved 2012 09 28, from <http://www.euro-label.com/en/code-of-conduct/index.html>. EESC, T. (2012) "European Code of Conduct for retail transactions ", from <http://www.eesc.europa.eu/self-and-coregulation/full.asp?ID=50>.

¹⁸⁵ Open Internet (2011) "Europe Overview" Retrieved 2012 07 06, from http://opennet.net/sites/opennet.net/files/ONI_Europe_2010.pdf. P. 279.

rules”,¹⁸⁶ measures developed by separate actors (or groups of actors) on the local level reduce the effectiveness of regulatory measures. Second, the self-regulatory initiatives developed under the Safer Internet Program, namely European Framework for Safer Mobile use by Young Teenagers and Children and the SSNP, seem to be easy targets for criticism. Although these initiatives have attracted a significant number of participants,¹⁸⁷ both of them seem to lack appropriate monitoring and enforcement mechanisms.¹⁸⁸ The other interesting aspect related to private parties’ commitments to monitor online content is that these commitments are not contested by the independent monitoring offered by the Safer Internet Program. In particular, this is visible in the case of the SSNP, where content of the ISPs is not evaluated “because of ethical reasons”.¹⁸⁹ This statement, although published by the independent researcher leads to the following implication. The EC, although promotes the development of self-regulatory initiatives monitoring of the online content, is reluctant to evaluate their appropriateness. Consequently, this allows private parties to act at their discretion in a relation to the online content.

3.4.4 Self-regulation protecting children’s privacy and data online cannot be effective in the online environment

The self-regulatory initiative titled The Safer Social Networking Principles was “voluntarily adopted by the industry in February 2009” as the outcome of the public consultation on online social networking, held within the framework of the Safer Internet Program.¹⁹⁰ The SSNP, which encapsulated seven broad commitments, sought to address two major concerns pointed out in the consultation, namely cyber bullying and privacy invasion. But as it becomes apparent from the implementation reports¹⁹¹ of the SSNP, the behavior of ISPs (private entities) to a large extent is evaluated according to their own self-declarations and randomly conducted tests.¹⁹² Parties submit self-declarations reporting the actions taken in order to follow the self-regulatory initiative. As these declarations are prepared by the parties

¹⁸⁶ Feick, J. and R. Werle (2011) Regulation of Cyberspace The Oxford Handbook of Regulation R. Baldwin, M. Cave and M. Lodge, Oxford University Press
<http://www.mpifg.de/people/jf/downloads/Regulation-cyberspace.pdf>. P. 533.

¹⁸⁷ The SSNP has 22 participants and European Framework for Safer Mobile use by Young Teenagers and Children has 92 members.

¹⁸⁸ Based on the opinion of Dr. V. Donoso, which is available in Annex I.

¹⁸⁹ Donoso, V. (2011) Assessment of the implementation of the Safer Social Networking Principles for the EU on 9 services: Summary Report The EC, . **Safer Internet Programme**
http://ec.europa.eu/information_society/activities/social_networking/docs/final_reports_sept_11/report_phase_b_1.pdf. P. 12.

¹⁹⁰ The EC (2012) "Steps leading to the adoption of the Principles" Retrieved 2012 07 06, from
http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.

¹⁹¹ Results of the independent assessments conducted in 2010 and 2011 can be found on the Safer Internet Program homepage available
http://ec.europa.eu/information_society/activities/sip/self_reg/index_en.htm.

¹⁹² Donoso, V. (2011) Assessment of the implementation of the Safer Social Networking Principles for the EU on 9 services: Summary Report The EC, . **Safer Internet Programme**
http://ec.europa.eu/information_society/activities/social_networking/docs/final_reports_sept_11/report_phase_b_1.pdf. Pp. 5-6.

themselves, there is a reasonable ground to doubt their objectiveness.¹⁹³ As regards the privacy matters, the assessment of the SSNP can be claimed to be inadequate and vague. The latest report provides conclusion, stating that “all the services assessed offer their users (including minors) a range of privacy settings. These settings enable users to control who can have access to the information contained in their profile. Privacy settings are user-friendly and accessible at all times in all the services analyzed. However, a few services offer users (including minors) a limited set of privacy options which lack complexity and do not allow users to customize privacy settings regarding specific groups of people or specific content”.¹⁹⁴ The use of more precise information about measures taken by each of the contracting party and their comparison might be valuable as this publicity subsequently would lead to the public pressure as regards the company. As a matter of fact, the EC has expressed its concerns as regards this initiative (as well as other self-regulatory initiatives developed under the Safer Internet Program) in the Communication on the European Strategy for a Better Internet for Children. The EC claims that the SSNP “have not been combined in a coherent framework” and notes that self-regulation will remain preferable regulatory option over the issues related to the online environment, only if it lives up to its intended goals.¹⁹⁵ As the EC in the proposal for General Data Protection Regulation has incorporated privacy related provisions of the self-regulatory initiatives, there seems to be ground to believe that self-regulation does not attain its objectives.

3.5 Is there an ultimate solution ensuring effectiveness of self-regulation addressing children’s online privacy and data protection?

Condensing similarities and differences among the examples discussed in the previous sections, it is possible and provide a list of features that may have impact on the effectiveness of self-regulation as a regulatory tool.

First, analyzing similarities among positively regarded self-regulatory arrangements, namely, the administration of the DNS, SquareTrade and the CARU, it appears that all three of them have a very specific and narrow target and objective. The administration of the DNS deals with the central identification system, which is responsible for assigning a numerical number to every domain name.¹⁹⁶ SquareTrade solves disputes between consumers and sellers arising while using the online auction platform. The CARU aims at ensuring that media providers both in off-line and on-line environments are following strict guidelines as regards the use of children’s data. Whereas so far unsuccessful self-regulatory initiatives, namely, European Framework for Safer Mobile use by Young Teenagers and Children and the SSNP provide a

¹⁹³ This statment is deducted from the interview with Dr. V. Donoso. Please find interview in Annex II.

¹⁹⁴ Donoso, V. (2011) Assessment of the implementation of the Safer Social Networking Principles for the EU on 9 services: Summary Report The EC, . **Safer Internet Programme** http://ec.europa.eu/information_society/activities/social_networking/docs/final_reports_sept_11/report_phase_b_1.pdf. P. 36.

¹⁹⁵ The EC (2012) "Communication on the European Strategy for a Better Internet for Children " **196 final**, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>. P. 6.

¹⁹⁶ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 77.

case in point that a long list of participants does not ensure effectiveness of the initiative. At the same time these two initiatives show that private actors are keen on joining and committing to self-regulatory measures as long as this participation can ensure that state keeps on hand-off policy within certain field.

These observations confirm Coglianese's and Mendelson's finding that self-regulation works best, when private parties presenting certain industry are homogenous, interconnected and feel pressure to act in order to avoid interference of the legislature.¹⁹⁷ Second, considering the way three well-perceived self-regulatory arrangements function, in opposition to the dominant views on monitoring of the self-regulatory initiatives, it can be concluded that parties' accountability or cooperation with state institutions have no direct link with the effectiveness of initiatives per se. Neither the administration of the DNS, nor SquareTrade work is based on rules which are supervised by independent authorities. Only the CARU reports its findings to the state authority, as this is an unavoidable part of its establishing arrangement, which is based on the legal obligations.

Provided the findings of analyses including the most illustrative forms of self-regulation developed in the online environment, it is possible to sketch a list of requirements that may possibly contribute to the effectiveness of self-regulation:

1. homogenous participants;
2. specific target and objective;
3. realistic pressure to enact legislative measures from the state authorities.

Strikingly as it appears from this list, features that could possibly increase effectiveness of self-regulation differ significantly from the features that are thought of to be necessary for self-regulation. The list of typical requirements for self-regulation is offered in the EESC report on self-regulation and co-regulation. Following this report balanced representation of the industry sector, transparency, openness to the public and proper monitoring are the key features of a good soft law measure. Issues related to legitimacy also are deemed to be of importance while discussing the development of self-regulation.¹⁹⁸ Once these features are combined, it is possible to draw an exhaustive list constituting requirements for self-regulation, which can be classified as a good regulation. Interestingly, this list includes typical requirements of legislative measures. Therefore, it comes by no surprise that following this list, self-regulation, despite being successful or unsuccessful in its functioning, is an easy target for criticism. Indeed, many times traditional criticism focuses on issues related to legislative mandate, accountability, due process, openness, legitimacy and expertise. This means, that traditional criticism of self-regulation is based on elements, which are recognized benchmarks by experts of regulatory theories, such as Baldwin and Cave.¹⁹⁹ Indeed, most of

¹⁹⁷ Coglianese, C. and E. Mendelson (2010) *Meta-Regulation and Self-Regulation* The Oxford Handbook of Regulation M. Cave, R. Baldwin and M. Lodge <http://ssrn.com/abstract=2002755>. P. 154.

¹⁹⁸ Schiek, D. G. (2007) "Private Rule-Making and European Governance - Issues of Legitimacy" European Law Review **32**, from <http://ssrn.com/abstract=1240648>.

¹⁹⁹ See: Baldwin, R. and M. Cave (1999) Understanding Regulation: Theory, Strategy and Practice New York, Oxford University Press. P. 77.

these benchmarks, apart from the requirement of expertise, allow harsh criticism of any self-regulatory arrangement. However, it should be noted that traditional criticism offers only one-sided opinion. In opposition of this deeply embedded view, Morgan and Yeung suggest that “it is wrong to tar [self-regulation] [...] with the same brush” as legislative measures because they differ in the institutional arrangement.²⁰⁰ This being said, it can be concluded that at the moment self-regulation receives inadequate evaluation by many. Therefore, a separate assessment methodology should be developed for evaluating self-regulatory arrangements. This could be done in a separate research as the development of assessment methodology does not fall within the scope of this research. The following part aims at constructing possible solutions out of the current troublesome situation in the EU, where self-regulation does not meet its expectations.

3.6 Is there any ultimate solution for self-regulation addressing privacy matters?

Self-regulation is not a new phenomenon; it has found applicability in various settings and industries all over the globe. Nevertheless, in the European context self-regulation, which could address children’s privacy and data protection matters, in the online environment still seems to be a future orientated challenge. Though there are several initiatives in this field, none of them seem to enhance children’s online safety in a substantial way. Moreover, no academic literature provides any ultimate solution out of the current situation, where ISPs engage into ineffective self-regulatory initiatives. For this reason, it is interesting to consider Hirsch’s and Bonnici’s academic work as it offers hints for constructing possible clues.

Hirsch, an American legal scholar and expert of regulatory theory, analyzes the capacity of self-regulation to protect personal data and privacy in the online environment from a very peculiar angle. He builds his arguments on the experience that he has gathered within the field of environmental law. His starting point of deductions relate to observation that “like smokestack industries that produce environmental pollution, digital economy businesses often do not bear the cost of the harms that they inflict”.²⁰¹ Provided this similarity in damage, Hirsch claims that “the privacy law of today shares much with the environmental law of thirty years ago [...] [and that] injuries caused by current business practices are just coming into the public eye and pressure is growing on governments to protect their citizens from them. The theory and practice of environmental law, developed through hard experience over the past three decades, provides a resource on which emerging privacy regulation can draw”.²⁰² Following this, Hirsch suggests that issues related to privacy and data protection should be solved by a number of the second generation regulatory solutions, which already

²⁰⁰ Morgan, B. and K. Yeung (2007) An Introduction to Law and Regulation: Text and Materials, Cambridge University Press. P. 94.

²⁰¹ Hirsch, D. (2006) "Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law " Georgia Law Review **41**(1). P. 10.

²⁰² Hirsch, D. (2005) Is Privacy Regulation the Enviromental Law of the Information Age? Privacy and Technologies of Identity: a Cross-disciplinary Conversation K. Strandburg and D. S. Raicu P. 16.

have been developed within the field of the environmental law.²⁰³ He claims that second regulation modes should be preferred instead of top-down regulation, which has failed to address “some social ills”, as the regulation of the second generation is in a better position to adapt “the highly dynamic and competitive digital economy”.²⁰⁴ The main feature of the second regulation tools is that private parties have a possibility to choose a regulatory tool, which would achieve public goals.²⁰⁵ Hirsch argues that second regulation strategies have many more advantages. According to the scholar, the second regulation strategies are not only effective, “more cost-effective than command-and-control requirements” and “also tend to do a better job of promoting new and better approaches to pollution reduction”.²⁰⁶ The latter Hirsch explains by the assertion that “move away from the single government-chosen technology standard and instead encourage facilities to come up with their own ways to improve [regulatory measures’] [...] environmental performance”.²⁰⁷

Hirsch in a response to damage, or in his words, negative externalities²⁰⁸ caused by the ICT industry suggests three possible solutions, namely, the fee system, regulatory covenants²⁰⁹ and public reporting about the performance of private parties. Regulatory covenants seem to be the most important suggestion as it is analyzed at length by the author; fee system based on the slogan “pay as you through away” and public reporting seem to be supplementing measures. Regulatory covenants focus on at achieving specific goals and are successful in that as “industry has more input in developing a covenant than a command-and-control regulation, tending to make covenants more practical and workable from an industry point of view”.²¹⁰ Although Hirsch refers to privacy law in general, his proposals could be evaluated and find application in the context of children’s online privacy and data protection as this would slightly change the addressee of the problem.

In contrast to Hirsch’s opinion, Bonnici suggests a different perspective. The scholar builds her claim on the finding that the common perception of self-regulation does not reflect reality. In this regard, Bonnici agrees with Morgan and Yeung about the perception of self-regulation. In particular, she suggests that self-regulation is wrongly claimed to be good or bad regulation based on comparison to legislative measures. Bonnici insists that self-regulation presents only one side of so called “mesh regulation”, which encapsulates all forms and types of regulatory measures.²¹¹ Mesh regulation can be referred as networked regulation, in which state regulation functions in parallel to private or self-regulation; the two

²⁰³ Hirsch, D. (2006) "Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law " Georgia Law Review **41**(1).

²⁰⁴ Ibid. P. 32.

²⁰⁵ Ibid. P. 8.

²⁰⁶ Ibid. P. 38.

²⁰⁷ Ibid. P. 38.

²⁰⁸ Note: Negative externalities exist whenever someone utilizes a resource but is able to impose on others the costs of that use. Definition is proposed in Hirsch, D. (2006), P. 23.

²⁰⁹ Note: To demystify the term regulatory covenant it must said that these arrangements stand for protective measures developed by legislative branch and industry in negotiation process.

²¹⁰ Hirsch, D. (2006) "Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law " Georgia Law Review **41**(1). P. 52.

²¹¹ Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace P. 199.

supplement each other. The scholar suggests that self-regulation rules developed for the online environment “tie up with the general legal framework provided by state regulation” and reflect general principles of the legal system, in which they operate.²¹² This seems to be a valid statement, as for example, most of self-regulatory agreements are constructed in a form similar to contractual agreements. In addition to these observations, Bonnici seems to offer a solution, which could possibly improve the effectiveness of self-regulatory measures. According to the scholar, self-regulation would benefit and receive positive perception by public, if it is developed within the framework offered by the legislative bodies.²¹³ This means that self-regulation should not tackle or address a particular problem by itself alone; it should be developed with particular legal rules in mind. In relation to self-regulation of the online environment, Bonnici insists that self-regulation cannot be changed by state regulation because it “is and is likely to remain a distinctive and indispensable form of regulation on the Internet”.²¹⁴ Two forms of regulations should function in supplementary manner.

To sum up this part, it appears that despite the prevailing criticism of self-regulation, there are legal scholars, who believe in the added-value of self-regulation, and who look for alternatives to improve self-regulatory agreements. Also, it can be concluded that both authors seem to applaud to the institutional arrangements in which parties representing industry and state authorities work together. Although Hirsch’s opinion on this issue is more explicit than Bonnici’s, there is no doubt that the latter scholar refers to co-regulation by suggesting that self-regulation should be developed within the existing legal framework. Following these two authors, one is inclined to believe that self-regulation as a regulatory measure could be improved, if it is developed in cooperation with state authorities and in accordance with existing legal framework. Provided these findings, the term ‘self-regulation’ should be changed by the term ‘co-regulation’, as the latter carries a more precise qualification.

3.7 Conclusion

The third chapter reflected on four initial reasons which have possibly influenced the current EU policy approach fostering self-regulation. The chapter suggested that initial form of the Internet governance, policy documents developed in the 90’s, legal framework and contextual circumstances have determined the preference for self-regulation as a mode dealing with the online issues. The chapter suggested that self-regulation has been chosen as a proper regulatory tool to address children’s online privacy and data protection matters because it was already used to address various online concerns. Yet this reasoning is shaken by the Inter-institutional Agreement. According to this policy document, self-regulation should not be used in order to address any fundamental values or rights.

In the following part of the chapter, the notion of self-regulation and its perception within the European context was discussed. It was found out that different scholars tend to suggest

²¹² Ibid. P. 198.

²¹³ Ibid. P. 199.

²¹⁴ Ibid. P. 189.

different definitions for the same phenomenon and so far there is no clear cut definition for self-regulation. Given a wide use of self-regulation in variety of sectors and contexts, it was concluded that it is even impossible to have one strict definition. Subsequently, the chapter provided a thorough overview of both successful and unsuccessful self-regulatory initiatives in the online environment. Based on this analysis, three the most important features of self-regulation that could possibly ensure its effectiveness were pointed out. In particular, the chapter suggested that homogenous participants, specific target and objective of self-regulation and the realistic pressure from the legislature's side to enact legally bounding measures are the key aspects of effective self-regulation.

In addition to this, the chapter provided an observation that traditional criticism, which is based on typical requirements for legislative measures, does not provide an adequate assessment of self-regulatory initiatives. Therefore, the chapter suggests to develop a separate assessment methodology, which would take into account specificity of self-regulatory arrangements.

The last part of the chapter considered possible solutions to the situation, where private parties engage into self-regulatory initiatives, which fail to attain intended objectives. Following research of two distinguished scholars, namely Hirsch and Bonnici, it appears that cooperation between industry and legislative bodies could be beneficial for both sides. Public authority would protect public interests and private parties could develop "workable" measures. The following chapter will address the existing self-regulatory practices protecting children's privacy and data online in the EU.

4 Chapter

Analysis of the EU self-regulatory initiatives safeguarding children's online privacy and personal data

4.1 Chapter overview

The main challenge of this chapter is to critically analyse self-regulatory initiatives, which aim at enhancing children's online privacy and personal data. In particular, the chapter reflects on the Safer Social Networking Principles (SSNP), the Coalition to make the Internet a better place for kids (CEO Coalition) and the Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU (ICT Principles). These initiatives are analyzed in the context of the current legal framework governing personal data. When addressing these initiatives in the above named order, the chapter follows the following structure. First, it introduces the background of each initiative, then, it discusses issues related to the effectiveness of a measure, and then, it relates an initiative with the legal background. In order to demonstrate specific features of an initiative, on several occasions the chapter, while defining one self-regulatory arrangement, refers to the other one. The last parts of the chapter reflect on the EC's view expressed in the Communication on A European Strategy for A Better Internet for Children and the EDPS opinion, which was adopted in a response to the Communication.

4.2 The state of the art of self-regulation governing online

According to van den Hoogen and Nowak, provided the amount of "classical legislative output of the EU, such as directives and regulations", self-regulation "remains of minor importance".²¹⁵ Nevertheless, the increasing use of self-regulatory initiatives should not be overlooked. On the EU level,²¹⁶ despite all criticism awarded by academia, experts, NGOs, the number of self-regulatory arrangements is constantly growing.²¹⁷ Thus far, issues related to the proper functioning of the internal market, such as technical standardization of goods, services and professional fields, seem to be the main areas, in which self-regulation is chosen

²¹⁵ van den Hoogen, T. and T. Nowak (2009) The Emergence and Use of Self-regulation in the European Decision Making Process: Does It Make a Difference? . Self-regulation and the Future of the Regulatory State: International and Interdisciplinary Perspectives M. Hertogh and P. Westerman P. 135.

²¹⁶ Note: On the national level positive developments can be grasped as well. For example, in Belgium E-Charter was adopted, in the United Kingdom UKCCIS Self-Regulation Project.

²¹⁷ This statement is based on the database of the European Economic and Social Committee. For more information see: <http://www.eesc.europa.eu/?i=portal.fr.self-and-co-regulation-enter-the-database>.

as an alternative regulatory option, which allows to avoid legally binding rules.²¹⁸ The ICT sector plays a significant role within the internal market. Therefore, it comes by no surprise that this sector takes part in self-regulatory measures.

The first code of conduct for the ISPs, which are the most important actors within the Internet, dates back to 2001.²¹⁹ This code of conduct was developed by the private party as a result of the new legislative framework for the emerging field of ecommerce. The code addressed issues related to the online retail transactions. The main goal of the initiative was to create “reliable and trustworthy electronic shopping for Europe”²²⁰ and “a collective minimum standard for the cooperation of companies supplying Internet trustmarks.”²²¹ Based on this code, the private entity, Euro-label, issues a certificate for a website, once it is established that a website operates in accordance with the principles of this self-regulatory initiative. Notably, the code is an independent business-led initiative and is a subject to a review.²²² In addition to this, the code is of an importance to the field of privacy and data protection. Article 2 of this code addresses concerns arising from the processing and use of personal data by the company, which offers online services or goods.²²³ The code also requires that the ISPs respect and ensure customer’s confidentiality of the communications.²²⁴

Despite the fact that first self-regulatory initiative within the online environment addressed privacy and data protection concerns, later these issues were undermined by raising concerns about the online content. The inappropriate online content was regarded as the most problematic aspect of the Internet. Thus, it received a lot of attention by legislative branch as well as private parties, including ISPs, which in order to avoid legally binding measures were voluntarily committing themselves to monitor digital content by various types of self-regulatory tools.²²⁵ It can be argued that the online content issues have received more attention than privacy and data protection matters because parents tend to place online content within the highest risk category.²²⁶

²¹⁸ The European Economic and Social Committee (2005) The Current State of Co-Regulation and Self-Regulation in the Single Market. EESC pamphlet series http://www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf. Pp. 3-10.

²¹⁹ Ibid. P. 10.

²²⁰ Eurocommerce (2001) "The European Code of Conduct for reliable and trustworthy electronic shopping for Europe", from <http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/050-private-act.pdf>.

²²¹ Euro-label (2012) "The European Code of Conduct" Retrieved 2012 09 28, from <http://www.euro-label.com/en/code-of-conduct/index.html>.

²²² In order to ensure that the initiative is in compliance with the legal framework, it is a subject to review.

²²³ Eurocommerce (2001) "The European Code of Conduct for reliable and trustworthy electronic shopping for Europe", from <http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/050-private-act.pdf>.

²²⁴ Ibid.

²²⁵ To name but a few: The EU Safer Mobile Framework and the national codes of practice, The EU Safer Social Networking Principles, The Mobile Alliance Against Child Sexual Abuse Content.

²²⁶ OECD (2011) The Protection of Children Online: Risks Faced by Children Online and Policies to Protect Them. OECD Digital Economy Papers 179 <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kgcjf71pl28.pdf?expires=1336130816&id=id&accname=guest&checksum=69BCBC4FFE71FD41EB32726A0C4A0514>. P. 15.

To this date, it is possible to encounter only three self-regulatory initiatives specifically addressing children's privacy and personal data concerns, namely the SSNP, the CEO Coalition and the ICT principles. To avoid confusion, it should be clarified that children's privacy and personal data concerns are not the end goals of these initiatives; they fall within the scope of the overall objective to improve the online safety for children. The following sections will analyze these initiatives.

4.3 The Safer Social Networking Principles

4.3.1 The background of the SSNP

In 2008, in a response to the increasing importance of the social networking sites and youth's growing use of the Internet, the EC via the Safer Internet Program addressed the urgent need for a platform, which would launch a public consultation on the matter and discuss guidelines ensuring safe use of social networking sites for children.²²⁷ The EC identified its preference for the use of self-regulation based on the following two reasons. First, the EC claimed that the pace of technological developments is "so fast that it is difficult for legislators to keep up", and thus, self-regulation is deemed to be a better option than legally binding measures as it is flexible and awards business with a freedom to manoeuvre. Second, the adoption of rules on the EU level is a time consuming process. The negotiation process might take a long time as in order to come to the final agreement on the EU, the expectations of the 27 countries have to be fulfilled.²²⁸ Consequently, this may result in an outdated a measure or a measure, which does not address the latest technological challenges of converging technologies.

Following the EC proposal, the platform, known as the European Social Networking Task Force, was established. This platform included industry representatives, academia and NGOs taking care of children's wellbeing.²²⁹ This composition turned to be productive as the SSNP were developed by the beginning of 2009. 18 companies became signatories to this self-regulatory arrangement. In the years that have followed, three other companies joined the initiative.²³⁰

The most concise description of the SSNP can be found in the background information provided by the text of the Principles. In particular, the text says that the SSNP are "the principles by which [social networking service] providers should be guided as [...] [these principles] seek to *help minimize potential harm* [emphasis added] to children and young people, and *recommends* [emphasis added] a range of *good practice approaches* [emphasis

²²⁷ The EC (2012) "Steps leading to the adoption of the Principles" Retrieved 2012 07 06, from http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.

²²⁸ The EC (2012) "Safer social networking: the choice of self-regulation", from http://ec.europa.eu/information_society/activities/social_networking/eu_action/selfreg/index_en.htm.

²²⁹ The EC (2012) "Steps leading to the adoption of the Principles" Retrieved 2012 07 06, from http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.

²³⁰ The EC (2012) "Safer social networking: the choice of self-regulation", from http://ec.europa.eu/information_society/activities/social_networking/eu_action/selfreg/index_en.htm.

added] which can help achieve those principles”.²³¹ The text of the Principles is interesting in a respect that it explains the meaning of the term ‘guidance’ within the context of this initiative. It notes that “the guidance is not intended as a ‘one size fits all’ solution [as] it is recognized that [...] the internet industry is very diverse and ranges from large global providers to smaller locally run services.”²³² This elaboration serves like a hint for the signatories. They can choose the measures of implementation at their own discretion, depending on the type of a company.

4.3.2 The functioning of the SSNP

In order to understand the functioning the SSNP in a thorough way, a visual representation of the Principles has been developed. It can be found in Annex III. This scheme allows to observe that the SSNP follow the top down approach and that the EC is the dominant actor within the framework of this initiative.²³³ The EC, in support to this initiative, monitors and funds the assessment process of the initiative. On the basis of qualities, the EC selects an independent expert, who prepares the assessment, and then, based on the findings of the assessment the EC makes a press release.

The assessment process includes two stages. First, the signatories prepare and submit self-declarations, providing information on the measures that have been in order to adhere to the guidelines.²³⁴ Second, the independent expert with a support of a team, tests, whether and to what extent the service provider followed his commitment to the Principles. According to Dr. V. Donoso (Donoso), who was involved in the assessment of the SSNP in 2011, the assessment process has no constraints and can be shaped by preferences of an independent expert.

Initially, the independent assessment was foreseen to be conducted on annual basis. The reports of 2010 and 2011 are published on the homepage of the Safer Internet Program.²³⁵ Thus far, there is no report on the implementation of the Principles in 2012.²³⁶ According to Donoso, this does not imply that initiative is invalid. Following the opinion of the scholar, this situation might have been influenced by the establishment of the CEO Coalition, which “to a large extent [...] [is] similar to the SSNP”.²³⁷ Provided that most of the SSNP signatories joined the CEO Coalition, it is reasonable to believe that they follow guidelines of the SSNP to the extent they relate to the new initiative.

²³¹ (2009) "Safer Social Networking Principles for the EU", from http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf P.7.

²³² Ibid. P. 7.

²³³ Annex III.

²³⁴ (2009) "Safer Social Networking Principles for the EU", from http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf

²³⁵ The EC (2012) "Safer Social Networking Principles for the EU" Safer Internet Programme: Self-regulation: Social networking sites, from

http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.

²³⁶ Provided that reports on the implementation used to be published in July or August, this delay provides a good reason to doubt the functioning of the initiative.

²³⁷ Annex I.

4.3.3 The effectiveness of the SSNP

As three years have passed since the SSNP were signed, the effectiveness of the initiative seems to be a timely consideration. Indeed, does the SSNP enhance children's data protection and privacy in the online environment? Does it improve children's online safety? What conclusions can be made after a careful analysis of two independent assessment rounds conducted in 2010 and 2011? Interestingly, so far, no academic literature, apart from the reports on the independent assessment rounds, is available on this specific initiative or its effectiveness. Only personal opinions in the form of interviews or blog posts, which unavoidably include subjective points of view, can be found. Nevertheless, an analysis of reports, press releases and personal opinions allows several observations.

First, according to Donoso, the evaluation of the initiative is problematic because the principles provide generic guidelines, which are interpreted, and thus, implemented by signatories in very different ways. It is hard to measure effectiveness of the initiative as the principles provide very broad guidance as regards their implementation.²³⁸ Indeed, the SSNP are based on generic guidelines and suggestions rather than predetermined requirements. The experts evaluating the SSNP must restrain from any criticism to companies as only the points of improvement are accepted.²³⁹ In addition to this, the evaluation reports do not have follow-ups, which would allow reviewing and improving the initiative.

Second, it appears that the results of independent assessment rounds are of little assistance while measuring the effectiveness of the SSNP for the following three reasons. First, they are subject to subjectivity as findings of the assessment depend on the type of methodology that is invoked. As Donoso noted, following certain methodology "some companies will score better than others, though this might not mean that they implement the SSNP principles in a better way".²⁴⁰ Second, two assessment rounds were based on "slightly different methodologies", therefore, the findings of the reports cannot be compared.²⁴¹ Certainly, this is a drawback of the current assessment strategy as it does not allow to point out trends and changes that took place over the period of two years. Third, the assessment rounds are limited to verifying self-declarations and testing websites; they do not assess the impact that the initiative has on children's online safety.²⁴²

Third, it appears that the only "punishment" for a noncompliance with the SSNP takes form of a press release. Press releases are tools of a crucial importance to the initiative as they allow to publicise companies with the lowest compliance level of the SSNP or one of its principles. It should be noted that, the EC makes use of press releases and sets an alarming tone regarding the implementation of the initiative. To name but a few titles: "European Commission calls on social networking companies to improve child safety policies", "Digital

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

Agenda: social networks can do much more to protect minors' privacy", "Digital Agenda: only two social networking sites protect privacy of minors' profiles by default". These press releases are not only meant to shame "free-riders" of the initiative, they also present the EC's opinion formed on the basis of the published reports. This opinion usually is rather positive as reports tend to express positive attitude to the initiative. Provided this, it can be concluded that, on the one hand, the initiative lacks incentives to follow one's commitment, but on the other hand, this "alarming tone" public relation strategy falls in line with the rationale of the EU governance. The EC does not have competence to award fines or start infringement procedures in relation to the implementation of this initiative. In this regard, public statements are the only measures that are in compliance with the fundamental principles of good governance, namely subsidiarity and proportionality set forth in Article 5 of the TEU.²⁴³

Provided these observations, the evaluation of the SSNP effectiveness is not possible. For this reasons, it can be concluded that the initiative is valuable only to the extent it contributes to the public debate on children's online safety.

4.3.4 The SSNP's relation to Directive 95/46/EC

In the context of this thesis, Principles 3 and 6 of the SSNP are the most important ones. Principle 3 invites the ISPs to develop tools and technology, which would empower users (children) to manage their online experiences, by minimizing exposure to undesirable content or conduct.²⁴⁴ Apart from the explicit reference to technology, this principle does not suggest any specific measure. Therefore, it can be regarded of a generic nature, whereas Principle 6 seem to put forward more tangible suggestions. This Principle seeks to "enable and encourage users to employ a safe approach to personal information and privacy".²⁴⁵ Following the guidance of this principle, the ISPs "should provide a range of privacy setting options with supporting information that encourages users to make informed decisions about the information they post online".²⁴⁶ Additionally, "providers should consider the implications of automatically mapping information provided during registration onto profiles, make users aware when this happens, and should consider allowing them to edit and make public/private that information where appropriate".²⁴⁷ And finally, "users should be able to view their privacy status or settings at any given time".²⁴⁸

Although there is no literature discussing the link between the SSNP and the DPD, provided the content of the guiding statements, it is possible to claim that the SSNP, in particular, Principle 6, fall within the scope of the EU legal framework protecting personal data. For example, it can be argued that the requirement for providers to develop "privacy setting

²⁴³ (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

²⁴⁴ (2009) "Safer Social Networking Principles for the EU", from http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf P. 7.

²⁴⁵ Ibid. P. 9.

²⁴⁶ Ibid. P. 9.

²⁴⁷ Ibid. P. 9.

²⁴⁸ Ibid. P. 9.

options with supporting information” relate to the criteria for making data processing legitimate, which is foreseen in Articles 7 and 8 of the DPD.²⁴⁹ Following the DPD, the user’s data will be object of the legitimate processing, only if the user has given “an unambiguous”, or in cases of processing of sensitive data, an “explicit consent”.²⁵⁰ Furthermore, in any case of data collection, the providers are obliged to offer information, which would ensure data’s subject so called “informed choice”. This obligation is embedded in Article 10 of the DPD, according to which “the controller [...] must provide a data subject [...] with [...] (a) the identity of the controller and of his representative, if any; (b) the purposes of the processing for which the data are intended; (c) any further information such as the recipients or categories of recipients of the data; whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply; the existence of the right of access to and the right to rectify the data concerning him”.²⁵¹ In the online context, Article 10 can be regarded as an important provision as it notes that “further information” might be needed in “the specific circumstances”.²⁵² Following this article, more information about consequences that arise from uploading personal data online may be required, as the online or social media applications can refer to specific circumstances. Additionally, it can be argued that the remark about editing personal information relates to Article 6d of the DPD, which announces that personal data must be “accurate and, [and] where necessary, kept up to date, [...] erased or rectified”.²⁵³ Finally, it can be claimed that the SSNP confirm the importance of data subject’s right to access personal information “without constraint at reasonable intervals and without excessive delay or expense”, as it is set forth in Article 12 of the DPD.²⁵⁴

As the proposed argumentation is not based on any credible literature sources, proving the existence of the direct link between the SSNP and the current EU legal framework protecting personal data, it should be perceived with caution. This link might be accidental as the SSNP might be an expression of a common-sense, which is undeniably affected by the legal framework.

4.4 The Coalition to make the Internet a better place for kids

4.4.1 The background of the CEO Coalition

The Coalition to make the Internet a better place for kids (CEO Coalition) was developed in 2011 as a response to the situation, where the existing self-regulation has not delivered satisfying results. According to the EC, the CEO Coalition is defined as “a cooperative

²⁴⁹ (1995) "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data " L 281 L 281

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

voluntary intervention designed to respond to emerging challenges arising from the diverse ways in which young Europeans go online”.²⁵⁵ The CEO Coalition presents the second initiative, which addresses children’s privacy and data protection issues in the European context. Again, children’s privacy and data protection are not the ultimate goals of this initiative. Following the official statement of purpose, the CEO Coalition aims “to be part of the contribution to make the Internet a better place for kids”.²⁵⁶ The list of signatories to the CEO Coalition overlaps with the list of signatories to the SSNP. Yet this should not be seen as a problem as these initiatives are “complementary in the sense that the CEO Coalition “provides a long-term roadmap and have a more general approach”,²⁵⁷ and thus, participation in both initiatives does not oppose each other. The stakeholders of the CEO Coalition include NGOs, civic society groups, interested parties, software, and hardware developers.

4.4.2 The Functioning of the CEO Coalition

Annex III includes a visual representation of the way the CEO Coalition is designed to function. Following this scheme, it appears that the CEO Coalition is a more complicated self-regulatory arrangement than the SSNP. The communication of this initiative may follow in different ways, whereas the communication in the SSNP follows only one direction. Five action plans, namely “simple and robust reporting tools for users; age-appropriate privacy settings; wider use of content classification; wider availability and use of parental control; effective takedown of child abuse material” constitute the core of the Coalition’s functioning.²⁵⁸

Stakeholders' participation and feedback during the process are the essential features of the CEO Coalition. In order to ensure that these features are not only declaratory statements, the functioning of the CEO Coalition is based on different types of meetings, such as “meetings of companies, meetings of business sector and the EC, and meetings, which are open for all interested parties”.²⁵⁹ In comparison with the SSNP, the CEO Coalition introduces a realistic approach to the online environment as in its statement of purpose, the Coalition has declared that it will seek to achieve “proportionate and pragmatic solutions to real problems”.²⁶⁰ The novelty of this self-regulatory initiative is that it proposes to form separate working groups,

²⁵⁵ The EC (2012) "Self regulation: responsible stakeholders for a safer Internet" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/self_reg/index_en.htm.

²⁵⁶ The CEO Coalition (2011) "Coalition to make the Internet a better place for kids: statement purpose" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf.

²⁵⁷ Based on the letter received from the Safer Internet Team. For more info see Annex II.

²⁵⁸ The CEO Coalition (2011) "Coalition to make the Internet a better place for kids: statement purpose" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf. P. 2.

²⁵⁹ Annex I.

²⁶⁰ The CEO Coalition (2011) "Coalition to make the Internet a better place for kids: statement purpose" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf. P. 2.

which would address specific issues, and which would be open to the third interested parties representing civil society, public or private sectors.²⁶¹ It is foreseen that the initiative will function on clearly defined goals, will measure performance on established benchmarks and will seek for feedback.²⁶²

If one compares the way that the SSNP (Scheme 1, Annex III) and the CEO Coalition (Scheme 2, Annex III) are meant to be functioning, it appears that the CEO Coalition is a more promising project.²⁶³ The functioning of the CEO Coalition is not only schematically more complicated, but also, it is based on the continuous process, which is open to public and interested third parties, and which is developed and can be improved based on feedback. Following the proposed way of functioning, each initiative, which will be developed under the separate objectives of the CEO Coalition. Moreover, each initiative will target a specific goal, which following the view point of Coglianesse and Medelson, can ensure effectiveness of the self-regulatory initiative. The attention of the EU institutions, such as the EC and the EDPS, also adds a great weight of the CEO Coalition (see 4.7 and 4.8).

4.4.3 The effectiveness of the CEO Coalition

Given the context of the thesis, the output of the working group on the creation of age-appropriate privacy settings of the CEO Coalition should be reviewed. This group has already developed “a comprehensive and comparative database” that reveals the current practices of privacy settings by content providers, game platforms, social networks, hardware manufacturers, software manufacturers, and network operators.²⁶⁴ Following the progress report statement, this database can be of assistance for caregivers and children while choosing a service provider.²⁶⁵

The working group functions on a clearly defined scope. The scope of this working group is based on the answers to a written questionnaire, which was spread to the members of the CEO Coalition and interested third parties. Noteworthy, the answers submitted by the industry and NGOs as regards the scope of the working group were in collision and showed tension between the industry and the NGOs positions. Hopefully, this tension will extend the scope of the working group and lead to productive work and tangible results. According to Donoso, this working group focuses on developing technological solutions and leaves privacy and data protection concerns aside.²⁶⁶ As this group is technology orientated, it tends to

²⁶¹ Ibid. P. 3.

²⁶² Ibid. P. 3.

²⁶³ Schemes are available in Annex III.

²⁶⁴ The CEO Coalition (2012) "WG2:Age Appropriate Privacy Settings: Progress Report" Retrieved 2012 07 30, from

http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/privacy_progress_report.pdf.

²⁶⁵ Ibid.

²⁶⁶ Annex I.

produce output faster than other groups addressing more complex issues, such as classification of the online content.²⁶⁷

4.5 Background and functioning of the ICT principles

The Principles for the Safer Use of Connected Devices and Online Services by Children and Young People, abbreviated as the ICT principles, were developed in 2012. The development of this initiative is also meant to be a response to the situation, where the existing self-regulation has not delivered satisfying results.²⁶⁸ The ICT principles present the third initiative, which addresses children's privacy and data protection issues in the European context. Time and again, children's privacy and data protection are not the ultimate goals of this initiative. Following the official statement, the ICT principles have an objective "to ensure that children and young people obtain the greatest benefit from new technologies, while avoiding the challenges and risks which are of concern to people worldwide".²⁶⁹ Provided this, it can be concluded that children's privacy and data protection are placed within the goal to improve safety of the online environment for children.

The ICT Principles are based on the six aspects of the Internet use, namely harmful, offensive or unwanted content, parental controls, abuse or misuse of technology, child sexual abuse content or illegal contact, digital literacy and awareness, and privacy.²⁷⁰ This initiative, as well as the CEO Coalition, provides guidance for the further self-regulatory developments. The part discussing the implementation of the principles obliges each company (or group of companies) within 6 months to present a draft document, which would present objective to be attained, and benchmarks, which would allow monitoring proper implementation.²⁷¹ Companies, which are signatories to this initiative, are obliged to report on their progress of their working groups in 18 months.²⁷² In comparison with other initiatives, the ICT Principles go one step further as it foresees negative implications, namely the exclusion of the ICT Principles, for a party, which is reluctant to act in compliance with the ICT principles.²⁷³

²⁶⁷ Ibid.

²⁶⁸ The ICT Coalition (2011) "Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU" Retrieved 2012 07 30, from http://www.gsma-documents.com/safer_mobile/ICT_Principles.pdf. P. 2.

²⁶⁹ The ICT Coalition (2012) "Companies unite to launch the first industry-led Europe-wide principles to enhance online safety for children" Retrieved 2012 07 30, from <http://www.teliasonera.com/PageFiles/21045/ICT%20Coalition%20press%20release%2019-01-2012.pdf>.

²⁷⁰ The ICT Coalition (2011) "Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU" Retrieved 2012 07 30, from http://www.gsma-documents.com/safer_mobile/ICT_Principles.pdf. Pp. 4-7.

²⁷¹ Ibid. P. 8.

²⁷² Ibid. P. 8.

²⁷³ Ibid. P. 8.

This initiative was signed by 25 world's wide-known, regional and local ICT companies.²⁷⁴ The list of signatories to the ICT Principles overlaps with the list of signatories to the SSNP and the CEO Coalition. Provided that the ICT Principles and the CEO Coalition have almost alike scope and are developed in parallel, the ICT Principles, as a purely industry driven initiative, has suspended its activities in order to avoid overlapping work of its signatories.

4.6 The link between the SSNP, the CEO Coalition, the ICT Principles, and the legal framework for privacy and data protection

Privacy theme is strongly embedded within the three analysed self-regulatory initiatives; it is addressed by the CEO Coalition, the ICT Principles and the SSNP. However, only the ICT Principles have made a clear link between the end goals of the initiative and the existing legal framework. In particular, the initiative proclaims that signatories while attaining intended goals should “comply with existing data protection and advertising rules and privacy rights as set out in the relevant legal dispositions”.²⁷⁵ The ICT Principles also encourage to “take steps, where appropriate and in accordance with legal obligations, to raise user awareness of different privacy controls enabled by services or devices and enable users to use these as appropriate”.²⁷⁶ To the extent that providers should offer “a range of privacy setting options that encourage parents, children and young people to make informed decisions about their use of the service and the information they post and share with others online”, the ICT principles seem to reiterate the SSNP.²⁷⁷ Yet the ICT principles have a wider scope and tend to be more specific in privacy matters. For example, they include categories of parents and young people, and acknowledge the existence of different age groups, and thus, propose age-appropriate privacy settings, which would be “easy to understand, prominently placed, user friendly and accessible”.²⁷⁸ In addition to this, the ICT principles include the need to “raise awareness among all parties, service, content, technology and application providers, including public bodies, of industry good practice in relation to the protection of children and young people online”, which under the SSNP was standing as an independent principle, and thus, its importance and relation to privacy matters was not that directly obvious.

4.7 The Communication of 2012 sets incentives to act

²⁷⁴ The ICT Coalition (2012) "Companies unite to launch the first industry-led Europe-wide principles to enhance online safety for children" Retrieved 2012 07 30, from <http://www.teliasonera.com/PageFiles/21045/ICT%20Coalition%20press%20release%2019-01-2012.pdf>. P.1.

²⁷⁵ The ICT Coalition (2011) "Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU" Retrieved 2012 07 30, from http://www.gsma-documents.com/safer_mobile/ICT_Principles.pdf. Pp. 6-7.

²⁷⁶ Ibid. Pp. 6-7.

²⁷⁷ Ibid. P. 7.

²⁷⁸ Ibid. P. 7.

The EC has recently published the Communication on European Strategy for a Better Internet for Children (Communication or Communication of 2012). It is believed, that this Communication marks a new stage of the EU policy for the online environment.²⁷⁹ As it appears from the wording of the title, the EC has decided to follow a realistic approach and “just” improve the Internet. This Communication is built on four pillars and seeks to point out new opportunities for business and children.²⁸⁰ The pillar focusing on a safe online environment for children is of a great relevance to the topic of this thesis. The Communication, while discussing this pillar, highlights the ever increasing need of a safe online environment for children. It recognises the importance and efforts of the industry to improve online safety, yet at the same time, it notes that market players, though taking part in a number of self-regulatory arrangements, so far have failed to deliver effective protection measures.²⁸¹ In particular, the Communication draws attention to the fact that situation within this pillar can be improved only, if privacy and data protection concerns are taken into account.

This Communication, though is a soft-law instrument, it leads to several tangible policy implications. First, this Communication clarifies the EU competence to act within the field of children’s online safety. Following the Communication, the EU competence to act in this field aligns the EU policy as established in the EU Agenda for the Rights of the Child, the Digital Agenda for Europe and Key priorities of the EU e-skills strategy.²⁸² Second, the Communication, calls for a coherent framework reducing the current fragmentation of the frameworks addressing children's online safety, privacy and data protection. The Communication emphasizes that “so far [EU policies] have not sufficiently recognized that children constitute a specific target audience for the Internet, requiring a new eco-system to support its needs”.²⁸³ Following the EC’s suggestion to develop a coherent framework, preventing market fragmentation, should be based on a strategy, which would “combine a series of instruments based around legislation, self-regulation and financial support”.²⁸⁴ This suggestion seems to be in compliance with the CEO Coalition’s vision.²⁸⁵ Third, the Communication threatens signatories of all self-regulatory initiatives. The Communication notes that self-regulation is a preferable regulatory option as long as it is “a dynamic process that responds to new challenges such as technology convergence and which provides appropriate mechanisms for benchmarking and independent monitoring”.²⁸⁶ That is to say,

²⁷⁹ Annex I.

²⁸⁰ 1) Stimulating quality content online for young people; 2) Stepping up awareness and empowerment; 3) Creating a safe environment for children online; and 4) Fighting against child sexual abuse and child sexual exploitation.

²⁸¹ The EC (2012) "The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Strategy for a Better Internet for Children", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>. P. 4.

²⁸² Ibid. P. 2.

²⁸³ Ibid. P. 6.

²⁸⁴ Ibid. P. 6.

²⁸⁵ The CEO Coalition seeks to be a party contributing to the improvement of children's online safety.

²⁸⁶ The EC (2012) "The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of

that the EC is ready to initiate legislative process and develop legally binding measures, if private parties fail to bring tangible improvements within the field of online safety in a fixed period.²⁸⁷ For example, in relation to the creation of age-appropriate privacy settings, the EC demands to see the first results by the end of 2012 and full implementation within 18 months.²⁸⁸ Provided this, it can be concluded that the Communication serves as a measure enhancing effectiveness of self-regulatory initiatives, which address children's online privacy and safety; it creates a realistic pressure, and thus, incentives for private companies to follow their voluntary commitments.²⁸⁹

4.8 The EDPS opinion on the Communication of 2012

The European Data Protection Supervisor (EDPS), which many times is referred to as the European watchdog for privacy and data protection matters, used a power awarded by Regulation 45/2001/EC and expressed his position in the opinion on European Strategy for a Better Internet for Children.²⁹⁰ The EDPS "in view of the importance of the subject" to privacy and personal data, found it necessary to provide his opinion and in this way contribute to the shaping of the EU policy.²⁹¹ This opinion "supports the Communication's initiatives to make the Internet safer for children", and, in particular, "welcomes the recognition of data protection as a key element for ensuring the protection of children on the Internet and for empowering them to enjoy its benefits in safety".²⁹²

The EDPS opinion is of an added value to the debate on children's online safety. It defines specific risks related to data protection that children are exposed to in the online environment, namely, "misuse of their personal data, the unwanted dissemination of their personal profile on social networking sites, their growing use of geo-location services, their being increasingly directly subject to advertising campaigns and to serious crimes such as child abuse".²⁹³ According to the EDPS, in order to be tackled these issues "must be addressed in a

the Regions - European Strategy for a Better Internet for Children", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>. P. 2.

²⁸⁷ Fox, B. (2012) "Child-proof the Internet or face regulation warns EU Commission", from <http://euobserver.com/creative/116126>.

²⁸⁸ The EC (2012) Communication on the European Strategy for a Better Internet for Children **196 final** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>. P. 17.

²⁸⁹ The list of measures enhancing effectiveness of the self-regulatory initiatives can be found in section 3.5.

²⁹⁰ The EDPS (2012) Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "European Strategy for a Better Internet for Children" http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf. P. 1.

²⁹¹ Ibid. P. 1.

²⁹² The EDPS (2012) Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "European Strategy for a Better Internet for Children" http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf. P. 14.

²⁹³ Ibid. P. 2.

manner appropriate to the specificity and vulnerability of the category of individuals at risk”.²⁹⁴ That is to say, the EDPS supports and strengthens the EC's position claiming the need to develop age-appropriate privacy measures.

Yet, the most important and added value contribution of this opinion is that it foresees “specific means which can help enhance the protection and safety of children online from a data protection perspective” and places the communication in the framework of the proposed General Data Protection Regulation.²⁹⁵ In particular, the EDPS suggests that awareness raising, educational circular including lessons on the Internet safety, age verification tools, messages informing about possible consequences of changes in privacy default settings and special default privacy setting for children, are the measures which could improve children’s online safety. The EDPS asserts that the proposed General Data Protection Regulation, if implemented, “would benefit [children] from [their] specific recognition” as the requirements, which initially have been set in self-regulatory measures, would become legally binding.²⁹⁶ For example, the SSNP and the ICT principles require provides to offer information related to privacy setting options in way it is accessible for both children and caregivers.²⁹⁷ Yet the ISPs would adhere to this requirement better, if this requirement is legally binding. Furthermore, following provisions of the proposed General Data Protection Regulation, the industry would be obliged to adjust its services, in a way that data processing is in compliance with special requirements to process data, meaning parental consent, and that personal data upon the request of a data subject can be deleted.²⁹⁸

However, the EDPS, as it could be expected from the data protection authority, provides criticism to the EC’s preference for self-regulation as regards the matters of online safety as they relate to the fundamental rights of privacy and data protection. The EDPS calls for caution of this approach as it has been found that one of self-regulatory initiatives, namely the EASA’s Best Practice Recommendation on Online Behavioral Advertising, was infringing the EU data protection legal framework.²⁹⁹ Given this finding, the EDPS is of an opinion “that the Commission should provide stronger encouragement to industry to develop privacy friendly self-regulatory measures at the EU-level promoting good practices with respect to online advertising to children, which should be based on full compliance with

²⁹⁴ Ibid. P. 2.

²⁹⁵ Ibid. P. 3.

²⁹⁶ Ibid. P. 4.

²⁹⁷ (2011) "Principles for the safer use of connected devices and on-line services by children and young people", from <http://www.teliasonera.com/PageFiles/21045/ICTPrinciples.pdf>. P. 7. (2009) "Safer Social Networking Principles for the EU", from http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf P. 13.

²⁹⁸ The EDPS (2012) Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "European Strategy for a Better Internet for Children" http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf. P. 4.

²⁹⁹ Ibid. P. 10.

relevant legislation as the baseline”.³⁰⁰ Thus, the EDPS applauds the EC’s determination to develop legislative measures.³⁰¹

4.9 Conclusion

This chapter analyzed the SSNP, the CEO Coalition and the ICT principles, which are the only three European self-regulatory initiatives addressing children’s online privacy and data protection concerns. Noteworthy, all initiatives place privacy and data protection concerns under the scope of the safer online environment for children.

While considering the effectiveness of the SSNP, the chapter found out three reasons, which allowed to conclude that evaluation of the SSNP effectiveness and tangible contribution to children’s privacy and data protection is impossible. Provided this, it was concluded that the SSNP are valuable only to the extent they contribute to the public debate on the issue at stake. The chapter identified the provisions of the DPD, which could possibly lead to the conclusion that the SSNP are developed in accordance with the EU legal framework for data protection. Yet, this conclusion should be perceived in cautious way as it is not confirmed by any academic sources.

Subsequently, the chapter introduced the CEO coalition, which is led by the EC, and the ICT Principles, which are driven by industry. The chapter found that privacy theme is strongly embedded within these two self-regulatory arrangements as it is addressed in the purpose statement of the CEO Coalition as well as in the ICT Principles. The chapter found that the CEO Coalition and the ICT Principles can be effective as each measure developed under these initiatives will target a specific goal. Following the position of Coglianese and Medelson, this specificity can ensure effectiveness of the initiative. The chapter indicated that the functioning of two initiatives is based on active participation of the stakeholders and different types of meetings.

The chapter found out that the ICT Principles form the only initiative, which establishes a clear link between the end goals to be attained and the current legal framework governing privacy and data protection. The chapter suggested that although the ICT principles to some extent reiterate the SSNP, the ICT principles have a wider scope and tend to be more specific in privacy matters. The chapter established that the ICT Principles initiative goes one step further than the SSNP and the CEO Coalition, as it foresees member’s exclusion, if it is reluctant to act in compliance with the ICT principles. Despite the innovations that the ICT Principles have brought, the work of this initiative was stopped as most of the signatories to this initiative take part in the CEO Coalition.

Finally, the chapter proved that the use of self-regulation in order to address children’s privacy and data protection becomes a more relevant topic. It draws attention of the EC and the EDPS and causes a slight tension between the two EU institutions. The EDPS, in order to

³⁰⁰ Ibid. P. 10.

³⁰¹ Ibid. P. 10.

ensure fundamental rights is in a support of stronger measures than obligations occurring from the voluntarily commitments, whereas the EC continues to support self-regulation. The following chapter will summarize the main findings of the thesis.

5 Chapter

Conclusion

5.1 Chapter overview

The final chapter of the thesis has three goals. First, it seeks to summarize the main findings of each chapter. Second, it aims at discussing findings in relation to the central question, which examines the extent to which self-regulation adopted on the EU level can ensure children's online privacy and data protection. Third, the chapter discusses limitations of the findings and suggests topics for future research.

5.2 A summary of the main findings

The legal framework addressing children's rights in the EU is a complex subject because of the inherently layered EU governance system, which is embedded in Article 6 of the TEU. The legal framework surrounding children combines measures developed on the international, domestic and the EU levels. This consequently makes it hard to address issues related to children in a coherent manner. It is suggested that children's privacy and personal data protection is a challenging topic because it merges complexity of different fields. This topic includes issues originating in the field of children's rights and problems inherent to the protection of privacy and data protection. It is asserted that the children's rights are gaining a momentum within the EU legal order as of the enforcement of the Lisbon Treaty, which for the first time in EU history, has included children's rights among the EU objectives.

In addition to this, it has been established that the legal framework, consisting of the DPD and the DPEC, is applicable to children and adults alike. However, this framework is believed to be of a lesser importance for children as they lack capacity to recognize cases of personal data processing, abuse and legal autonomy to impose their rights. Furthermore, this legal framework securing children's online privacy and data protection is in a way set aside with the Safer Internet Program, which fosters the development of self-regulatory initiatives in relation to these problems.

As regards the preference for self-regulation in matters related to the online environment, four reasons, which possibly have determined the current EU policy approach, were pointed out. It was suggested that the initial form of the Internet governance, policy documents developed in the 90's, legal framework and contextual circumstances have determined the preference for self-regulation as a mode dealing with online issues. Following the rationale of these reasons, it comes by no surprise that self-regulation was found to be a proper regulatory tool to address issues arising in the online environment, such as children's online privacy and

data protection matters. Yet this finding has been deemed to be a very controversial point as provided the Interinstitutional Agreement, self-regulation should not be used in order to address fundamental rights.

This thesis makes an important contribution to the discussion on the use of self-regulation as it introduces a list of features which could possibly ensure effectiveness of a self-regulatory initiative. In particular, it suggests that homogenous and interconnected participants, specific target and objective of self-regulation and constant pressure from the legislative bodies' side to enact legally bounding measures are the key aspects, which can enhance effectiveness of self-regulation. In addition to this, it is observed that traditional criticism, which is based on typical requirements for legislative measures, does not provide an adequate assessment of self-regulatory initiatives, and for this reason, a separate assessment methodology should be developed specifically addressing self-regulatory arrangements. It is suggested that cooperation between industry and legislative bodies could benefit both sides as public authority would protect public interests and private parties could develop "workable" measures.

The SSNP, the CEO Coalition and the ICT principles are considered to be the only three self-regulatory initiatives on the EU level, which address children's online privacy and data protection concerns. It was established that privacy theme is strongly embedded within these self-regulatory arrangements, yet this theme is placed under the umbrella goal - to improve children's online safety. It is suggested that the design of the CEO Coalition as the ICT Principles is innovative and may ensure better functioning of self-regulatory measures. The importance of self-regulation to the EU governance is proven in Communication of 2012, in which the EC notes that industry plays a crucial role while developing policy measures for the online environment.

5.3 The final message

The main goal of the thesis was to examine the extent to which self-regulation adopted on the EU level can ensure children's online privacy and data protection. Yet it appears from the summary of the main research findings that, thus far, this is an unattainable objective because the effectiveness of three self-regulatory initiatives has not been defined. First, it was found that effectiveness of the SSNP cannot be measured as the assessment rounds are limited to verification of self-declarations and testing of websites. The assessment rounds do not measure the impact that the initiative has on children's online safety or privacy. Furthermore, it was found that the findings of two assessment rounds are of a little assistance as they do not allow conducting comparisons. Second, the CEO Coalition has been established less than a year ago, and thus, it is too early to evaluate this initiative. Finally, the movement of the ICT Principles was flagged down, and thus, the effectiveness also cannot be measured. Based on these findings, the central research question cannot be answered.

However, it is reasonable to believe that self-regulation can help to enhance children's online privacy and data protection because of the following reasons. First, as it is seen in the framework of the CEO Coalition, the stakeholders actively participate in self-regulation, and thus, adhere to voluntarily commitments, if they feel impact and support of their effort. Second, the ICT Principles show that self-regulation, if it is developed in accordance with the legal framework, is supported by industry. Third, despite that self-regulatory measure cannot be challenged in the ECJ, it can help to achieve balance between private and public interests. The working group on age-appropriate privacy settings of the CEO Coalition proves that participation of diverse stakeholders, which include the NGOs and civic society groups, may lead to balanced output of the initiative. Finally, the Communication 2012 allows to conclude, that the EC believes in self-regulation as a regulatory tool of good governance, which ensures representativeness of stakeholders and the plurality of interests.

5.4 Limitations of the thesis

The findings of this thesis are prone to certain limitations for the following reasons. First, this thesis, to a large extent, represents a desk research, and therefore, most of the findings are based on the available literature study. The findings of the literature include element of subjectivity as they are based on the author's personal interpretation. Second, the fourth chapter has addressed only three self-regulatory initiatives related to the online environment; more self-regulatory initiatives addressing children's online privacy and data concerns can be found on the global scale. Third, the addressed initiatives are relatively new developments, and thus, they are not addressed in recognised literature sources. Fourth, the structure and conclusions of the fourth chapter unavoidably include element of subjectivity as they are based on information gathered during the semi-structured interviews with Donoso. The fact that the same person was interviewed twice, also, increases the probability of subjective findings. Finally, the research and the findings of thesis are affected by the legal background of the author.

5.5 Possible topics for future research

Based on this research, several possible topics for future research can be pointed out.

- It was observed that over the time period of 5 years, the EU legislator's preference has shifted from national self-regulatory arrangements to the European ones. However, no reasons were found to explain this change. It would be interesting to consider what political developments might have had influence on this shift of preference.
- It was found that there is no sufficient empirical data on online privacy risks and threats to children. It might be speculated that because of the lack of research on these

topics, no coherent and adequate regulatory measures have been developed on the EU level. Social scientists could change this situation by means of empirical research.

- It was established that in the EU the scope of privacy is limited to the extent it relates to informational privacy and processing of personal data. Yet this interpretation has never been confirmed by the EU legislation or European data protection authorities. Also, it was found that no definitions are assigned to the concepts of privacy or online privacy in the EU. This reluctance to clarify and define privacy in the EU has led to the conceptual misunderstanding of privacy as a right, which could be re-established by means of legal (doctrinal) research.
- In the USA various certification programs, including data protection seals, are promoted in support to the use of self-regulatory initiatives, which are referred to as the safe harbor programs. It is worth to question, whether this arrangement can improve effectiveness of self-regulatory initiatives, addressing children's online privacy and data concerns, and whether this practise could be applied in the EU.
- It was observed that traditional criticism, which is based on typical requirements for legislative measures, does not provide an adequate assessment of self-regulatory initiatives. The author claims that a separate assessment methodology, which would specifically address self-regulatory arrangements, could be developed.
- The current assessment of the SSNP does not reflect on the real impact that this initiative has on children's online safety. This finding may provide rich opportunities for future research in the field of social sciences.
- No authoritative literature sources were found on the SSNP Principles, the CEO Coalition or the ICT Principles and their relation to the existing legal framework governing privacy and personal data protection. Only policy documents and personal opinions are available on this issue. Therefore, this might be a field for further and more in-depth research.

Annex I

Transcript of interviews with Dr. V. Donoso

Parties:

Interviewee: V. Donoso (V.D.)

Interviewer: L. Jasmontaité (L.J.)

Abbreviations:

The European Union - the EU

The Member States - the MS

The Safer Social Networking Principles- the SSNP

The interview transcript does not include introduction and closing parts of the interviews as they are of no relevance to the thesis.

Interview I

Place: Leuven University

Date: 7 July, 2011

Time: 58 min.

L.J. What do you think about the debate on children's online safety? What is missing and what is neglected? What are the issues that are not addressed or addressed in a wrong way? Do you envision any solution regarding the problem in question?

V. D. This is a very interesting and difficult question. I think this is a necessary debate and this is something that we should be debating more. There are many stakeholders involved at many different levels; therefore, at the end of the day, it is important to take into consideration everyone's views. I think that there is something missing. For example, as you saw yourself, at the Digital Agenda Assembly the most important stakeholders were represented; they take part in these meetings. However, it is not that they initiate their participation; they are basically invited by the Commission to attend several meetings or forums per year. Yet there is no real platform for all stakeholders to work together or to listen

to each other. As you saw, we had some time, we had a nice workshop, but when the time is so limited, there is no time to listen to each or to talk thoroughly. It is intimidating for adolescents and for academics to talk in front of the representatives of private actors, as well as for the industry side it is hard to communicate with academics because of the stereotypes that are widely accepted. The industry side is thinking that they know about the problems in question better because they deal with real people while running their daily tasks, whereas academics are thinking that the industry side is interested only in profits. Therefore, there are a lot of issues in this debate about the internet safety of having stakeholders apart. This separation leads to the lack of real communication, not meaning those artificial one-morning meetings twice a year, but real work together. I have seen some companies trying to make an effort and sending their personal to schools or various institutions to talk with people about the threats that the Internet brings and how to protect children, but this is not enough. Apart from having an instance for communication and indentifying the problems, the other big problem is developing intervention programs that can help children to tackle and deal with risks. Obviously, as the pace that technology is developing it is hard to be ahead, but the field is pretty much covered as most of the risks have been already identified. There is enough scientific and reliable knowledge, but then, there is a big gap as none takes responsibility to act.

L. J. Could you please elaborate what do you mean by intervention programs?

V. D. For example, let's take a concrete case with cyber bullying. Of course, there is a lot of overlap between bullying and cyber bullying. Most of the schools have developed specific policies how to deal with cases of traditional bullying. Everyone is aware of his/her role. Children know that, if someone beats them, they should go to the head of the class, school or psychologist and talk about that; by the help of adults they will develop a strategy how to deal with a certain case. For example, they might develop a strategy how to prove empathy of a child, as it is scientifically proven that, if children are more empathetic, they bully other less and other way around. Basically, in the cases of traditional bullying specific programs are chosen in order to develop certain skills. The same happens in cyber bullying cases to a far lesser extent. Teachers at school are not aware and sometimes do not have skills enabling them to deal with problems that occur online, meaning that they cannot look for a solution. Therefore, I think there is lack of knowledge of people – care-givers, meaning teachers and parents, who traditionally deal with those problems. In the contemporary world of online technologies, we have a lot of parents who are not aware or do not manage technologies very

well. It is hard for parents to help their children to tackle cyber problems because sometimes they are not aware of the existing technologies. Thus, I think concrete measures, materials, and actions at school or at the community level could be established. As I am concerned, there are initiatives, but then, they are not centralized, they are scattered. There are some NGOs and schools which are trying to contribute to the creation of the safer internet, but then there are other schools, which follow do-nothing policy. Even the police forces are dealing with cyber crimes differently depending on the country. There is no tendency towards safety, as at the moment, there is no policy on the Internet safety in place.

L. J. Do you think it should be done on the EU level or the MS should find adequate solutions for their specific situations?

V. D. I think that the general guidelines could be set on the European level. It would enhance the importance of the issue, if the EU takes the lead. However, there should be enough space for countries to adapt these general guidelines in a way that reflects specificity of each MS because even with one country the situation regarding the online safety might vary depending on the region. For example, some schools are advancing the topic more than others; some members of the society are very skilled internet users whereas many are not. So, the creation of general guidelines on the EU level is welcome, they would give an incentive to act. However, the formulation of those rules is a very hard task. What does it mean e-safety? (*Rhetorically*)

L. J. Indeed, it seems that definitions constitute the trickiest part. There is no definition of children's online safety or children's safety, although everyone debates about it.

V. D. Indeed, it is an issue. The definition of safety changes according to the one, who is talking. We assume the safety is minimized risks, but this is a common definition, without any real parameters to measure it. What is the standard to measure and determine that one child is safer than the other child?

L. J. Yes, it is a tremendous task. Following among the same lines, I would like to ask you, what should be the role of the European Commission in this debate?

V. D. The problem in question touches upon a very sensitive political ground, thus, the Commission plays very safe. Anything that is said by the Commission has a very big social impact on all levels of the society. I believe that the main role of the Commission is to enable a dialogue among the stakeholders; only afterwards comes the determination of the things

that should be done. I think it is very important that they create real platforms that could foster the dialogue among various parties. Additionally, I think the Commission should continue supporting various self-regulatory initiatives because otherwise companies will be left aside and they will be able to act at their own discretion. The Commission as a key player on the EU should assume the greater burden for itself as not all the MS have enacted specific laws regarding the online safety, especially in the relation to the protection of children's safety, although children are exposed to higher risks and they are more vulnerable than other groups because they do not identify the threats that await for them.

L. J. This is a very interesting opinion. Being a social scientist you should see the difference between lawyers and sociologists while approaching the issue in question. What are the particular aspects of children's online safety that should be addressed by sociologists and what should be left for lawyers to resolve? Do two groups understand each other?

V. D. I think the boundaries between legal and sociological aspects are very blurred. Moreover, this relationship depends on each country's legal system. For example, laws regarding privacy requirements, freedom of expression, or how to deal with information provided by users on online surveys differ a lot. There are countries without laws regulating those issues.

L. J. And what about the directives setting the minimum requirements for the common 'play ground'?

V. D. Yes, there are directives. I am not that well acquainted with them. However, in general I think, that instead of dividing the tasks that one should do, the sociologists should be in a position to inform lawyers and legal experts about the findings of their research, whereas lawyers should inform social scientists about intellectual property rights and other legal issues. I am certain that interaction between two is very important in order to make righteous decisions and create laws that protect children. However, I myself know only one lawyer working on the intellectual property rights. Of course, there are people specializing in the criminal law matters of the cyberspace. It is amazing to see how our perspectives differ as they look only into the legal acts. However, on the cyberspace there are a lot matters that are not considered as crimes, such as cyber bullying. But then, what does happen when a child commits a suicide because of being a victim of cyber bullying? In this case, it is difficult to draw a distinguishing line between legal and social aspects; it becomes difficult to determine liability. I sometimes think that it is an unnecessary distinction as some of the issues are

penetrating both fields at the same time. Let's think about the other example. What does happen to your data provided on the websites? There are services where you cannot delete your profile, if you have made one. This means that they will own your information forever. Is this legal? I do not know. Should it be legal? Probably not, and this is what lawyers should tackle by the means of legal measures. So, the sociologists should share the information in the field with lawyers. Finally, I think it is a good match, which could ensure the protection of all citizens, not only children.

L. J. Now I would like to go back to the topic of self-regulatory initiatives. Do you think a self-regulatory initiative is a proper tool to tackle the problem?

V. D. I myself, I do not know, if it is a good or the best measure. I think that because of the political reasons, self-regulation is the only way that has been accepted by all partners. I think that big companies would not like to be regulated from outside. However, self-regulation, if it is not assessed, or if it is not evaluated externally, it does not make any sense. Companies while opting for self-regulation expect to preserve their freedom in decision making, for example, what are the best things to do, according to the philosophy of the company, or their customers. Companies want to remain in power of determining their action. Thus, self-regulation to a certain extent is a good option because you have a variety services, customers, and people. Following this, companies have a right to decide what measures they should take, but the problem is finding out, if these measures are appropriate. This is impossible without any evaluation. So, self-regulation within the framework which is serious and independent, and well designed is O.K. to me. But if the evaluation part is missing, this kind of measure is useless. It becomes a nice way of saying 'We do what we want because it is our option to regulate ourselves and we do not want anyone to intervene into our internal matters'.

L. J. But isn't it what has happened with the Safer Social Networking Principles (SSNP)?

V. D. The problem with the SSNP firstly lays in a fact that they were designed by the companies and a few external people advising them. So basically, the SSNP are problematic because of the way they were drafted. As people, who drafted them, were not experts on the issue, it becomes difficult to evaluate those Principles or apply any methodology to measure the compliance with the rules. Compliance maybe is not a proper word, as there is a whole debate arguing that, if they are self-regulated, they are not legally liable. This means that you can assess, only if they are implementing measures well or not; you cannot establish any benchmark while assessing them in the way the principles were drafted. There are too many

open questions that are prescriptive and that are suggesting the best practices. If it is only a suggestion, someone from outside cannot say, ‘Well, you are not implementing this principle in a right way’. The party will answer you, ‘But this was only a suggestion and I (company) implement this in a different way and I am allowed to do that’. So once you are confronted with this kind of the answer, you realize that, if the principles are not properly drafted, a whole assessment afterwards is a contempt to evaluate something that has been wrong from its very beginning. Evaluation becomes very difficult and subjective.

L. J. So do you think that the revision of those Principles will enhance the quality of this self-regulatory measure?

V. D. Definitely, I think it is a key point in self-regulation, meaning any principles or guidelines, that after every evaluation, a regulatory measure should be reviewed because evaluation points out the weaknesses of the measure, which can be changed.

L. J. So what do think about self-reporting system set in the SSNP? Is it enough to tackle the problem? And finally, how to measure compliance?

V. D. Do you mean self-declarations?

L. J. Yes.

V. D. The process in the specific case of the SSNP is based on their structure. As you know, they consist of seven guidelines, and companies, which are committed to those principles, have to prepare self-declarations, in which they describe how they implement each of the principle. So basically, the companies declare to the world how good they implement the provisions related to children’s safety and this story usually does not reflect the reality of what they are actually doing. Furthermore, even if the reports include the real information, it is does not mean that this is the best what that company could do or the best approach towards online safety. I think the next step, which should be a part of any regulation, is **an independent assessment**. So this is basically that I want to show with my recent project in which I have developed a two-step methodology. The first step is to analyze those self-declarations in the relation to the guidelines, then, I question, whether the approach that has been taken is in favor for a particular principle, and whether the measures contribute to the implementation of the principles. Usually self-declarations are positive; therefore, at first glance it seems that companies are following their commitments duly. After this first step of the assessment is completed, we move on with actual testing of the websites. I have

developed several tests, which were applied by the different researches in the different parts of the EU. The researchers mostly had to create fake profiles of children, adults, and strangers, some of the researches were assigned tasks to pretend to be an adult, who wants to get in touch with children, or to create cases, for example, a case of a girl sending messages and asking for a help from a company to deal with bullying or unknown people. The companies were not aware of this testing system, and therefore, the results enabled us to see, whether the companies have followed their promises. Based on this exercise, we published evaluation report. The biggest issue that we found, which Neelie Kroes mentioned as well, was **the privacy by default**. We tested 14 websites and it appeared that only two of them keep the information of minors private, whereas if you look at the self-declarations you find written that the profiles of minors are private. There is no reason to think that companies are providing false statements in those declarations, they just use different concepts of privacy. The definition of ‘privacy’ that is provided in the principles sets higher standards than it was interpreted by the most of the companies. However, this situation stresses the obvious lack of clear definitions, such as privacy by default. Also, it is not clear who should be included in the accepted list of contacts. Who should be able to contact minors? For example, companies, such as Facebook, allowed friends of friends to contact minors and they did not realize that until we pointed this out. So the evaluation tests should not be seen as a critique but as a way to develop ideas how to improve their applications. As independent experts we are not allowed to make suggestions for a company, but we can point out problematic issues, which can be easily changed or resolved. Interestingly, the companies instead of changing something usually start defending themselves and deny the existing situation. Then, we have to send information proving things that have pointed out. For example, one company denied the existence of alcohol commercials, so we sent the data, meaning advertisements of alcohol, which we found on that website. This means that we have to work very carefully and preserve the evidence of all the information that we find.

L. J. The Internet deals with technological issues whereas cyber space and websites deal with content. Do you think there is a distinguishing line between two?

V. D. I think that it is a difficult distinction to make. The online technologies cannot be separated into content or format. This is exactly that makes them so interesting and so difficult at the same time. Even the very nature of content and the fact that it is hyperlinked makes it so different from the static sources of information, such as a book. Therefore, I think that content in itself and the way it is presented online are intertwined and not separated. It

deals with all types of formats, video and music files as well as self-generated content. So, this is not only the question of content. Certainly, we try to deal with it by questioning, whether it is enough that the company provides safety information on the bottom of the page in a tiny font or on the footer of the page adds a link to the safety information. Of course, then companies argue that they are compliant with guidelines as they have a button for *help* under which you can find *terms of use* and under this you can find *safety tips for children*. Then the question rises, whether it is enough to provide content, and in what way this content should be provided. I think that the content in the online environment should be provided in an accessible, interactive, attractive way for children and in a way it can be easily used and understood by parents. In general, information should be user friendly and findable, thus, I think that the question of safety has a lot to do with design mechanisms. The child in case of a problem, if s/he does not dare to talk about it with her/his parents, s/he should be able to deal with it online. I think that the content and the way the content is presented, is essential for children. Of course, children at different ages have different needs and they favor different things.

L. J. This is a very interesting point. Differentiation of age groups is what I am missing in the current debate on the online safety.

V. D. This is a very important issue. We paid a lot of attention to that while conducting evaluation tests. We asked questions differentially, for younger children and for adolescents, if the services were open for all kind of ages. Most of the services in the terms of use say that they accept children profiles from 13 years. However, this does not prevent children from getting on those websites earlier. Of course, the company continues to say that children under age are not allowed to register, and this way they withdraw from the problem. If they do not take responsibility, then who should do that?

L. J. Yes, the questions of responsibility and liability are problematic, for now there is no answer. Following among the same lines, I would like you to comment on the skeptical opinion that was in the air of the workshop at the Digital Agenda Assembly that all this hustle about children's online safety is a fake bubble and the EU seeks to gain more control over the online information.

V. D. I do not think that this is a valid statement. Of course, it is always convenient for institutions in power to have control over what is happening and information. However, the EU is seriously concerned about children's online safety. So I do not deny that some other

issues might be involved, but I do think that the Commission's action favor children. Certainly, they could do more and invest more money into the social research and education. If we follow the rationale that the sum of money invested in the field determines its importance, then, obviously, the research on engineering and medicine issues would overtake any social science project. Thus, I would conclude that the interest is limited as it is not the primary goal of the Union.

L. J. This is a very interesting remark. As we are approaching to the end of the interview, I would like you to talk about the next steps that are about to be taken, apart from the revision of the Safer Social Networking Principles. What do you think should be done in terms of policy action and research?

V. D. Well, there are different directions. One direction is of a self-regulation. The more self-regulation is being demanded and the more is being produced. We have not only the Safer Social Networking Principles; we have the European Framework for Safer Mobile use by Young Teenagers and Children. In a short while we will also have the Safer Internet Principles in very general terms, the ones we were discussing during the Assembly. These principles will cover not only social websites, but all type of services which have to do with children and online technology. So, the current trend is that regulation is becoming more general. However, I do not think it is a right way to go, I think the regulation should become more specialized. From my point of view, the Safer Social Networking Principles are already very broad. Furthermore, as you saw, there are parties who are not social networking sites but they do have social networking functionalities, for example YouTube. Following the assessment process both types of websites are evaluated according to the same principles. I encounter some inconsistency here. I think the broader is the scope of a certain regulation, the harder it becomes to evaluate and assess the compliance. So the current trend to develop broad principles for everything is a wrong approach. Although they can be applicable for all, at the end of the day they are applicable for none. I am certain, the if the EU engages in a self-regulatory approach, then, the right direction would be to establish a stricter benchmarking and develop guidelines together with standards, that those guidelines should respond to. It is not enough to say what could be done, evaluation systems should be developed together with guidelines because this is the only way to see problems of your guidelines.

L. J. What do you mean by standards?

V. D. Evaluation standards for principles. However, I am not sure that establishing principles is a way to go. Maybe instead of principles there should be something similar to the technological standards that replace principles, which are too general, liberal and free for interpretation. On the other hand, some basic things could be regulated in a stricter way, for example, all children should be able to report cases of inappropriate content in an easy way. Maybe this could lead to developing a standard of a red-button. Yet there is a huge debate about this type of reporting system, and maybe it is not the best solution, but this example just illustrates that many things can be done. Of course, I understand companies, they do not welcome any external regulation as they are the only ones, who possess expertise in the field and know all the information about future developments.

L. J. Do you intend to say that some minimum requirements could be established by means of directives or other legal tools?

V. D. Directives might be a solution, but they should concern only some legal issues. All the parties should agree on the issues that will be regulated. However, the debate on the top issues of children's online safety still has to take place; all the parties have to agree what is crucial to achieve in order to protect children. At this very moment, we have some principles, though this end phase of the debate has not been reached. There is no research proving or demonstrating that the online environment becomes safer because of the principles, we just have assessment of self-declarations. So we can conclude that Bebo is implementing the SSNP better than Giovanni, and thus, Italian children are safer on Giovanni. But what are the implications of those principles in practice? I think that at the given time, we speculate more, than we make meaningful conclusions. The compliance of the principles is tested by one person per website, without knowing, if these principles are really protecting children. I see inconsistency in policy as the principles are not based on any empirical or academic research. In my opinion, the things had to proceed in the following order. After the risks were identified, the principles had to be developed. For example, children are confronted to greater risk on this and that platform; therefore, it should be done this and that in order to ensure their safety. This reflection would enable us to develop principles that tackle real problems. If we go back to the SSNP, it is unclear who developed them and under what basis, it is also unclear, if any of those principles prevail over the other.

L. J. But isn't it that the current situation is a direct consequence of the choice that was made in the mid 90's based on the discussion on the way the internet regulation should be

developed? At that time it was not clear who should take responsibility for the Internet's regulation. As states at the time realized that they are not cable of regulating cyberspace, they in a way delegated 'legislative powers' to the private actors. From that time onwards, it was assumed that self-regulation is the best option, without having any information proving this position.

V. D. I am not sure if self-regulation is a better option. Of course, there is an issue as we talk about new technologies and companies which are upfront in technology. Self-regulation makes sense as only the companies know what their customers want. I am sure that they know, which direction to go, but how can one make sure that they choose not only a way to increase their profits but the well-being of their clients as well. However, I assume that for the companies it might be hard to be regulated by government, if they feel that the legislator does not have expertise. Thus, if one seeks to develop a legal measure, one should gather top experts, engineers, developers of graphic software as they possess knowledge in the field. In general, some real work has to be done in order to develop regulation; academics should be heard and children should be consulted. At this point maybe there are companies which would like to contribute to this kind of regulation, but this attempt is not enough. There is a need for a platform, which would include stakeholders which would be open towards each other and willing to hear and understand opposing views. I usually feel like someone in between the two worlds, academics and industry. At the given time, problems go beyond self-regulation. Furthermore, there is one thing that I wanted to mention regarding the self-regulation. If principles are meant to protect children online, the first thing that we should do, is to discuss what do online safety and other relevant definitions mean. And before developing tools and self-regulatory measures we should discuss the issues of media and literacy, those two are the points that currently are absent in the SSNP or anywhere else. Therefore, the final question that remains open for the further research follows like what "What could make online environment a safer place?"

L. J. Indeed, this is the question, which should be answered as soon as possible; it could contribute to solving the problem in question. Thank you so much for your answers and time.

The interview was closed with an agreement that the interviewer will forward the report to the interviewee for a revision. The report and transcript was revised by the interviewee.

Interview II

Place: Leuven

Date: 8 October, 2012

Time: 50 min.

L.J. Could you name reasons, why the discussion on children's use of the internet is on the top of the EU policy agenda? Why is this topic such a popular theme for political discussions?

V.D. I think this situation has a lot to do with the public opinion. This topic often appears on the media. Yet at the same time, the general public does not know much about the topic from the objective perspective. Media coverage many times creates panic among the society members. People are afraid that their children will be confronted with a lot of risks online, such as paedophiles or predators. People are also afraid that their children will become online addicts and refuse to socialise. This fear leads to the situation where not only parents but the whole society is concerned. The common idea is that the Internet is full of risks. However, I am not saying that this is the reality as these risks seem to be exaggerated. The number of the Internet users grew, yet the level of digital literacy did not improve as much. Parents who use online services many times cannot protect their children, who also engage into online practices. The importance of the topic has increased even more as social media and networking became a massive phenomenon I think because of these two reasons the EC has started funding research, which would inform about the latest situation, and which would allow to develop future policies in relation to this topic. The research project titled "EU Kids Online" was established for this reason.

L.J. During my research I came across several surveys that present the situation on children's online safety through the lens of parents. These surveys point out parental concerns related to their children's use of the Internet. Interestingly, most of the surveys tend to rank inappropriate content and an unwanted contact within the highest risk category. Based on the information provided by these surveys the legislator develops policies for online behaviour and monitoring. Do you agree with the statement that privacy and data protection issues are overlooked in the debate on children's online safety?

V.D. I do agree that other risks receive more attention than privacy and data protection concerns. Yet the attention to the field of privacy and data protection is given. The biggest problem is that people are not aware or informed about privacy issues. For example, people are not aware of what information they are giving away while downloading applications offered online. Many people do not read terms of agreement or use. From the last year onwards, privacy issues receive more attention. Events, such as Google's and Facebook changes in privacy settings and policy, were well highlighted by media. But media is just a tool to raise awareness; it does not improve situation, it does not improve knowledge of the general public.

L.J. I have noted that this year the website of the Safer Internet Program has not yet published an annual report on the implementation of the SSNP. I want to ask you, whether this self-regulatory initiative is still functioning?

V.D. The parties to these principles are still working. But in order to understand what is really happening, you should understand the latest developments. The EC, with the lead of Neelie Kroes, has launched a new initiative titled the CEO Coalition. This initiative supports five different principles and not only social networking sites are parties to these principles. The dominant service providers as well as IT companies have joined this initiative. The SSNP are still applicable and signatories of these principles should continue adhering to these guidelines. Yet their focus became broader because of the CEO Coalition. At this moment, the signatories of the SSNP follow new principles. The guidelines of the CEO Coalition to a large extent are similar to the SSNP, yet the new principles have a broader scope.

L.J. I found out that the SSNP assessment report of 2010 regards Principles 3 and 6 as being implemented the best, whereas the report of 2011 (your report) concludes that these principles are “the least best implemented”. Based on this finding I concluded that two assessment reports contradict each other. Do you agree with this statement?

V.D. It is hard to compare findings of these two assessments because slightly different methodologies were applied. My methodology was based on the methodology of the first assessment, yet it had new questions and included another criteria. For example, the second assessment took into account user’s experience, usability, and accessibility of the websites. In addition to this, the second round used other definitions to interpret the question. The second assessment in a way was stricter than the first one. This, of course, leads to a situation where it is hard to compare results as different parameters were taken into account. The biggest challenge of this kind of annual review is evaluation and assessment of the whole assessment process. It is expected to be transparent and objective. Yet objectivity is a hard criterion to be achieved, especially in the context of the SSNP, where each principle sets a certain framework, which provides broad guidance for the proper implementation. This framework at the same time might be very specific and suggest the creation of new applications. It is a real challenge to measure how companies running similar or different business implement this self-regulatory initiative. You have signatories to the principles, but they adhere to these principles in very different ways. In the end, the results of the assessment are closely connected to the type of the methodology, which has been chosen. Methodology is always prone to the certain degree of subjectivity. Meaning, that depending on the type of methodology some companies will score better than others, though this might not mean that they implement the SSNP principles in a better way. Personally, I found it difficult to evaluate companies, which committed themselves to do very little within the scope of these principles, but did, that “very little” very well, and companies that expressed a very broad commitment, but which did very little within the scope of every principle. In addition to this, human resources bring the element of subjectivity. We had 14 people, who checked several websites, who came from different backgrounds. To sum up, the second assessment round measured a personal commitment of a company to implement the principles, and then, it compared commitments between companies. This did not happen in the first assessment

round. As you know, we adapted methodology to the types of social networking sites and divided the assessment into two stages. First, we looked at the typical social networking sites, such as Facebook, and then, we looked at websites on which social networking takes place, yet these websites do not fall under the scope of typical networking sites, such as Picasa, YouTube or X-box.

L.J. Could you compare the SSNP, the ICT Principles and the CEO Coalition?

V.D. The ICT coalition is totally a separate initiative, it is driven by industry. The EC has nothing to do with it. This initiative awards private companies with a lot of freedom, whereas the other two initiatives, which are developed by the EC, set certain benchmarks and expect to achieve certain results. In terms of stakeholders, these initiatives are quite different. In the CEO Coalition and ICT Principles you can see more diverse stakeholders; they include NGOs, interested parties, advertising industry, software and hardware companies. All of them can give feedback during the process. The ICT Principles as well as the CEO Coalition hold different types of meetings; these include meetings of companies, meetings of business sector and the EC, and meetings, which are open for all interested parties. I regard this as a very positive innovation in comparison with what was happening with the SSNP. I even believe that this might be a reason why private parties are so actively engaged in the latest initiatives. Then, the scope of the ICT Principles and the CEO Coalition and their signatories is almost the same; just few signatories are different.

L.J. Could you please clarify the relation between the ICT Principles and the CEO Coalition? Do the ICT Principles form a part of the CEO Coalition?

V.D. No, though most of the signatories of these two initiatives are the same. The ICT Principles and the CEO Coalition is not the same thing. The ICT Principles are driven by companies and the CEO Coalition is driven by the Commission. There is a lot of confusion between these two initiatives as they were developed in parallel. The ICT Principles were signed in January 2012 and the CEO Coalition was signed in December 2011. Eventually, the signatories started feeling that it is a repetitive work and heavy burden to take part in two self-regulatory initiatives, which have the same focus, therefore, the ICT principles made a step back.³⁰²

L.J. Thank you for this explanation. It was hard to comprehend the relationship between two initiatives as there is no website of the ICT Principles. I found out that only certain providers, who are signatories to this initiative, provide a link to the text of the Principles. Could you identify the main differences between the CEO Coalition, ICT Principles and the SSNP? While writing my thesis I found out that the CEO Coalition is developed in a way it can function as a continuous process, whereas the SSNP seem to be developed as one way street. Could you comment on these tables (Annex III)?

V.D. This is absolutely right. The SSNP were following a top down approach, it was led by the EC. The other difference is the role that companies play within the initiative. Companies

³⁰² Please note that the ICT Principles are no longer available under the following link < http://www.gsma-documents.com/safer_mobile/ICT_Principles.pdf >.

have a stronger position and say in the CEO Coalition than in the SSNP. In the CEO Coalition companies can decide on the process and evaluation of the principles. The stakeholders can give feedback on the development of this process. In this regard, the ICT Principles will function in a different way. First, companies will present their implementation plans to the ICT forum. This forum is composed of all signatories and is open for the interested parties, such as civil society groups, NGOs, the EC, and etc. Everyone who takes part in the ICT forum can give feedback. I am certain that this will cause practical problems. It is not clear how this can be done, but it is obvious that resources of NGOs will be lacking to comment on each and every implementation plan. The other drawback of the initiative is that companies themselves will write individual assessments, which later will be reviewed by an independent reviewer (expert). I believe that expert's involvement at this very late stage is also a drawback of the ICT Principles. I am sure that, if expert is involved in the work from the beginning, it could lead to better outcomes. So, the main difference between initiatives is the type of involvement.

L.J. Do you think the CEO Coalition will attain its goals? Will it enhance children's online safety?

V.D. Well, I do think that all self-regulatory initiatives within this field should be regarded in a positive way. Companies are committing themselves to various guidelines. However, I think that not all actions are easy to implement and not all of the actions are relevant for all stakeholders. I think these initiatives focus too much on technology. For example, instead of addressing privacy issues, they focus on developing better privacy settings. Additionally, it is often forgotten that companies are engaged in different kinds of business. For example, what it is applicable for Facebook is not applicable for Vodafone or Orange. It is hard to guess to what extent the measures, which will be taken, will be effective. I believe that more is needed than these actions. Parental consent can serve as an example for my case. Companies can develop very advanced parental controls, but their effectiveness will depend on type of controls developed, that is, if the measures are user friendly, if people are aware of their use, if children can bypass them and so on. The differences between the EU countries are also many times forgotten. People in Southern parts of the EU might be digitally illiterate to provide parental consent, whereas people in the Scandinavian countries might deem it be an inappropriate tool, which infringes children's rights to freedom to expression and privacy. Therefore, I think that for these initiatives to be effective they should be exposed to periodical assessment. This stage is still missing.

L.J. I do agree with you on the point of assessment. So far, there is no information on effectiveness and efficiency of the taken measures.

V.D. Yes, one thing is to measure, if the technological side works, but then, the more challenging thing is to measure, if population adopts that measure. In my view, two different researches are needed. What is more worrisome in this situation is that children have never been involved in any assessment of the taken measures.

L.J. The ICT principles on several occasions refer to the existing legal framework, whereas the CEO coalition doesn't. Does this difference imply anything?

V.D. I think that companies included these references in order to bring more stability to the initiative. It might be that the CEO Coalition avoided making references to the existing legal framework because it is a future oriented project, which expects that signatories will go beyond the legal obligations. I think that the Communication, which followed the initiative, sends a clear message to the signatories of the CEO coalition. The Communication showed that EC has enough political will to employ stricter regulatory measures, if the companies fail to achieve intended goals. I think that the establishment of the CEO Coalition is a preparatory step, which might lead to substantial changes.

L.J. After the CEO Coalition presented the first round of progress reports, the EC released a Communication on European Strategy for a Better Internet for Children. On its behalf the EDPS published an opinion about the statements made in this communication. What is your opinion about this Communication? In what ways does it affect the functioning of the CEO Coalition?

V.D. The Communication pays a lot of attention to technical development. It concludes that because of the rapid pace of technological development, it makes a lot of sense to work with industry. The Commission by means of this Communication sends a message, that despite restructuring taking place within the Commission, it may decide to use stricter regulatory tools to address the issue of children's online safety. The EC in this Communication calls for concrete actions improving children's safety online, media literacy, and the amount of useful content. I am sure that the EC has chosen to use a word 'better' not by accident. It seeks to create positive experience for the Internet users, and in particular, children. It seeks to reduce media panic perspective and foster collaboration between industry and civil society groups or NGOs. I think that at this very moment the Commission has reached its goal to raise awareness about the risks of the online use. Now it wants to take a one step forward and create positive experiences of Internet use. The Communication points out that problems, which occur in the online environment, can be solved in a more efficient way, if industry collaborates with the legislator. It notes that it would be a big loss, if the industry steps back and refuses to cooperate while developing policy actions related to the children's online safety. Indeed, industry side is the one, which provides content, software and technology itself. Therefore, I would say that Communication sends a clear message: We (meaning the EC) need industry, but we will press you (industry) to ensure the quality of your actions.

L.J. I know that you take part in the working group on appropriate privacy settings of the CEO Coalition. Could you comment on the progress of this working group?

V.D. With the establishment of this working group, the Commission was very clear in its goals. It wanted to leave data protection issues aside, as there is a whole unit dealing with it, and focus on the technological side. All that I can say, is that in comparison with other groups our group has made a lot of progress. Yet I have to admit that it is easier for our group to progress as we focus on purely technological solutions. Other groups, such as a group on

content classification, have to deal with more fundamental discussions. Certainly, this slows the pace of progress. Nonetheless, I would not compare groups as they are different in their nature.

L.J. Thank you for your answers.

The interview was closed with an agreement that the interviewer will forward the report to the interviewee for a revision. The report and transcript was revised by the interviewee.

Annex II

The letter from the Safer Internet Team

From: CNECT-SAFERINTERNET@ec.europa.eu <CNECT-SAFERINTERNET@ec.europa.eu>

To: jasmontaite@gmail.com

Dear Lina,

We are happy that you take an interest in this area and have set out to explore it as part of your studies.

You are right that the overall aims of the two initiatives are quite similar. There are however some differences. The Commission is directly involved in the CEO Coalition - VP Kroes invited CEOs from a number of big companies to work - in a self-regulatory context, for a restricted period of time (2011-2012) on specific action areas (actions 1-5), setting out to achieve operational and concrete steps forward on reporting mechanisms, privacy, content classification, parental control tools and more effective takedown of child abuse material. The companies involved signed the Statement of Purpose last December (attached). It is possible to look at the two initiatives as complementary in the sense that the ICT Principles "provide a longterm roadmap" and have a more general approach, e.g. also including awareness raising cf. statement:

<http://www.teliasonera.com/PageFiles/21045/ICT%20Coalition%20press%20release%2019-01-2012.pdf>

In order for you to have data on effectiveness of the measures taken for e.g. privacy you might find it a bit premature to study the Coalition, since it is still not possible to draw firm conclusions on the exact outputs. There have been previous self-regulatory initiatives in this area, which you might already be aware of that could be worth looking at. In 2007 mobile phone operators signed a code of conduct for safer mobile phone use by teenagers and children. There are currently 95 signatories and 27 national codes of conduct, covering of close to 100% of European subscribers. In 2009 20 major social networks active in Europe, including Facebook, YouTube, Netlog, Hyves signed the Safer Social Networking Principles for the EU.

DG INFSO is now DG CONNECT after reorganisation earlier this summer - one implication of this is that we will be restructuring our webpages, making some content unavailable in September. You should consult our web pages before September, or you can always contact us - for material on the self-regulatory initiatives.

http://ec.europa.eu/information_society/activities/sip/self_reg/index_en.htm

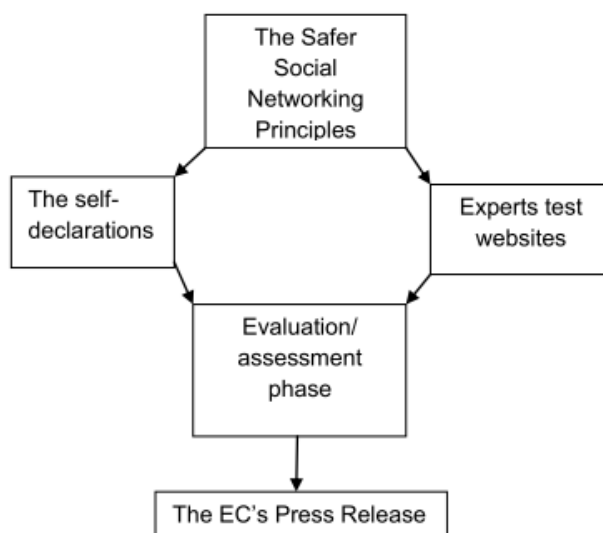
On behalf of the Safer Internet Team,

Best regards,
Kristin Bilberg

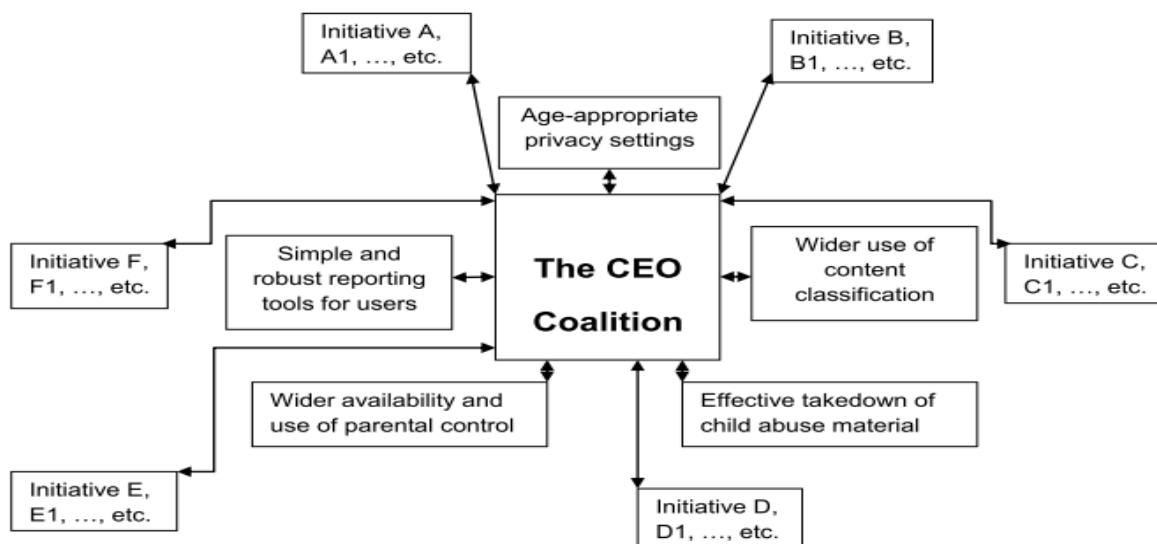
Annex III

Functioning schemes of self-regulatory initiatives addressing children's data protection and privacy concerns in the online environment

1. The scheme on the functioning of the SSNP

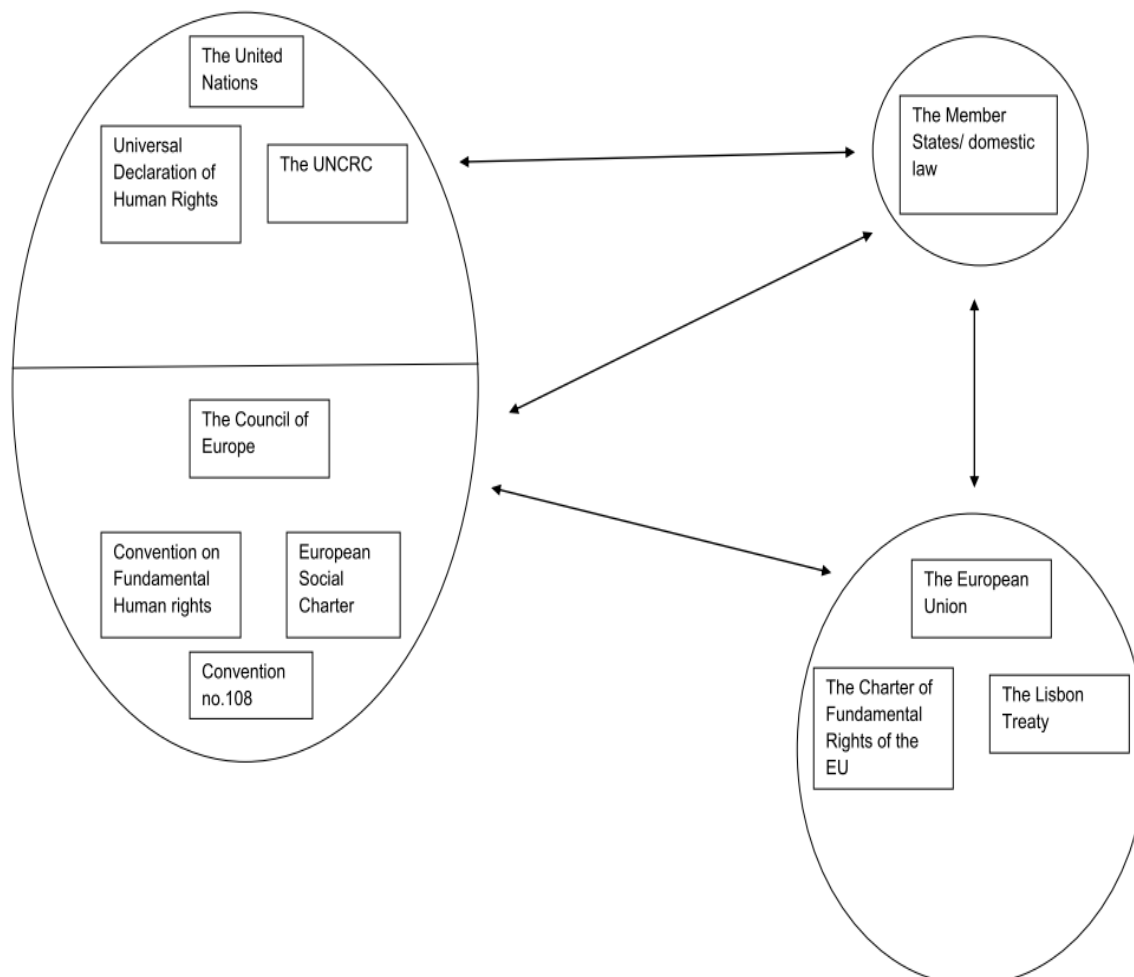


2. The scheme on the functioning of the CEO Coalition:



Annex IV

Complexity of framework for children's rights



Bibliography

- ^The European Court of Human Rights *Marckx v Belgium* (1979) Retrieved http://www.equidad.scjn.gob.mx/IMG/pdf/Caso_Marckx_v- Belgica_Ingles_-2.pdf.
- (1995) "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data " L 281 L 281
- (2000) "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT>.
- ^The European Court of Human Rights *K.U. v Finland* (2008) Retrieved.
- (2009) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Lisbon Treaty. **2010/C 83/01** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.
- (2009) "Safer Social Networking Principles for the EU", from http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf
- (2011) "Principles for the safer use of connected devices and on-line services by children and young people", from <http://www.teliasonera.com/PageFiles/21045/ICTPrinciples.pdf>.
- Andrade, N. N. G. d. (2010) Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights *Privacy and Identity Management for Life: 6th IFIP WG PrimeLife International Summer School* S. D. Fischer-Hübner, P.; Hansen, M.; Leenes, R.; Zhang, G. Helsingborg, Sweden, Springer **352** <http://ssrn.com/abstract=2033225>.
- Arkadas-Thibert, A. (2012) Review of legal protection indicators in early childhood. *Commissioned by UNESCO within the framework of the Holistic Early Childhood Development Index*
- Article 29 Working Party (2008) Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools)
- Bainham, A. (2005) *Children: The Modern Law*, Jordan Publishing Limited.
- Baldwin, R. and M. Cave (1999) *Understanding Regulation: Theory, Strategy and Practice* New York, Oxford University Press.
- Black, J. (1996) "Constitutionalising Self-Regulation " *The Modern Law Review* **59**(1), from <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1996.tb02064.x/pdf>.
- Bowen, G. A. (2005) "Preparing a Qualitative Research-Based Dissertation: Lessons Learned" *The Qualitative Report* **10**(2), from <http://www.nova.edu/ssss/QR/QR10-2/bowen.pdf>.
- Bryman, A. (2008) *Social Research Methods*, Oxford University Press.
- Coglianesi, C. and E. Mendelson (2010) Meta-Regulation and Self-Regulation *The Oxford Handbook of Regulation* M. Cave, R. Baldwin and M. Lodge <http://ssrn.com/abstract=2002755>.
- Curry-Sumner, I., F. Kristen, et al. (2010) *Research skills: Instruction for lawyers*.
- Davidson, J., J. Grove-Hills, et al. (2011) Online Abuse: Literature Review and Policy Context The European Commission Safer Internet Plus Programme. **European Online Grooming Project** <http://www.europeanonlinegroomingproject.com/wp-content/file-uploads/EOGP-Literature-Review.pdf>.
- Donoso, V. (2011) Assessment of the implementation of the Safer Social Networking Principles for the EU on 9 services: Summary Report The EC, . **Safer Internet Programme** http://ec.europa.eu/information_society/activities/social_networking/docs/final_reports_sept_11/report_phase_b_1.pdf.
- EESC, T. (2012) "European Code of Conduct for retail transactions ", from <http://www.eesc.europa.eu/self-and-coregulation/full.asp?ID=50>.
- Euro-label (2012) "The European Code of Conduct" Retrieved 2012 09 28, from <http://www.euro-label.com/en/code-of-conduct/index.html>.
- Eurocommerce (2001) "The European Code of Conduct for reliable and trustworthy electronic shopping for Europe", from <http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/050-private-act.pdf>.

- European Economic and Social Committee (2002) "Opinion on 'Simplification'" C 48/28, C 48/28, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_048/c_04820020221en01300141.pdf.
- Feick, J. and R. Werle (2011) Regulation of Cyberspace The Oxford Handbook of Regulation R. Baldwin, M. Cave and M. Lodge, Oxford University Press
<http://www.mpifg.de/people/jf/downloads/Regulation-cyberspace.pdf>.
- Fortin, J. (2005) Children's Rights and the Developing Law, Cambridge University Press.
- Fox, B. (2012) "Child-proof the Internet or face regulation warns EU Commission", from <http://euobserver.com/creative/116126>.
- Franklin, B. (1986) The rights of children Oxford [etc.], Blackwell.
- González Fuster, G., P. J. A. d. Hert, et al. (2011) D.2.5. Recommendation Report: Situating Privacy and Data Protection in a Moving European Security Continuum Converging and Conflicting Ethical Values in the Internal/External Security Continuum in Europe (INEX) VUB
- Graig, P. and G. De Burca (2008) EU Law, Oxford University Press.
- Hert, P. J. A. d. and S. Gutwirth (2009) Data protection in the case law of Strasbourg and Luxembourg : constitutionalisation in action Reinventing Data Protection? Y. P. GUTWIRTH S., P. DE HERT, J. NOUWT & C. DE TERWANGNE (eds), Springer
http://works.bepress.com/serge_gutwirth/10
- Hert, P. J. A. d. and N. Purtova "Status and Review of the European Data Protection Regime"
- Hirsch, D. (2005) Is Privacy Regulation the Environmental Law of the Information Age? Privacy and Technologies of Identity: a Cross-disciplinary Conversation K. Strandburg and D. S. Raicu
- Hirsch, D. (2006) "Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law " Georgia Law Review 41(1).
- Kilkelly, U. (2000) The Impact of the Convention on the Cse-law of the European Court of Human Rights Revisiting Children's Rights : 10 Years of the UN Convention on the Rights of the Child D. Fottrell, Kluwer Law International
- Koen de Feyter S. I. S. (2003) Self-regulation World Bank, IMF and Human Rights Sfeir-Younis A., Koen de Feyter S. I. S., Hunt P. et al, Enfield Publishing & Distribution Company
- Koops, E. J. L., A.M.B.; Nouwt, J.; Prins, J.E.J.; Schellekens, M.H.M. (2006) Should Self-Regulation Be the Starting Point?
- Koren, M. (1998) Tell Me! The Right of the Child to Information, NBLC.
- Lagace, M. (2007) Interview with M. Toffel "Industry Self-Regulation: What's Working (and What's Not)?" Working Knowledge: Research and Ideas Harvard Business School
- Lessig, L. (2006) Code version 2.0 New York, Basic Books.
- Lievens, E. (2010) Protecting children in the digital era: the use of alternative regulatory instruments, Nijhoff Publishers.
- Livingstone, S., L. Haddon, et al. (2011) Risks and safety on the Internet: the perspective of European Children
<http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/EUKidsOnlineIIReports/D4FullFindings.pdf>.
- Livingstone, S., K. Ólafsson, et al. (2011) Social networking, age and privacy London EU Kids Online
<http://www2.lse.ac.uk/media@lse/research/eukidsonline/shortsns.pdf>.
- Livingstone S., Ólafsson K., et al. (2012) Towards a better internet for children. EU Kids Online
<http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20III/Reports/EUKidsOnlineReportfortheCECoalition.pdf>.
- Lugaresi, N. (2002) "Principles and Regulations about Online Privacy: 'Implementation Divide' and Misunderstandings in the European Union" SSRN eLibrary, from <http://ssrn.com/paper=333440>.
- Macagno, F. (2010) "Definitions in law " Bulletin Suisse de Linguistique Appliquée 2, from <http://ssrn.com/abstract=1742946>.
- Mestdagh, K. d. V. and R. Rudolf Rijgersberg (2009) Internet Governance and Global Self-Regulation: Building Blocks for a General Theory of Self Regulation. Self-regulation and the Future of the Regulatory State: International and Interdisciplinary Perspectives M. Hertogh and P. Westerman
<http://www.rug.nl/gcl/congressen/Selfreg%20C9%20INTERNET%20GOVERNANCE%20AND%20GLOBAL%20SELF%20REGULATION.pdf>.
- Mifsud Bonnici, J. P. (2008) Self-Regulation in Cyberspace
- Morgan, B. and K. Yeung (2007) An Introduction to Law and Regulation: Text and Materials, Cambridge University Press.

- Myers, D. G. (2009) *Psychology*, Worth Publishers.
- OECD (2011) The Protection of Children Online: Risks Faced by Children Online and Policies to Protect Them. *OECD Digital Economy Papers* 179 <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kgcjf71pl28.pdf?expires=1336130816&id=id&accnam e=guest&checksum=69BCBC4FFE71FD41EB32726A0C4A0514>.
- Ogus, A. (1999) "Self-regulation", from <http://encyclo.findlaw.com/9400book.pdf>.
- Open Internet (2011) "Europe Overview" Retrieved 2012 07 06, from http://opennet.net/sites/opennet.net/files/ONI_Europe_2010.pdf.
- Palfrey, J. and U. Gasser (2008) *Born Digital* New York, Basic Books.
- Pearce, G. and N. Platten (1998) "Achieving Personal Data Protection in the European Union" *Journal of Common Market Studies* 36(4): 529-547.
- Rubinstein, I. (2010) "Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes" *New York University Public Law and Legal Theory Working Papers* 181, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510275.
- Ruxton, S. (2005) *What about us? Children's rights in the European Union: next steps*, European Children's Network.
- Schiek, D. G. (2007) "Private Rule-Making and European Governance - Issues of Legitimacy" *European Law Review* 32, from <http://ssrn.com/abstract=1240648>.
- Senden, L. (2005) "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?" *Electronic Journal of Comparative Law* 9(1), from <http://www.ejcl.org/91/art91-3.html>.
- Stalford, H. and H. Sax (2009) Developing indicators for the protection, respect and promotion of the rights of the child in the European Union. *Summary Report* European Union Agency for Fundamental Rights
- Tebbit, M. (2007) *Philosophy of Law: An Introduction*, Routledge.
- The CEO Coalition (2011) "Coalition to make the Internet a better place for kids: statement purpose" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf.
- The CEO Coalition (2012) "WG2:Age Appropriate Privacy Settings: Progress Report" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/privacy_progress_report.pdf.
- The Children's Advertising Review Unit (2012) "About the Children's Advertising Review Unit", from <http://www.caru.org/about/index.aspx>.
- The Council (1997) "Resolution of the Council and of the Representatives of the Governments of the Member States on illegal and harmful content on the Internet ", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997X0306:EN:HTML>.
- The Council, The European Parliament, et al. (2003) "Interinstitutional Agreement on Better Lawmaking", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF>.
- The Council of Europe Explanatory Report on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data <http://conventions.coe.int/treaty/en/Reports/Html/108.htm>.
- The Council of Europe (1950) "Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14", from <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.
- The EC (1996) "Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services".
- The EC (1996) Communication on Illegal and Harmful Content on the Internet <http://aei.pitt.edu/5895/>.
- The EC (1997) "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Social Committee of the Regions "Action Plan on promoting safe use of the Internet" ", from <http://aei.pitt.edu/5894/1/5894.pdf>.
- The EC (1998) "Communication from the Commission to the Council "International Policy Issues related to Internet Governance" ".
- The EC (2000) "Communication from the Commission to the Council and the European Parliament "The Organisation and Management of the Internet: International and European Policy Issues 1998-2000" " 202, 202.
- The EC (2001) "The White Paper on European Governance", from http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

- The EC (2006) "Communication Towards an EU Strategy on the Rights of the Child" Retrieved 2012 03 25, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:EN:PDF>.
- The EC (2010) A Digital Agenda for Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Brussels The European Commission
- The EC (2012) "ACTIVITIES: Safer Internet Programme: Policy" Retrieved 2012 05 07, from http://ec.europa.eu/information_society/activities/sip/policy/index_en.htm.
- The EC (2012) "The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Strategy for a Better Internet for Children", from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>.
- The EC (2012) "Communication on the European Strategy for a Better Internet for Children " **196 final**, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>.
- The EC (2012) Communication on the European Strategy for a Better Internet for Children **196 final** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>.
- The EC (2012) Proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.
- The EC (2012) "Safer Social Networking Principles for the EU" Safer Internet Programme: Self-regulation: Social networking sites, from http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.
- The EC (2012) "Safer social networking: the choice of self-regulation", from http://ec.europa.eu/information_society/activities/social_networking/eu_action/selfreg/index_en.htm.
- The EC (2012) "Self regulation: responsible stakeholders for a safer Internet" Retrieved 2012 07 30, from http://ec.europa.eu/information_society/activities/sip/self_reg/index_en.htm.
- The EC (2012) "Steps leading to the adoption of the Principles" Retrieved 2012 07 06, from http://ec.europa.eu/information_society/activities/sip/self_reg/social_netwk/index_en.htm.
- The EDPS (2012) Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "European Strategy for a Better Internet for Children" http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf.
- The EU (2000) "The Charter of Fundamental Rights of the European Union", from http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
- The European Economic and Social Committee (2005) The Current State of Co-Regulation and Self-Regulation in the Single Market. EESC pamphlet series http://www.eesc.europa.eu/resources/docs/2018_cahier_en_smo_def.pdf.
- The ICT Coalition (2011) "Principles for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU" Retrieved 2012 07 30, from http://www.gsma-documents.com/safer_mobile/ICT_Principles.pdf.
- The ICT Coalition (2012) "Companies unite to launch the first industry-led Europe-wide principles to enhance online safety for children" Retrieved 2012 07 30, from <http://www.teliasonera.com/PageFiles/21045/ICT%20Coalition%20press%20release%2019-01-2012.pdf>.
- The UN (1948) "The Universal Declaration of Human Rights" Retrieved 2012 05 15, from <http://www.un.org/en/documents/udhr/>.
- The UN (1989) "Convention on the Rights of the Child", from <http://www2.ohchr.org/english/law/crc.htm>.
- van den Hoogen, T. and T. Nowak (2009) The Emergence and Use of Self-regulation in the European Decision Making Process: Does It Make a Difference? . Self-regulation and the Future of the Regulatory State: International and Interdisciplinary Perspectives M. Hertogh and P. Westerman
- Verschuren, P. and H. Doorewaard (2009) "Designing A Research Project".

- Viola, M. d. A. C. (2012) Review of the Data Protection Directive: Is There Need (and Room). For a New Concept of Personal Data? European Data Protection: In Good Health? S. L. Gutwirth, R.; De Hert, P.; Pouillet, Y.
- Woodhouse, B. (2001) "Children's Rights" University of Pennsylvania Law School, Public Law Working Paper No. 06, from <http://ssrn.com/paper=234180>.
- Working Group on Consumer Consent (2009) From legitimacy to informed consent: mapping best practices and identifying risks LSE
- Working Party 29 (2003) Opinion 3/2003 on the European code of conduct of FEDMA for the use of personal data in direct marketing
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp77_en.pdf.