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The promise and potential of transgovernmental cooperation on the international data privacy agenda: Communicative action, deliberative capacity and their limits

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A B S T R A C T

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One of the great oxymorons and paradoxes of information technology regulation is that the governance of data privacy around the world to a large extent occurs through transgovernmental cooperation by data privacy commissioners; however, it has hardly received any attention among legal or political science scholars. Despite an increasingly prominent role that data privacy is gaining on an inter-governmental level and the United Nations agenda, an international community still struggles to find ways to cooperate over data privacy regulation. This paper aims to contribute to the international data privacy discourse by analysing data privacy authorities' ('DPAs') prospects to influence the international data privacy agenda and cooperation. The article aims to build upon and go beyond the existing descriptive narratives of the DPAs' functions and networks by applying the theoretical framework of the *transgovernmental networks* and *Habermas theory of communicative action* to data privacy to examine the potential and limits of the transgovernmental cooperation among the DPAs beyond European level which has not been analysed yet in legal or political science scholarship. The paper argues that while the transgovernmental cooperation by data privacy authorities represents a significant governance alternative to the more conventional inter-governmental cooperation, it is questionable whether that is sufficient to *de facto* alter the cooperative stalemate between the EU and USA and change the regulatory landscape in data privacy governance on an international level. While the hopes for data privacy commissioners could be high, the experience in other issue-areas, even the ones that are considered very 'successful' examples of transgovernmental cooperation, such as the Basel Committee, International Organization of Securities Commissions, and International Competition Network, requires some caution. This is so given that many of the factors impeding cooperation in other areas, including incompatible regulatory philosophies, politicisation of issues, the limited ability of regulatory cooperation to bind other governmental actors, and the presence of distributive conflicts, appear to be present in the area of data privacy as well. Thus, the paper concludes that aspirations that the data privacy authorities may, in the words of Anne-Marie Slaughter, create 'a genuinely new set of possibilities' for a future governance of data privacy where *deliberation* takes over and eliminates the power disparities and national interests are likely to remain elusive at least in the nearest future.

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1. Introduction

One of the great oxymorons and paradoxes of information technology regulation is that the governance of data privacy around the world to a large extent occurs through transgovernmental cooperation by data privacy authorities (DPAs); however, it has hardly received any attention among legal or political science scholars. Despite an increasingly prominent role that data privacy is gaining on an inter-governmental level and the United Nations ('UN') agenda, an international community still struggles to find ways to cooperate over data privacy regulation. Data privacy authorities – or commissioners as they are sometimes called – have a strong reputation of being privacy norm diffusers since the emergence of data privacy as a public policy issue in the 1970s. Transgovernmental cooperation in data privacy on an international level reaches back to 1979 and the first International Conference of Data Protection and Privacy Commissioners ('ICDPPC') in Germany. During the past decade data privacy regulators from around the world have not only been calling for more effective international cooperation, but also have been gradually strengthening their own common identity, institutional capacity and infrastructure through annual meetings, participation in policy making and educating the public. The important question is whether such activities could have any broader effect on international data privacy policy and other actors: that is, whether the DPAs have enough power and capacity to build upon earlier achievements and go beyond them by generating deeper international cooperation. While it is clear that the DPAs have their own preferences for data privacy regulation that are distinct from national governments and supranational policy makers, such as the US Congress or the EU Commission, they lack the formal authority to directly introduce any international legislation or binding regulation and have to count on 'informal tools to shape agendas, mediate disputes, and mobilize support for their interests.'¹ As it will be explained, the DPAs have been successful in imposing their own preferences upon policymakers and key decision-making actors in the EU since the 1990s,² but it is however doubtful whether the same success could be repeated at the global level. The efforts of the DPAs to cooperate and regulate data privacy more effectively are complicated by many factors that are beyond their control: in addition to the distributive conflicts between the EU and USA, data privacy is also being 'attacked' by the transgovernmental networks of public security, global e-commerce and many other aspects of 21st century lifestyle.

The transgovernmental activities, preferences and cooperation among the DPAs at the international level have not

received much attention, especially among legal scholars.³ Political scientist Charles Raab, building on his earlier investigations into regulatory governance of data privacy, had briefly focused on the development of the DPAs' networks, and evolving patterns of their activity on international level in his two articles published in 2010 and 2011.⁴ While Raab acknowledged the usefulness of the conceptual tools developed by the international relations scholars for data privacy research, he himself refrained from constructing or seeking to test those theories.⁵ Abraham Newman has analysed the DPAs' activities and influence in Europe leading to the adoption of the EU Data Protection Directive⁶; however, the cooperation among the DPAs beyond European level has not been analysed in depth before.⁷

In the author's view, international data privacy cooperation provides the perfect ground for the application of the interdisciplinary framework of international relations and law, which has become known as the 'transgovernmental networks' literature during the past decade. The transgovernmental analysis lens has been strongly advocated by the prominent international-law and international-relations scholar, Anne-Marie Slaughter, and has been increasingly applied to diverse areas of international law and regulation.⁸ The scholarship on transgovernmental networks explicitly or implicitly assumes such networks to be efficient, normatively desirable and promising multi-level governance devices allowing

³ For a few exception in the political science literature, see *ibid*; Abraham Newman, 'Watching the Watchers: Transgovernmental Implementation of Data Privacy Policy in Europe' (2011) 13 *Journal of Comparative Policy Analysis: Research and Practice* 181; Charles D Raab, 'Information Privacy: Networks of Regulation at the Subglobal Level' (2010) 3 *Global Policy* 291; Charles D Raab, 'Networks for Regulation: Privacy Commissioners in a Changing World' (2011) 13 *Journal of Comparative Policy Analysis: Research and Practice* 195.

⁴ Raab, 'Information Privacy' (n 3); Raab, 'Networks for Regulation' (n 3); Raab's earlier collaborations include, e.g., Colin Colin John Bennett and Charles D Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Ashgate Publishing, Ltd 2003); Charles D Raab and Paul De Hert, 'Tools for Technology Regulation: Seeking Analytical Approaches Beyond Lessig and Hood' in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart Publishing 2008); Charles D Raab and Bert-Jaap Koops, 'Privacy Actors, Performances, and the Future of Privacy Protection' in Serge Gurtwith and others (eds), *Reinventing Data Protection?* (Springer 2009).

⁵ See explicit statement in Raab, 'Networks for Regulation' (n 3) 198.

⁶ European Union Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 95/46/EC; OJ L 281, 23.11.1995, 31. 1995.

⁷ On EU level, Abraham Newman has analysed DPAs activities and cooperation, see, e.g., Newman, 'Building Transnational Civil Liberties' (n 1); Newman, *Protectors of Privacy* (n 2).

⁸ See, e.g., Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Milton Mueller, Andreas Schmidt and Brendan Kuerbis, 'Internet Security and Networked Governance in International Relations' (2013) 15 *International Studies Review* 86; Cristina Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) 35 *Journal of Consumer Policy* 175.

¹ Abraham Newman, 'Building Transnational Civil Liberties: Transgovernmental Entrepreneurs and the European Data Privacy Directive' (2008) 62 *International Organization* 103, 120.

² Abraham Newman, *Protectors of Privacy: Regulating Personal Data in the Global Economy* (Cornell University Press 2008).

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