

Public consultation on the processing of children’s personal data and the rights of children as data subjects under the General Data Protection Regulation

QUESTIONS FOR PUBLIC CONSULTATION

The DPC seeks submissions in response to the questions set out in respect of each of the following issues:

I. Children as data subjects and the exercise of their data protection rights

(A) Transparency and the right to be informed about use of personal data (Articles 12-14 GDPR)

The GDPR requires that individuals must be given certain key pieces of information about the use of their personal data by an organisation (the obligation on an organisation to give this information is known as transparency) and that this information must be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language. This is stated to be particularly important where such information is being provided to children.

The transparency information that must be provided where an organisation is processing an individual’s personal data includes the identity and contact details of the organisation who is collecting or using the personal data, the purposes and the justification (known as legal basis) for collecting or using the personal data, who the personal data is being shared with, how long it will be kept for, and what the individual’s data protection rights are.

Questions:

1. What methods could organisations who collect and use children’s personal data employ to easily convey this transparency information to children?

Use of pictures/posters/videos, ensuring privacy notices are given to children/young people in a format that is suitable for their age and stage of development. The language should be clear and ideally the information should be available in a range of languages reflecting the languages of the children/young people from whom you are looking for consent. The information should be discussed with the child/young person to ensure understanding and answer any questions they have.

2. What approach should be used by organisations whose products or services are aimed at both adults and children? For example, should two separate sets of transparency information be provided that are each tailored according to the relevant audience? (B) Right of access (Article 15 GDPR)

The information should be tailored so that is understood by all parties who access the service – the key is finding the method that is appropriate for your audience.

The right of access is one of the most important data protection rights because it allows individuals to find out whether their personal data is being held by a specific organisation and to obtain a copy of their personal data.

Like all other data protection rights, the GDPR does not say when, or in what circumstances, a parent or guardian can make an access request for their child’s personal data, or when or in what circumstances a child can make their own access request for their personal data.

Questions

3. At what age or in what circumstances should a child be able to make an access request to an organisation and receive a copy of their personal data? Is age the only relevant factor and if not, what other factors should be taken into consideration?

We believe a child should be able to make an access request when they are 18, if a blanket age limit has to be applied.

Factors to consider are the age and stage of development of the child and the information being requested. When a child is accessing sensitive information they will need to be in a safe environment and have supports on hand to help them to process and understand the information in question.

4. In what circumstances should a parent be able to make an access request and receive a copy of their child's personal data? Is there an upper age limit after which a parent should not be able to make an access request for their child's personal data? Are there circumstances where both the parent and child should have to jointly make an access request for the child's personal data?

We believe that a parent should only be able to access the information on their child if they are the legal guardian of that child (or if they have the consent of the legal guardian and child).

Legal guardians should be able to access the child's personal records until the child is 18.

Access to a child's personal data should not be given, where an organisation feels it is not in the best interest of the child to do so.

5. How should the balance be struck between a parent's right to protect the best interests of their child and the child's right to privacy when organisations are dealing with access requests for the child's personal data?

We feel this is best dealt with on a case by case basis, but organisations should put the interests of the child first.

(C) Right to erasure ("Right to be forgotten" – Article 17 GDPR)

Individuals have the right to have their personal data erased, without undue delay, by an organisation if certain grounds apply. This includes where personal data was collected by an online service provider in circumstances where the individual now making the erasure request originally gave their consent to have their personal data used or collected when they were a child. The GDPR says that where this has happened, an individual should be able to request that their personal data be erased because, having been a child when they consented to the collection and use of their personal data, they may not have fully understood the risks of doing so.

Questions

6. At what age or in what circumstances should a child be able to make an erasure request to an organisation and have their personal data erased? Is age the only relevant factor and if not, what other factors should be taken into consideration?

The challenge here relates to consent – if the child is the correct age to give their consent (to give the information) then it follows that the same age requirement should apply if they want this information erased.

7. In what circumstances should a parent be able to make an erasure request on behalf of their child and have their child's personal data erased? Is there an upper age limit after which a parent should not be able to make an erasure request for their child's personal data? Are there circumstances where both the parent and child should have to jointly make an erasure request?

We believe that parents should not be able to request that their child's personal data be erased, where an organisation feels that this is not in the best interest of the child.

A joint request from a parent and child should be considered in the same way.

II. Safeguards

(A) Age verification (Article 8 GDPR)

In Ireland, children below the age of 16 (the "age of digital consent") cannot give consent to online service providers to process their personal data. If consent to process personal data is requested by the online service provider in order for the child to access the service, parental consent must be given. This means that consent must be given by the person who holds parental responsibility for the child. However, the GDPR requires that the online service provider must make "reasonable efforts" to verify that consent is given by the holder of parental responsibility "taking into consideration available technology".

Questions

8. If an online service provider is relying on consent as their legal basis (justification) for processing children's personal data, what methods could/should be used to verify that a child is 16 or over in order that the child is granted access to the online service without the need for parental consent?

A consent form could be printed off and signed by both the parent and child and returned to the provider in question. A follow up phone call to the parent to confirm consent has been given could also be carried out.

9. (a) What methods could/should online service providers use to ensure that the person providing consent in these circumstances is actually the holder of parental responsibility over the child?

Please see above.

(b) What constitutes a "reasonable effort" made by organisations to verify such consent is being given by a person who is actually the holder of parental responsibility over the child? How should "reasonable efforts" be measured in this regard?

Please see above – in our opinion reasonable effort means that the organisation has taken at least an extra step to confirm the consent in writing. We do not think an email confirmation or an online tick box should suffice.

10. Prior to 25 May 2018, there was no law setting the age of digital consent in Ireland, but many online service providers required users to be at least 13. If an online service provider now is aware that an existing user of their service is under 16, should the user be locked out of the service until they reach 16?

Yes

(B) Online service providers and different national ages of digital consent in the EU (Article 8 GDPR)

Many online service providers offer services in multiple EU countries where there are different ages of digital consent. For example, while the age of digital consent in Ireland is 16, in Spain it is 13, and in Austria it is 14.

Questions

11. How should such online service providers ensure they comply with different ages of digital consent in different Member States?

They need to ensure that they have the correct technology in place that can identify where the users of their services are living.

III. Profiling and marketing activities concerning children (Articles 21-22 GDPR)

Profiling is a way of using someone's personal data to predict or analyse characteristics about that person, such as services they will be interested in, their likes or dislikes, preferences, views or opinions, or their behaviour, amongst other things. For example, organisations may collect information from their customers or users to try to predict other services or products they might be interested in.

A user profile can be a really valuable tool in revenue terms for an organisation because the detailed information on an individual contained in a profile can help the organisation to tailor information, advertisements and marketing materials, amongst other things, precisely to a person's interests, needs or individual views. For example, if an individual often clicks on posts online about a specific singer or "likes" pictures of clothes from a particular shop, they may start to see ads for tickets to that singer's concert or similar artists' concerts popping up on their social media feed, or ads might start appearing telling them that there is a sale on in that particular shop or similar shops. That is because online operators are constantly collecting and frequently sharing with each other this type of information about users and adding it to the profile being built about them. In this way, the user's profile then becomes the basis upon which specific advertising and marketing materials are selected to target that user.

The GDPR does not impose an outright prohibition on organisations marketing or advertising to children, but it does say that they should apply specific protections for children when marketing to them or creating user profiles. Additionally, collective guidance issued by the EU's data protection authorities (European Data Protection Board ("EDPB")) advises that, because children are more vulnerable, organisations should, in general, refrain from creating individual profiles on children for marketing purposes. All individuals (including children) have the right to object at any time to their data being processed for direct marketing purposes.

Questions

12. In the case of marketing to a child, what factors should be taken into consideration when balancing an organisation's own legitimate interests in conducting direct marketing and the interests and rights of a child who is being marketed to?

Gathering direct marketing information is one thing that could be considered reasonable in terms of an organisation's legitimate interest. Using that information to tailor direct marketing campaigns to children is what needs to be controlled.

Factors to consider are the age and stage of development of the child, the child's ability to process the information appropriately, if the information could cause distress to the child, could the information be misinterpreted by the child and what are the possible outcomes as a result.

13. Should organisations be prohibited from profiling children for marketing purposes? If so, should this be age-dependent or dependent on other factors? If so, what are these other factors?

Yes, see considerations above.

IV. Data protection by design and by default (Article 25 GDPR)

The GDPR imposes a new obligation of data protection by design and by default on organisations who process personal data. This means that data protection and privacy protection should be built into a product or service from the very start of the design process (rather than being considered after the development phase) and that the strictest privacy settings should automatically apply to a product or service (rather than the user having to activate them). These obligations are particularly relevant considerations for organisations whose products or services are used by or offered to children.

Questions

14. What measures should organisations take to incorporate the principles of data protection by design and by default into the services and products that they offer to children?

Organisations should make sure that the principles are incorporated into their policies and procedures. Items to consider include thinking about how to share this information with children, using different methods to get the message across, using plain and simple language, having the information available in a variety of languages, using age appropriate language and being mindful of the age and stage of development of the child.

15. Do you think products/services that are used by or offered to children should have built-in default privacy settings that vary according to the age and evolving capacities of a child? For example, should there be stricter privacy settings for younger children? How should these variations in the privacy settings be given effect?

Ideally Yes

V. General

16. Are there any other particular issues you would like to raise with the DPC in connection with the subject matter of this consultation?

We are also looking for clarity on the term parental responsibility - our understanding that it is not defined under Irish Law.