

**Submission by the Minister for Justice and Equality in response to the Data Protection  
Commission's consultation on the protection of children's personal data**

**Introduction**

The Minister for Justice and Equality welcomes the Data Protection Commission's public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation (GDPR).

Concerns relating to the protection of children's personal data were highlighted during last year's extensive and detailed parliamentary discussions leading up to enactment of the Data Protection Act 2018. The production, by the Data Protection Commission, of guidance materials for children and young people, as well as for organisations that process the personal data of children and young people, will contribute greatly to the protection of children's personal data in the coming years. In particular, the Minister welcomes the decision to include the voices of children in the consultation process by launching a concurrent consultation aimed directly at children and young people in primary and secondary schools across the country.

Minister Flanagan, last year, voiced his support for the recommendation of the Joint Oireachtas Committee on Justice and Equality in relation to involving children directly in any consultations on data protection measures affecting them during Oireachtas debates on the Data Protection Bill.

While the same data protection rights and safeguards that apply to adults also apply to children, several Member States, including Ireland, had been cognisant of the need to provide special protections for children's personal data since negotiations on the GDPR began in 2012. This ensured that a number of child-specific provisions were inserted into the text.

The GDPR consistently acknowledges that the personal data of children "merit specific protection". It contains a number of child-specific provisions including:

- a) Article 8 ('digital age of consent') provides, in the case of information society services offered directly to a child, that the processing of the child's personal data shall be lawful only if and to the extent that consent of the holder of parental responsibility has been obtained; the applicable age threshold is 16 years;
- b) Article 6.1(f), which generally permits lawful processing of personal data where necessary for the purposes of the legitimate interests of a data controller, is restricted in the case of children; it may not be used where such interests are overridden by the interests or

fundamental rights and freedoms of the data subject, in particular where the data subject is a child;

- c) Article 12 imposes higher standards of transparency on data controllers when providing information to data subjects; it specifies that information must be provided in a concise, transparent, intelligible and accessible form, using clear and plain language, in particular for any information addressed specifically to a child;
- d) Recital 65, which relates to Article 17 (Right to erasure), underlines the relevance of the erasure right in the case of data processed on the basis of consent given when the data subject was a child and not, therefore, fully aware of the risks involved;
- e) Article 40 makes provision for codes of conduct with a view to ensuring proper application of the GDPR, including for the purposes of specifying matters relating to the provision of information to, and the protection of, children, and the manner in which the consent of holders of parental responsibility over children is to be obtained under Article 8.

In addition, there are a number of child-specific provisions in the Data Protection Act 2018. These provisions, which provide for enhanced protection for children's personal data, were brought forward by Minister Flanagan during Oireachtas consideration of the Act in order to address concerns that had been raised. Section 32 makes provision for the drawing up and implementation of codes of conduct intended to contribute to the proper application of the GDPR with regard to the protection of children, as permitted under Article 40 of the GDPR. It also contains provisions in relation to consultations in respect of draft codes of conduct. Section 33 makes specific provision for an enhanced "right to be forgotten" in the case of children in accordance with Article 17 of the GDPR. While the GDPR does not include a definition of a child, section 29 provides that references to "child" in the GDPR shall be taken to refer to a person under the age of 18 years. This is in line with the definition in Article 1 of the UN Convention on the Rights of the Child.

Minister Flanagan welcomes the Data Protection Commission's plans, as set out in the consultation document, to "work with industry, government and voluntary sector stakeholders and their representative bodies to encourage the drawing up of codes of conduct to promote best practices by organisations that process the personal data of children and young people".<sup>1</sup> The Minister believes that it would be worthwhile to seek to develop codes which could apply EU-wide. As the Minister indicated in the course of the Oireachtas debates on the Data Protection Bill, if a draft code, which in

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<sup>1</sup> Data Protection Commission: Public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation, pg 9

the opinion of the Data Protection Commission complies with the GDPR, relates to processing of children's data across several Member States, the GDPR provides that it must be referred to the European Data Protection Board (EDPB) for its approval and where the EDPB is satisfied that the code is GDPR-compliant, its opinion must be submitted to the European Commission. The European Commission may then adopt a formal implementing act, which will give the code legal validity across the EU.<sup>2</sup>

The Minister wishes to provide some general comments in relation to the themes addressed in the consultation document.

## **I Children as data subjects and the exercise of their data subject rights**

### ***(A) Transparency and the right to be informed about the use of personal data***

Where a controller processes personal data of a data subject, Article 12 of the GDPR imposes an obligation on that controller to provide certain information (as set out in Articles 13 and 14) to the data subject. Article 12(1) states that this obligation applies “in particular for any information addressed specifically to children.”

Controllers that are targeting children or are providing services that they know will be used by children are required to adapt the information that they provide to data subjects so as to ensure that it is intelligible to children. In cases where both children and adults are using the controller’s service, this may necessitate having a separate privacy notice for children. The controller must provide information to children in a “concise, transparent, intelligible and easily accessible form”, using “clear and plain language”.

Article 12 stipulates that the provision of information to the data subject shall be “in writing, or by other means”. This allows for flexibility in how controllers communicate with children. They are not confined to written privacy notices but may also use “cartoons, infographics or flowcharts”<sup>3</sup>. Indeed, in their Guidelines on Transparency, the Article 29 Working Party (now the European Data Protection Board) states;

“Where transparency information is directed at children specifically, controllers should consider what types of measures may be particularly accessible to children (e.g. these might be comics/ cartoons, pictograms, animations, etc. amongst other measures).”<sup>4</sup>

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<sup>2</sup> Article 40 GDPR

<sup>3</sup> Article 29 Working Party - Guidelines on transparency under Regulation 2016/679, pg. 12. These Guidelines were endorsed by the European Data Protection Board at its first plenary meeting on 25 May 2018.

<sup>4</sup> ibid

**(B) *Right of access (Article 15 GDPR) and (C) Right to erasure (“Right to be forgotten” – Article 17 GDPR)***

As acknowledged in the consultation document, children enjoy the same rights as adults under the GDPR but the GDPR does not determine when, or in what circumstances, these rights should be exercised by a child or by a parent or guardian on a child’s behalf. Article 5 of the UN Convention on the Rights of the Child states that “States Parties shall respect the responsibilities, rights and duties of parents... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”<sup>5</sup> This Article is elaborated by the Committee on the Rights of the Child in the following manner:

“The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child’s development, but will steadily increase as the child is encouraged to contribute her or his views.”<sup>6</sup>

Moreover, children must be able to understand the consequences of exercising their rights and the age at which they reach this understanding is likely to vary. This is also acknowledged by the Committee on the Rights of the Child:

“In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.”<sup>7</sup>

Suffice it to say that it is difficult to determine precisely the age at which a child is competent to exercise his or her data protection rights to access and erasure of personal data. A guiding principle might be that if a child is considered competent to give consent to the processing of his or her personal data, he or she should be considered competent to exercise his or her data protection rights.

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<sup>5</sup> UN Convention on the Rights of the Child, Article 5 (Parental guidance and the child’s evolving capacities)

<sup>6</sup> UN Committee on the Rights of the Child - General comment No. 12 (2009): The right of the child to be heard pg. 20

<sup>7</sup> UN Committee on the Rights of the Child - General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, pg. 6.

Where a child is not competent to exercise his or her rights as a data subject, it is clear that the parent or holder of parental responsibility is permitted to exercise them on the child's behalf, in accordance with the child's best interests. In the absence of a policy in relation to the age and circumstances in which a child can exercise his or her data protection rights independently of his or her parents and where there is disagreement between a child and his or her parents regarding the exercise of rights, the controller should consider the child's views and level of competency and make a decision based on the best interests of the child. Such an approach is in accordance with the Convention on the Rights of the Child and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.<sup>8</sup>

## **II Safeguards**

### ***(A) Age verification (Article 8 GDPR)***

Article 8(2) of the GDPR states that where consent is given by the holder of parental responsibility for the processing of a child's personal data, the controller shall make "reasonable efforts" to verify the age of the holder of parental responsibility. What exactly "reasonable efforts" entails has been a source of debate since the GDPR was adopted. The Article 29 Working Party guidelines on consent, which were endorsed by the European Data Protection Board at its first plenary meeting on 25 May 2018, provide the following guidance –

“What is reasonable, both in terms of verifying that a user is old enough to provide their own consent, and in terms of verifying that a person providing consent on behalf of a child is a holder of parental responsibility, may depend upon the risks inherent in the processing as well as the available technology.”<sup>9</sup>

It is incumbent on the controller to determine the level of risk to the data subject and to apply their age verification mechanism accordingly. What the Article 29 Working Party make clear, however, is that age verification “should not lead to excessive processing”. Whatever age verification mechanism is employed must be proportionate and respect the principle of data minimisation.

## **III Profiling and marketing activities concerning children (Article 21-22 GDPR)**

Particular concerns were also raised during Oireachtas discussions in relation to the use of children's personal data for the purposes of direct marketing and profiling. In response to those concerns Minister Flanagan pointed out that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest of a controller but that the legitimate interest

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<sup>8</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, pg. 28.

<sup>9</sup> Article 29 Working Party (now European Data Protection Board)- Guidelines on consent under Regulation 2016/679, pg 26

of the controller must be balanced against the interests and fundamental rights and freedoms of the data subject, in particular where the data subject is a child. The reference to a child in Article 6(1)(f) and recital (47) of the GDPR underlines that such an assessment must be performed with particular care where personal data of children are processed. The Minister also noted that recital (38) states that “specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services.”.

While the processing of children’s personal data for marketing or profiling purposes is clearly prohibited under Article 22 of the GDPR where automated processing results in a decision producing legal effects or that has a similar significant effect, the processing of personal data of children for the purposes of direct marketing or profiling is not otherwise unlawful.

However, while there may be no absolute prohibition on this type of processing, the Article 29 Working Party Guidelines on Automated individual decision-making and Profiling, which were endorsed by the European Data Protection Board at its first meeting on 25 May 2018, state as follows:

“Because children represent a more vulnerable group of society, organisations should, in general, refrain from profiling them for marketing purposes. Children can be particularly susceptible in the online environment and more easily influenced by behavioural advertising. For example, in online gaming, profiling can be used to target players that the algorithm considers are more likely to spend money on the game as well as providing more personalised adverts. The age and maturity of the child may affect their ability to understand the motivation behind this type of marketing or the consequences.”<sup>10</sup>

It is, however, important that children continue to be in a position to access appropriate information and services specifically targeted at children, in particular preventative and counselling services, which may require profiling.

Controllers should, as a matter of good practice, take into account sector-specific guidelines on marketing such as the Advertising Standards Authority for Ireland’s (ASAI) Code of Standards for Advertising and Marketing Communications in Ireland. This Code contains useful information in relation to children and marketing which could provide guidance in relation to the types of matters that should be taken into account when balancing the legitimate interest of the controller and the rights and freedoms of children which require protection of personal data. For example, the Code points out that the “way in which children perceive and react to marketing communications is

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<sup>10</sup> Article 29 Working Party - Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, pg 29

influenced by their age, experience and the context in which the message is delivered”<sup>11</sup>. The Code also points out that “(m)arketing communications should contain nothing that is likely to result in physical, mental or moral harm to children that is likely to frighten or disturb them, except to promote safety or in the public interest.”<sup>12</sup> Moreover, the Code states that “(m)arketing communications should not condone or encourage poor nutritional habits or an unhealthy lifestyle in children.”<sup>13</sup>

#### **IV Data Protection by design and by default (Article 25 GDPR)**

One of the innovations in the GDPR is the emphasis given to the need to build data protection into data processing activities from the start, in particular the obligation to implement data protection by design and by default. As indicated in the consultation document, this means that “the strictest privacy settings should automatically apply to a product or service (rather than the user having to activate them)”.<sup>14</sup> This is particularly important when processing children’s personal data.

#### **Conclusion**

The Minister wishes to thank the Data Protection Commission for undertaking this public consultation on the protection of children’s personal data and their rights as data subjects under the GDPR and Data Protection Act 2018. The Minister also wishes to acknowledge the role of the Ombudsman for Children’s Office and welcomes the fact that the lesson plan produced for the second stream of the consultation is supported by that Office.

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<sup>11</sup> ASAI Code of Standards for Advertising and Marketing Communications in Ireland, Section 7: Children, 7<sup>th</sup> Edition

<sup>12</sup> Ibid

<sup>13</sup> Ibid, Section 8

<sup>14</sup> Data Protection Commission: Public consultation on the processing of children’s personal data and the rights of children as data subjects under the General Data Protection Regulation, pg 9