
Submission to the DPC consultation on The Fundamentals for a Child-Oriented Approach to Data Processing (the Fundamentals)

31 March 2021

Introduction

The American Chamber of Commerce Ireland (henceforth ‘the American Chamber’) is the leadership voice of US business in Ireland. Our mission is to strengthen the transatlantic business community through advocacy and networking with purpose. American Chamber membership includes US companies operating from Ireland, Irish companies expanding in the US and organisations with strong bilateral links between Ireland and the US.

The American Chamber welcomes the opportunity to submit to the Irish Data Protection Commission’s (henceforth ‘the DPC’) consultation on the Fundamentals for a Child-Oriented Approach to Data Processing (henceforth ‘the Fundamentals’) and views this consultation as an opportunity to provide practical and useful feedback to the DPC. We fully support the development of the DPC’s draft Fundamentals which can provide practical guidance for industry on how it can remain accountable and fully respect children’s fundamental rights and which is also a useful tool for meeting the requirements within GDPR.

The American Chamber also wishes to support the overall approach by the DPC to this area, in particular the thorough and lengthy consultation process it undertook with children in the first part of this consultation process in 2019. As previously stated, the American Chamber fully supports funding and resourcing of the DPC that reflects the level of responsibility they hold, and welcomed the increase in funding provided to the DPC in 2020. The American Chamber has outlined below some areas that would merit further consideration by the DPC to ensure that the Fundamentals can have the most effective application.

Development of Codes of Conduct

With regard to Codes of Conduct, the American Chamber notes with interest the request by Commissioner Dixon within the Fundamentals¹ to engage with stakeholders on the drawing up of sectoral Codes of Conduct as guided by the 2018 Act. **The American Chamber fully support this request**, and as previously discussed with Deputy Commissioner Sunderland at an American Chamber event, we would welcome further engagement with the DPC on the drawing up of sectoral Codes of Conducts with the aim of driving the higher standards of protection for children’s personal data required under the GDPR and creating a level playing field within sectors. The American Chamber underlines that industry is

¹ Beyond this consultation, the DPC is already preparing to engage fully with its Section 32 obligation under the 2018 Act to encourage the drawing up of Codes of Conduct for various sectors that process children’s data. On that basis, we would be very keen to hear from stakeholders across all sectors (e.g. internet service providers, social services providers, education sector providers etc.) that would be interested in engaging with the DPC in relation to a sectoral code of conduct with the aim of driving the higher standards of protection for children’s personal data required under the GDPR and creating a level playing field within sectors.

focused on this area and we will be bringing members together in the coming period to assess this area. We look forward to engaging further with the DPC on Codes of Conduct.

Scope of the Fundamentals

As it stands, the Fundamentals covers a large range of online and offline services defined as ‘services likely to be accessed by children’. There may be instances where it may not always be the appropriate medium for children to exercise such rights, for instance, where the service has little or no connection to children or the child has an age requiring support of a parent/guardian. It is much broader than the services covered by GDPR Article 8, which applies to "the offer of information society services directly to a child".

The American Chamber recommends that the scope of services covered by the Fundamentals is clarified to ensure certainty for entities and maximise the effectiveness of the Fundamentals.

Best interests of the child

While the best interests of the child are front and centre within the Fundamentals with regard to processing of their personal data, consideration should also be given to the fact that the DPC should emphasise the need for a holistic consideration of the standard, including young people’s rights to identity, to play, and to education, as well as their freedom of expression, freedom of association, and freedom to seek, receive, and impart information.

The DPC should acknowledge that the best interests of the child is a guiding principle that should always prevail but requires a balancing exercise regarding any use cases. In order to protect children’s privacy without compromising other rights and freedoms (as well as their general wellbeing), it is important that these considerations are part of a detailed balancing test to avoid unintended consequences. A holistic balancing test is relevant, irrespective of the applicable GDPR legal basis of the relevant processing activity and whether it is connected to commercial purposes or otherwise.

Furthermore, the DPC should apply a risk-based approach to the concept of commercial online services. The American Chamber recommends that the DPC should also consider that commercial interests may have a neutral impact on the child best interests or even align with these interests.

Risk based approach

The American Chamber recommends that a risk based approach is applied more clearly across the Fundamentals in their entirety, this would align with the approach taken within the GDPR.

Organisations remain best placed to determine what solutions work best for them and individuals, in the context of how their specific services are built, targeted, what risks they may pose (in this case to children), and the mitigations that may already have been built in. This is why we believe that the Fundamentals should be ‘outcome driven’, recognising that different organisations will ensure compliance in many different ways.

Profiling

The Fundamentals outlines a principle of a prohibition on profiling² unless it can be demonstrated how and why it is in the best interests of the child to do so.

The American Chamber recommends a more balanced and flexible approach to profiling. Although the DPC has outlined that profiling may never be in the best interest of the child, there may be instances where services need to ‘profile’ young users where the data obtained to sort out users who are under 13 years old, between 13 and 18 years old, or beyond 18 years old. Furthermore it would not appear to be in line with Article 6(1) of the GDPR which outlines specific reasons for the lawful processing of personal data including profiling. Therefore it would be contrary to GDPR to introduce an outright ban on processing for profiling purposes where GDPR requirements are already met.

The Fundamentals should acknowledge that when profiling is used, the best interest of the child shall be assessed paying particular attention to the processing purpose, the core or ancillary role this profiling plays in the provided service and the safeguards in place to address any likely and serious harms. We suggest that the DPC tailors its guidance to focus on safeguards that are designed to prevent potential concrete risks while enabling the beneficial users of profiling to provide young people with age-appropriate positive user experiences and recommend that the DPC adopts a risk-based approach to assessing the appropriateness of profiling for young people and clarify the scope of activities to which these restrictions apply.

Furthermore, as it stands, the Fundamentals lack practical guidance on how to build safeguards around profiling for specific purposes. For instance, profiling for ad purposes shall be assessed jointly with (i) the nature of service that is provided (i.e., whether the profiling or personalisation is required as part of a core service or otherwise as part of an ancillary activity) as well as (ii) safeguards that organisations have implemented to avoid or mitigate specific harms to all users or, users of the age band to which the service is designed. These safeguards mechanisms could, for instance, restrict the types of goods or services advertised to children or the extent of advertising, and give notice and choices to children. On the other hand, the Fundamentals do not address profiling for any non-ads purpose, such as integrity and safety that could be particularly relevant to avoid harmful content being accessible to children.

In addition, the application of this for all children under the age of 18 appears to not take into account

² PROHIBITION ON PROFILING: Online service providers should not profile children and/ or carry out automated decision making in relation to children, or otherwise use their personal data, for marketing/advertising purposes due to their particular vulnerability and susceptibility to behavioural advertising, unless they can clearly demonstrate how and why it is in the best interests of the child to do so (Section 6.2 “Profiling and automated decision making”).

the different needs of certain age categories of children which are explicitly highlighted within some provisions of the UN Convention on the Rights of the Child (UNCRC). For example we note that the UNCRC recognises the need to respect the evolving capacities of the child but extending the Fundamentals to all young people under 18 seems to disregard the abilities and needs of teenagers, and would limit their autonomy, access to information, and digital development.

The Foreword of the Fundamentals outlines that contextual advertising is out of the scope of data protection law because it does not rely on the processing of personal data. Nevertheless, contextual advertising can imply the processing of personal data but should still be out of the scope of Fundamental 12 because it does not constitute profiling. Contextual advertising only relies on contextual signals and not on a profile or tracking. Similarly, if Fundamental 12 is to stay in the final guidance, we would ask that it is clarified to only refer to profiling or automated decision making and exclude other use of personal data for marketing/advertising purposes which could inadvertently capture other purposes such as abuse prevention, frequency capping or measurement.

Separately, the Fundamentals should further clarify what it considers as 'marketing and advertising' in the context of the use of (for instance) recommendation engines which might be critical to the functioning of certain online services but are not specifically marketing. For example, recommendations of appropriate reading material for children directly contributes to the quality of the service rendered to children, and still risk to qualify as marketing by the DPC or other DPAs.

Age verification

The American Chamber welcomes the first principle³ within the Fundamentals that outlines a 'floor' of protection for all users and that entities can utilise a risk based approach to assess specific risks and user age verification. **The American Chamber highlights two issues under this principle - that age verification is a challenge to implement in practice, and that a floor of protection already applies within GDPR under Article 5.** With regard to the latter, as Article 5 applies, and with consideration that data protection by design and by default under Article 25 also fits most of the requirements laid down in the code, it is unclear whether the Fundamental's expectations are for this current 'floor' (set in line with the GDPR) is to be raised in the context of children.

With respect to age verification, the American Chamber encourages the DPC to clarify that age checks are only one part of what should be a holistic approach to the protection of young people online. The American Chamber note with interest the DPC's reference to industry codes of conducts and encourage the DPC to emphasise the importance of collaboration among industry and policymakers, involving children and parents. It would also be helpful for the DPC to clarify how the age verification requirement interacts with the digital age of consent under Article 8 of the GDPR which does not require an age verification mechanism.

³ FLOOR OF PROTECTION: Online service providers should provide a "floor" of protection for all users, unless they take a risk-based approach to verifying the age of their users so that the protections set out in these Fundamentals are applied to all processing of children's data (Section 1.4 "Complying with the Fundamentals").

Furthermore, we would welcome age ranges for children to be clearly set within the code with regard to the exercise of their data protection rights. The focus should always be on how the rights of children can be protected and enabled holistically, however there is an important distinction between young users and teenagers, and setting of age ranges would help industry to understand when children require support from their parents to exercise their rights and when they are considered at an age with increased capabilities and therefore have the ability to go online independently.

All legal bases are equal

As the Fundamentals mentions, the fact that processing concerns children's personal data does not eliminate all the GDPR legal bases except (parental) consent. It is important that the Fundamentals clarify that the processing of personal data of children may rely on any appropriate legal basis under Article 6 (and where applicable Article 9) of the GDPR. Only when the processing purpose at hand is based on consent and relates to the provision of an information society service, will the age threshold of Article 8 GDPR trigger the necessity to assess who shall grant such consent, i.e., the children or their parents/guardians. When parental consent is required, the Fundamentals should provide guidance on what the IDPC's expectations are as to what it considers as workable and reasonable methods for organisations to obtain consent, since this is not without its challenges.

In particular, we recommend the DPC clarify that that the 'zero-tolerance' principle within the Fundamentals does not mean that legitimate interests cannot be a valid legal basis if the relevant data processing involves any interference with the fundamental rights and freedoms of a child, as opposed to when those fundamental rights and freedoms override the legitimate interests pursued. Such an approach would be contrary to the GDPR and inconsistent with the UNCRC. We would request that the IDPC clarifies that Article 6(1)(f) GDPR may also apply in the context of the processing of children's personal data and specifically provide guidance on a more balanced approach to the interplay between the best interests of the child and the exercise of other fundamental rights and freedoms of children and other competing legitimate interests, including reference to the ability of organisations to mitigate impacts on the best interests of the child.

Conclusion

The American Chamber greatly appreciates the opportunity to input into this important consultation and looks forward to further engagement on the topic and the relevant Codes of Conduct. If the DPC has any questions on the above, please do not hesitate to contact the American Chamber.