



children's charities' coalition on internet safety
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Comments on the Article 29 Working Party guidance on profiling

It is a matter of great regret that the [Article 29 Working Party](#) (Article 29) has not made any substantive or substantial comment about the likely impact of the General Data Protection Regulation (GDPR) on children. Despite several requests no discussion or exchange of papers has been organized even though there is a near universal recognition of the fact that the GDPR raises issues of huge complexity as far as children are concerned.

Under the auspices of Article 29, five sets of guidance notes have been issued, consulted upon and adopted and two more, including the one on profiling, are currently out for consultation. This paper is our response to that consultation.

The absence of any kind of steer on children is keenly felt when trying to comment on the guidance on profiling. This is because profiling has so many interdependencies and conditionalities, moreover the the language both of the Recitals and the Articles is sometimes far from clear, even for experienced data protection lawyers.

In the UK we are fortunate that our Data Protection Authority (DPA), the Information Commissioner's Office (ICO), took part in a seminar organized by the LSE in mid-November, 2017, where many aspects of children and the GDPR were discussed in some depth. Some of that discussion is reflected in this note on profiling.

A question of age

At several points in the GDPR, in both the Articles and Recitals, the text speaks of "services offered directly to a child". It is extremely important for there to be clarity about what exactly such services are. If, for example, they embrace any information society service which, so to speak, is offered indiscriminately to everyone, but it intentionally allows, includes or solicits persons under the age of 18, then that must qualify as a service that is offered directly to a child, even if it is also offered to others who plainly are not children.

Rather obviously, such a definition would include a substantial number of services currently available on the internet. The implications would therefore be wide-ranging.

Incidentally, the concomitant appears to be that where a service or part of a service is expressly NOT offered to children i.e. it is advertised as being intended *only* for persons over the age of 18, such services may be required to demonstrate that, being mindful of the available technology they are taking effective steps to ensure under 18s are not ordinarily able to gain access. That appears to necessitate robust age verification. Merely ticking a box

to declare one's age has consistently been shown not to work and therefore is unlikely to be acceptable.

It is still unclear what the implications of the GDPR are for services which say they will not allow or accept children on to their services if they fall below the Article 8 minimum. In the UK that will be 13, which coincides with COPPA, but in other countries the Article 8 age will be higher than 13.

It is anticipated that in countries such as the UK where the Article 8 age is the same as the existing COPPA requirement in effect nothing will change. Businesses will continue to say that no one below 13 is allowed to be a member but we know that that over 75% of all 10-12 year olds in the UK are using one or more services that specify 13.

Children and Profiling

Article 22 of the GDPR contains the principal terms which describe the basis on which profiling may be carried out. Its wording is more or less mirrored in Recital 71 of the GDPR. Inter alia it is clear that a data subject should have a right not to be the subject of profiling but there are circumstances in which profiling is allowed. These include

where expressly authorised by Union or Member State law to which the controller is subject,.....to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable..... safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision.

However, unlike the Article, the Recital ends with these words

Such measure should not concern a child.

On page 26 of the Article 29 guidance note it says the following

*"Article 22 does not prevent controllers from making solely automated (profiling) decisions about children, if the decision will **not** (emphasis added) have a legal or similarly significant effect on the child. However, solely automated decision making which influences a child's choices and behaviour could potentially have a legal or similarly significant effect on them, depending upon the nature of the choices and behaviours in question.*

*Because children represent a more vulnerable group of society, **organisations should, in general, refrain from profiling them for marketing purposes.** (emphasis added to underline the difference between the wording of the Article and the Recital). 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.¹

Article 40(2) (g) explicitly refers to the preparation of codes of conduct incorporating safeguards for children; it may also be possible to develop existing codes.⁴¹

Absent sight of the codes of conduct it is impossible to comment on the likely effectiveness of the protections that may be offered or insisted upon. However, it is clear much will turn on the interpretation and meaning of

“Legal effect or similarly significant affects”

While there is no clear cut definition of what constitutes a “legal effect” or what might be considered to be a “similarly significant” one, the following nevertheless appears on pages 10/11 of the guidance.

“This bring us also to the issue of online advertising, which increasingly relies on automated tools and involves solely² automated individual decision-making.

In many typical cases targeted advertising does not have a significant effect on individuals....

However it is possible that it may do, depending upon the particular characteristics of the case, including:

- *the intrusiveness of the profiling process;*
- *the expectations and wishes of the individuals concerned;*
- *the way the advert is delivered; or*
- *the particular vulnerabilities of the data subjects targeted.*

Processing that might have little impact on individuals generally may in fact have a significant effect on certain groups of society, such as minority groups or vulnerable adults. For example, someone in financial difficulties who is regularly shown adverts for on-line gambling may sign up for these offers and potentially incur further debt.

Even where advertising or marketing practices do not fall under Article 22, data controllers must comply with the general legal framework applicable to profiling under the GDPR, covered in [Chapter IV](#). The provisions of the proposed ePrivacy Regulation may also be relevant in many cases. Furthermore, children require enhanced protection....”

The italicised passages aptly illustrate the urgency of obtaining clarification of how to interpret the GDPR in terms of children’s day -to-day involvement with a large number of online platforms and services.

¹ An EU study on [the impact of marketing through social media, online games and mobile applications on children’s behaviour](#) found that marketing practices have clear impacts on children’s behaviour. ⁴¹ One example of a code of conduct dealing with marketing to children is that produced by FEDMA Code of conduct, explanatory memorandum, available at: <http://www.oecd.org/sti/ieconomy/2091875.pdf>

² Btw elsewhere they adopt a common sense interpretation of “solely”. Really it means “largely”

Advertising industry codes

The advertising industry has its own rules about not collecting data which relate to products or services likely to be of interest to children or advertising or marketing to children but here the definition of a child is typically not the same as the GDPR's and, in any event, what transparency or enforcement procedures exist in relation to such codes? How will the rules on profiling intersect with or support such codes?

If you are at or above the Article 8 age are you, in effect, an adult?

The absence of an explicit age verification requirement means that in future, as now, large numbers of young people who are in fact below the Article 8 age are likely to gain access to sites and services without parental consent having been obtained. They will do this, again as now, by the simple expedient of ticking a box to declare they meet or exceed the Article 8 age. Depending on what age, if any, they actually declare, these youngsters could therefore be being treated as if they are adults for profiling as well as all other purposes, including the processing of sensitive data such as location.

The Article 8 age of consent for data purposes for the UK is going to be 13. Where a child is below that age the information society service provider will need to obtain verifiable parental consent. However, persons between the ages of 13 and 17 are still children. Recital 38 recognises that all children "merit specific protection."

Yet the GDPR seems silent on how this protected status will or ought to be acted upon. This matters generally but also particularly in relation to profiling.

Absent any age verification requirement, all a site or service may know is that someone has declared themselves as meeting the Article 8 requirement. But this cannot mean, can it, that the GDPR is therefore content for everyone above the Article 8 minimum, in effect, to be treated as if they are part of an undifferentiated mass of adults?

All sites and services should therefore be under an obligation to use available technology and research to know who their customers are and if they learn that substantial numbers of children are in fact using their site or service they should be required to tailor the delivery of their service and profiling activities accordingly.

Processing divorced from consequences may miss the mark

The GDPR will draw DPAs, the European Data Protection Supervisor and the wider privacy community very much to the forefront of a range of matters concerning children's use of the internet and associated technologies. There is therefore an urgent need for privacy practitioners to bring themselves up to speed with contemporary thinking and research in order to ensure they fully understand the terrain. There is a fear that, otherwise, *too* narrow a focus on data processing as such may lead DPAs to miss some of the real world impacts on children's lives of different online environments.

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