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Looking for needles in a haystack: Key issues affecting children's rights in the General Data Protection Regulation

Eva Lievens ^{a,*}, Valerie Verdoodt ^b^a Faculty of Law, Ghent University, Belgium^b Centre for IT and IP Law, KU Leuven, Belgium

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The EU General Data Protection Regulation (GDPR) devotes particular attention to the protection of personal data of children. The rationale is that children are less aware of the risks and the potential consequences of the processing of their personal data on their rights. Yet, the text of the GDPR offers little clarity as to the actual implementation and impact of a number of provisions that may significantly affect children and their rights, leading to legal uncertainty for data controllers, parents and children. This uncertainty relates for instance to the age of consent for processing children's data in relation to information society services, the technical requirements regarding parental consent in that regard, the interpretation of the extent to which profiling of children is allowed and the level of transparency that is required vis-à-vis children. This article aims to identify a number of key issues and questions – both theoretical and practical – that raise concerns from a multi-dimensional children's rights perspective, and to clarify remaining ambiguities in the run-up to the actual application of the GDPR from 25 May 2018 onwards.

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1. Introduction

In recent years, significant technological progress, globalisation and the emergence of new business models have contributed to the collection and processing of personal data on an ever-increasing scale. Children's personal data as well is

being collected in unprecedented quantities, by businesses, governments, schools, and other organisations, leading to children's lives being increasingly 'datafied'.¹ Children's online behaviour is being tracked by means of cookies and plug-ins;² joining a social media platform or downloading an app usually involves a transfer of personal information; advergames offer content tailored to the age or sex of the child; and

* Corresponding author. Faculty of Law, Ghent University, Voldersstraat 5, 9000 Ghent, Belgium; Valerie Verdoodt, Centre for IT and IP Law, KU Leuven, Sint-Michielsstraat 6, 3000 Leuven, Belgium.

E-mail addresses: e.lievens@ugent.be, valerie.verdoodt@kuleuven.be (E. Lievens).

¹ D. LUPTON and B. WILLIAMSON (2017) The datafied child: The dataveillance of children and implications for their rights. *New Media & Society* Vol. 19, Iss. 5, 780–794; S. VAN DER HOF (2017) I agree. . . or do I? – A rights-based analysis of the law on children's consent in the digital world. *Wisconsin International Law Journal* 34, 409–445.

² In 2015, an international network of data protection authorities conducted a privacy sweep of 1494 children's websites and apps, which showed that 67% of the websites and apps were collecting children's personal data and 50% shared this personal data with third parties. GLOBAL PRIVACY ENFORCEMENT NETWORK (2015) Results of the 2015 Global Privacy Enforcement Network Sweep. Retrieved from https://www.priv.gc.ca/en/opc-news/news-and-announcements/2015/nr-c_150902/. <https://doi.org/10.1016/j.clsr.2017.09.007>

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connected toys interact with children and even record conversations.³ On the one hand, these technologies offer numerous opportunities for exercising children's fundamental rights under the United Nations Convention on the Rights of the Child (UNCRC)⁴, including *inter alia* their right to freedom of expression (article 13), right to freedom of assembly (article 15), right to education (articles 28 and 29) and right to play (article 31). On the other hand, significant risks may arise, such as the potential impact of the vast collection of children's personal data on their right to development (article 6) and right to privacy (article 16).

Against the background of this fast-evolving digital environment, the legal framework is also undergoing significant reforms. The new EU General Data Protection Regulation ("GDPR"),⁵ devotes specific attention to the protection of children's personal data.⁶ This Regulation was adopted by the European Union Parliament and Council on 27 April 2016, and will be applicable as of 25 May 2018. The GDPR is applicable to (most often fully or partially automated)⁷ processing⁸ of personal data⁹ (Article 2 GDPR)¹⁰ and is underpinned by the

³ S. CHAUDRON, R. DI GIOIA, M. GEMO, D. HOLLOWAY, J. MARSH, G. MASCHERONI, J. PETER, and D. YAMADA-RICE (2017) *Kaleidoscope on the internet of toys*. Retrieved from http://publications.jrc.ec.europa.eu/repository/bitstream/JRC105061/jrc105061_final_online.pdf.

⁴ GENERAL ASSEMBLY OF THE UNITED NATIONS (1989) Convention on the Rights of the Child. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>; hereinafter UNCRC.

⁵ EUROPEAN PARLIAMENT AND COUNCIL (2016) Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 4 May 2016, L119/1.

⁶ In contrast, the recent proposal for an e-Privacy Regulation does not contain specific references to children: EUROPEAN COMMISSION (2017) Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), 10 January 2017. Retrieved from <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications>.

⁷ As well to "processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system" (Article 2 GDPR).

⁸ Processing is "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction" (Article 4(2) GDPR).

⁹ Personal data is "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person" (Article 4 (1) GDPR).

¹⁰ With regard to the territorial scope, the GDPR applies to (1) the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not; (2) the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or

premise that natural persons should have control of their own personal data.¹¹ Although the EU legislator opted for a high level of harmonisation by adopting a regulation, the GDPR still leaves a margin of manoeuvre to the EU Member States regarding the implementation of certain provisions, including a number of provisions that could be important for children. Hence, at the moment, it is still unclear what the real impact of the GDPR on the daily lives of children and the exercise of their rights will be. This article aims to identify a number of such key issues from a children's rights perspective and to clarify remaining ambiguities in the run-up to the actual application of the GDPR.

2. Specific protection for children in the GDPR

The existing EU data protection framework did not make a distinction between children and adults. Directive 95/46/EC does not contain any child-specific provisions and, as such, data controllers have to comply with the same set of legal requirements for processing personal data, regardless of the age of the data subjects. In turn, data subjects can rely on the same rights and principles, regardless of their age. In 2006, the European Commission launched its EU Strategy on the Rights of the Child¹², recognising children's rights as a priority across different policy domains. In 2009, the Article 29 Working Party¹³ issued an opinion on the protection of children's personal data, referring explicitly to the 2006 Strategy.¹⁴ In this opinion, general principles and guidelines for the processing of children's personal data are discussed (e.g. concerning consent). The Working Party emphasised that the processing of children's personal data requires extra care. This idea has been reiterated in other opinions, such as the one on smart devices, in which app developers are recommended to interpret the principles of data minimisation and purpose limitation in a more stringent way when children are involved,¹⁵ or in its opinion on online

services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union; and (3) the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law (Article 3 GDPR).

¹¹ Recital 7 GDPR.

¹² EUROPEAN COMMISSION (2006) Towards an EU Strategy on the Rights of the Child, COM(2006) 367 final, 4 July 2006. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0367&from=NL>.

¹³ The Article 29 Data Protection Working Group ("Working Party") is a European advisory body comprising of representatives of the national data protection authorities. Although the opinions of the Working Party are not binding, significant authoritative value is attached to them, as all the Member States are represented in this body.

¹⁴ ARTICLE 29 DATA PROTECTION WORKING GROUP (2009) Opinion 2/2009 on the protection of children's personal data (General Guidelines and the special case of schools). Retrieved from http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp160_en.pdf.

¹⁵ ARTICLE 29 DATA PROTECTION WORKING GROUP (2013) Opinion 02/2013 on apps on smart devices. Retrieved from http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf, 26.

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