



**Irish Heart
Foundation**

**Submission to the Data
Protection Commission**

**Children Front and Centre:
Fundamentals for a Child-
Oriented Approach to Data
Processing**

March 2021



Introduction

The Irish Heart Foundation welcomes the opportunity to make a submission to the Data Protection Commission on “Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing”, following on from the 2019 Public Consultation on the Processing of Children’s Personal Data and the Rights of Children as Data Subjects under the GDPR.

The Irish Heart Foundation (IHF) promotes policy changes that reduce premature death and disability from cardiovascular disease (CVD). A number of the risk factors for CVD have been shown to be influenced by developments in the digital world. The rapid evolution of online platform capabilities and the sophistication of new forms of commercial communication has sparked the need for concrete action to be taken to protect children from exploitation and harms.

The Irish Heart Foundation sees an important role for data protection in protecting children’s health and protecting them from privacy risks, loss of reputation, commercial exploitation of personal data, profiling and cyber harassment. Indeed, there is significant scope for the Data Protection Commission to recognise and support the position that children hold in the digital ecosystem, as articulated by UNICEF: “that of rights holders, entitled to be protected from violations of their privacy and deserving an Internet free from manipulative and exploitative practices.”

The Irish Heart Foundation believes that the outcome from this consultation must be strong, robust and independent standards and obligations with effective monitoring, enforcement and transparency mechanisms. Neither parents nor law-makers could have anticipated how effectively children could be exposed to data extraction practices so easily nor targeted by technologies that are evolving faster than our capacity to respond to them, and wherein oversight is minimal and barriers to oversight are systemic.

This submission is made up of 3 parts:

- An observation relating to Data Protection and upcoming legislation on Online Harms
- Questions and observations on some of the fundamentals
- Questions on the process going forward

Observation & Recommendation

The objectives of this document cannot be met in isolation without deep engagement with other legislation and consideration of interrelated issues, such as Online Safety, with the proposed Media Commission. Our concern here is that, taken in isolation, neither these Fundamentals nor the Online Safety and Media Regulation Bill, do not sufficiently emphasise the extent to which online safety issues are interconnected with complex issues of data protection and privacy.

We appreciate the effort taken in the Online Safety and Media Regulation Bill to harmonise some aspects of regulation of online safety that applies to data protection, but we note that in this area, the Bill could benefit from a much more comprehensive understanding of the online harms related to data protection breaches.

Indeed, while the proposed Bill provides that the Media Commission shall enter into memoranda of understanding with other relevant bodies, including the Data Protection Commission, there have been many criticisms levelled against the DPC on the capacity to fully and effectively execute its functions under the General Data Protection Regulation, with specific reference to its role as the Lead European Supervisory Authority in relation to large technology companies whose regional headquarters are located in Ireland.¹

While there is no intention for the Media Commission to supplant the role of the DPC in relation to data protection and privacy matters in any way, there must be intensive collaboration and cooperation on online harms as they relate to data protection. From the perspective of the Irish Heart Foundation, such projects should relate to behavioural advertising and marketing. Such overlap between the activities of the Media Commission and the DPC or potential synergies are already set to be addressed through a memorandum of understanding, which can be updated as needs be, but there must be recognition of the need for the burden of online harms pertaining to data protection to be sufficiently addressed, especially if the DPC is overstretched.

¹ ICCL. (2021). ICCL alerts Irish Government of strategic economic risk from failure to uphold the GDPR. [Online] Available from: <https://www.iccl.ie/news/iccl-alerts-irish-government-of-strategic-economic-risk-from-failure-to-uphold-the-gdpr/>

The Fundamentals

ZERO INTERFERENCE

The IHF welcomes statements on page 24 that “that the interests and/ or fundamental rights and freedoms of child data subjects should always take precedence over the rights and interests of an organisation which is processing children’s personal data for commercial purposes.... organisations processing children’s data in reliance on this legal basis should ensure that legitimate interests pursued do not interfere with, conflict with or negatively impact, at any level, the best interests of the child.”

The document notes that organisations must carefully examine all of their processing operations on a case-by-case basis with regard to these conditions.

Questions:

- On this, the document repeats that “organisations should ensure” or that “the interests should” – but, how can we be sure that organisations will? How will this be proactively monitored?
- How can complaints be raised if, for example, neither parents or children are aware of the processes that are being undertaken that include processing or profiling?

KNOW YOUR AUDIENCE

Under the Fundamentals, organisations cannot rely solely on stating that a service should not be used by children below a certain age. If organisations provide such a service, they must take steps to ensure their age verification mechanisms are effective at preventing children below that age from accessing the service. If this is not possible, organisations must safeguard the position of users aged below and above the minimum age threshold.

It is well known that many social media companies operate under the mantra “it is easier to seek forgiveness than to ask permission”. In that regard, the failure to know their audience and take pre-emptive steps is unacceptable.

Questions:

- How will the attitudes such as the one highlighted above be extinguished i.e., how will the DPC ensure that companies complete due diligence to know their audience and circumvent any harmful practices?
- How will the DPC assess if companies completed the due diligence and whether they complied with the principles?

PROHIBITION ON PROFILING

Protecting children from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing involves ensuring that

companies do not engage in unfair commercial practices towards children and limit the processing of children’s personal data for commercial purposes, unless it is strictly necessary.

The document notes on page 48 “that organisations processing children’s data in reliance on this legal basis must ensure that the legitimate interests pursued do not interfere with, conflict with or negatively impact, at any level, the best interests of the child.” Moreover, on page 54, it states that the “DPC does not consider that it is in the best interests of children to show them advertisements or auto-suggestions for other games/ services/ products/ videos etc. which they might be interested in where such advertisements or suggestions are based on profiling”. This is to be strongly welcomed.

Due to the susceptibility of children to behavioural advertising, it is welcome that one of the fundamentals is a prohibition on profiling children, carrying out automated decision-making concerning children or otherwise using their personal data for marketing / advertising purposes, unless the organisation can clearly demonstrate how and why it is in the best interests of the child to do so.

It is critical that children are protected from an extraordinarily complex advertising technology ecosystem that extracts user data and auctions ad space (in millisecond online auctions). Where formerly advertising was contextual—delivered to settings where audiences were assumed to be interested—now it is carried out by “programmatic” automated processes.

We know that “the digital ecosystem, entirely reliant on data extraction and profit-driven by the ‘adtech’ (advertising technology) industry, has been characterized as ‘advertising as surveillance’, from which multiple privacy-related risks flow.²”. Similarly, the WHO refer to the advent of the “attention economy” in the digital age, where “any product that is “free” – a website or social media product – is paid for with our attention and with our data”³. This has important implications for children as we see how the metrics employed by social media companies and websites allow for vast amounts of data about users to be gathered, thus facilitating the targeting of users by sophisticated algorithms to retain attention and maximise ad views.

As a result, platforms are now seen as gatekeepers and, as such, there is exponential potential for greater exposure to harmful content, as well as the abuse of children’s data. This is because platforms, contain large amounts of user-generated content, are heavily data-driven and are highly dependent on advertising revenues.⁴ Individual’s choices and data management capacities are intrinsically shaped by the design and functionalities of these platforms, which are far from neutral and have been extensively shown to have been

² Garde, A. et al. (2019). General Comment submission Children’s rights in relation to the digital environment. [Online] Available from: https://www.ohchr.org/EN/HRBodies/CRC/Pages/Submissions_Concept_GC_Digital_Environment.aspx

³ World Health Organisation. (2019). MONITORING AND RESTRICTING DIGITAL MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND ADOLESCENTS. Report based on the expert meeting on monitoring of digital marketing of unhealthy products to children and adolescents. [Online]. Available from:

http://www.euro.who.int/__data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf?ua=1 p4

⁴ Lambrecht, I., Verdoodt, V. and Bellon, J. (2018). *Platforms and commercial communications aimed at children: a playground under legislative reform?*, International Review of Law, Computers & Technology, 32:1, 58-79 [Online]. Available from: <https://doi.org/10.1080/13600869.2018.1443378>

created to advance business interests, rather than to allow the user to exercise their autonomy and control over their data.⁵ UNICEF has noted that there exists a lack of transparency in the current digital marketing landscape, coupled with a greater intelligence about how individuals view, react to and engage with digital advertising, which has the effect of incentivising the expansion of data collection and discouraging the publication of such information.⁶

It has been estimated that by the age of 13 years, adtech companies have collected over 72 million data points on a child, equivalent to 12,000 pieces of data for each hour spent online.⁷ However, this figure is noted to be a likely underestimation given that this excludes the trackers used by Facebook, Twitter, and YouTube among others⁸.

The Fundamentals state that there is a high burden of proof on organisations to show profiling is in a child's best interests and that there will be a "very limited range of circumstances" in which it can be shown that this is a legitimate, lawful activity.

Questions and observations:

- What examples can be given of the limited range of circumstances?
- Who will be make the assessment and judge a "legitimate interest" case?
- Who, how often, and with what frequency, will profiling by companies be reviewed to ensure that they are undertaking legitimate, lawful activities?

DO A DPIA

The Fundamentals prescribe that organisations should carry out a data protection impact assessment in respect of the different types of processing operations which are carried out on the personal data of children, stating that the best interests of children must be a key criterion in any DPIA. A DPIA is mandatory for profiling children to target marketing or online services at them.

The IHF welcomes that the best interests of the child must prevail over the commercial interests in an organisation.

Question:

- How will the DPC guarantee that companies undertake due diligence in order to identify, prevent and mitigate their impact on the rights of the child and ensure the best interests of the child are upheld?

⁵ Macenaite, M., & Kosta, E. (2017). Consent for processing children's personal data in the EU: following in US footsteps? *Information & Communications Technology Law*, 26(2), 146–197. [Online]. Available from: <https://doi.org/10.1080/13600834.2017.1321096>

⁶ UNICEF. (2018). Children and Digital Marketing: Rights, risks and responsibilities. Discussion Paper. Geneva, Switzerland: UNICEF Private Sector Engagement. [Online]. Available from: [https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf)

⁷ Superawesome. (2017). Blog: How much data do adtech companies collect on kids before they turn 13? [Online] Available from: <https://www.superawesome.com/blog/how-much-data-do-adtech-companies-collect-on-kids-before-they-turn-13/>

⁸ Ibid

Going forward

Page 6 of the document notes that the “final version of the Fundamentals will be published which will inform the DPC’s approach to supervision, regulation and enforcement in the area of processing of children’s personal data.”

Question & Observation:

- What is meant by inform? Are these guiding principles only?
- How will these fundamentals be monitored and enforced?

The DPC has stated that it is preparing to engage with its obligations under the Data Protection Act 2018 to encourage the drawing up of codes of conduct in this area for various sectors.

Questions:

- How will the DPC develop, apply and regularly review child-oriented industry policies, standards and codes of conduct?
- How will the DPC take reasonable, proportionate and effective measures to ensure that the terms and conditions of services are enforced?
- The section 32 obligation of the 2018 act “encourages” the drawing up of codes of conduct for various sectors that process children’s data, but how can the processes be stopped before the fact e.g. processing of children’s personal data for commercial purposes?