Consent, contract and legitimate interests as grounds for lawful processing of children’s personal data in the EU:
investigating an unexpected turn of events

Ingrida Milkaite & Eva Lievens
Ghent University, Belgium
16 April 2019, BILETA, Belfast
Recital 38 GDPR

Children merit **specific protection** with regard to their personal data

**Less aware** of the risks, consequences, safeguards, rights

Particular protection in cases of **marketing** or **profiling**

No parental consent in the context of **preventive** or **counselling** services
Principles relating to data processing (article 5)

- Lawfulness, fairness and transparency
- Purpose limitation principle
- Data minimization
- Data accuracy
- Storage limitation
- Data integrity and confidentiality

Article 6 GDPR “scenarios”

1. Consent
2. Contract
3. Legal obligation
4. Vital Interests
5. Public Interest or Official Authority Task
6. Legitimate Interest
<table>
<thead>
<tr>
<th>Platform</th>
<th>Lawful grounds used</th>
</tr>
</thead>
</table>
| Facebook         | 1. Contract  
|                  | 2. Consent  
|                  | 3. Legitimate interests  
|                  | 4. Contract  
|                  | 5. Legal obligations  
|                  | (only four)  |
| Google           | 1. Consent  
|                  | 2. Legitimate interests  
|                  | 3. Contract  
|                  | 4. Legal obligations  
|                  | (only four)  |
| Snap Inc.        | 1. Contract  
|                  | 2. Legitimate interests  
|                  | 3. Consent  
|                  | 4. Legal obligation  
|                  | (only four)  |
| TikTok           | 1. Contract  
|                  | 2. Legitimate interests  
|                  | 3. Consent  
|                  | 4. ...  
|                  | 5. ...  
|                  | 6. ...  |
What is our legal basis for processing data?

We collect, use and share the data that we have in the ways described above:

- as necessary to fulfil our Facebook Terms of Service or Instagram Terms of Use;
- consistent with your consent, which you may revoke at any time through the Facebook settings and Instagram settings;
- as necessary to comply with our legal obligations;
- to protect your vital interests, or those of others;
- as necessary in the public interest and
- as necessary for our (or others’) legitimate interests, including our interests in providing an innovative, personalised, safe and profitable service to our users and partners, unless those interests are overridden by your interests or fundamental rights and freedoms that require protection of personal data.

Learn more about these legal bases and how they relate to the ways in which we process data.
Under European law, companies must have a legal basis to process data. You have particular rights available to you, depending on which legal basis we use, and we’ve explained these below. You should know that no matter what legal basis applies, you always have the right to request access to, rectification of and deletion of your data under the General Data Protection Regulation (GDPR).

We’ll ask all people who have the legal capacity to enter into an enforceable contract, we process data as necessary to perform our contracts with you (the Facebook Terms and Instagram Terms, together, “the Terms”). We describe the contractual services for which this data processing is necessary in the “Our Services” section of the Terms, and in the additional provisions of our contractual services, we:

To provide, personalize and improve our Facebook Products;
To promote safety, integrity and security;
To transfer, transfer, store or process your data outside the EU, including to the United States and China;
To communicate with you, for example, on ad-related issues; and
To provide a consistent and seamless experience across the Facebook Company Products.

These users are explained in more detail in our Data Policy, under “How do we use this information?”, “How do we store and transfer data as part of our global services?” and “How do the Facebook Companies work together?” We use the data we have to provide these services. If you choose not to provide certain data, the quality of your experience when we process data that you provide us is necessary for performing our contracts with you, you have the right to opt out under the GDPR. To exercise your rights, visit the Facebook settings and Instagram settings.

The other legal bases that we rely on in certain circumstances when processing your data are:

Your consent.
- For processing data with special protections (such as your religious views, political views, if you are “interested in” or your health, if you share this information in your Facebook profile fields or life events), so we can share with those you choose and personalize your content.
- For using facial recognition technology.
- For using data from advertisers and other partners provide us with about your activity on Facebook and Instagram, so we can personalize content, and show you on Facebook Company Products, and our websites, apps and devices that use our advertising services.
- For sharing data that personally identifies you (such as your name or email address, that by itself can be used to contact you or identify who you are) with advertisers, such as when you directly to share your contact information with an advertiser so they can contact you, for example, with additional information about a promoted product or service.

For collecting information that you allow us to receive through the device-based settings you enable (such as access to your GPS location, camera or photos), so we can provide the features and services described when you enable the settings.

When we process data that you provide us based on your consent, you have the right to withdraw your consent at any time and to port that data you provide us, under the GDPR. To exercise your rights, visit the Facebook settings and Instagram settings.

Our legitimate interests or the legitimate interests of a third party, not outweighed by your interests or fundamental freedoms.
- For providing you with our products and services, including products and services you have requested or you have a limited ability to enter into an enforceable contract in a manner.
- For creating, providing, support and maintain innovative products and features that enable people under the age of majority to express themselves, communicate, discover and engage with information and communities relevant to their interests, build communities and utilize tools and features that promote their well-being.
- To secure our platform and network, to verify accounts and activity, combat harmful conduct, detect and prevent spam and other bad experiences, keep the Facebook Company Products free from harmful or inappropriate content and investigate suspicious activity or breaches of our terms or policies, and to protect the safety of people under the age of majority.
- For all people, including those under the age of majority:
  - For providing measurement, analytics and other business services where we are processing data as a controller.
  - For providing accurate and reliable reporting to our advertisers, developers and other partners, to ensure accurate pricing and inventory performance and to demonstrate the value that our partners realize using Facebook Company Products;
  - In the interests of advertisers, developers and other partners to help them understand their customers and improve their businesses, validate our pricing models and evaluate the effectiveness of their online content and advertising and off on the Facebook Company Products.
  - For providing marketing communications to you. The legitimate interests we rely on for this processing are:
    - To provide Facebook Company Products and apps our direct marketing.
    - To research and innovate for social good. The legitimate interest we rely on for this processing is:
      - To further the state-of-the-art or academic understanding on important social issues to affect our society and work in a positive way.
    - To share information with others including law enforcement and to respond to legal requests. See our Data Policy, How to respond to legal requests or prevent harmful for more information. The legitimate interests we rely on for this processing are:
      - To prevent and address fraud, unauthorized use of the Facebook Company Products, breaches of our terms and policies, or other harmful or illegal activity, to protect ourselves (including our rights, properties or Products), your uses, or others, including as part of investigations in regulatory enquiries; or to prevent death or imminent harm.

You have the right to object to, and seek restrictions of, such processing; to exercise your rights, visit the Facebook settings and Instagram settings.

We will consider several factors when assessing an objection, including: our users reasonable expectations; the benefits and risks to you, us, other users or third parties; and other available means to achieve the same purpose that may be less invasive and do not require disproportionate effort. Your objection will be upheld and we will cease processing your personal information.

If you are under the age of majority in your country and have a limited ability to enter an enforceable contract, we will take particular account of how that is below the age of majority and adjust our assessment of our legitimate interests and the balancing of your interests and ours accordingly. We provide specific protections for people below the age of majority associated with the processing of their data.

Compliance with a legal obligation.
- For processing data when the law requires it, including, for example, if there is a valid legal request for certain data. See our Data Policy, under How do we respond to legal requests or prevent harmful for more information.
- For processing your vital interests or those of another person.
- The vital interests that we rely on for this processing include protection of you life or physical integrity or that of others, and we rely on it to combat harmful conduct and promote safety and security, for example, when we are investigating reports of harmful conduct or when someone needs help.

Tasks carried out in the public interest.
- For undertaking research for social good and to promote safety, integrity and security, as described in our Data Policy under “How do we use this information?”, where this is necessary in the public interest as laid down by Union law or Member State law to which we are subject.

When you process your data as necessary for a task carried out in the public interest, you have the right to object to, and seek restrictions of, our processing. To exercise your rights, visit the Facebook settings and Instagram settings. In evaluating an objection, we will evaluate several factors, including: reasonable user expectations; the benefits and risks to you; and we may require disproportionate effort.

Your objection will be upheld and we will cease processing your personal information, unless the processing is necessary for complying with legitimate ground or is needed for legal reasons.
Consent

Article 4(11))
‘consent’ means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

Recital 32

**ticking a box** when visiting an internet website
**choosing technical settings**
another statement or **conduct which clearly indicates** acceptance

Silence, pre-ticked boxes or inactivity should not therefore constitute consent.
Conditions applicable to child's consent in relation to online services:

1. Consent is the ground for processing

2. Online services are offered to the child

3. The child is at least 16 years old

Child is below the age of 16 → parental consent is needed

Can be lowered to - 15, 14, 13.
The changing patchwork of the child’s age of consent for data processing across the EU (January 2019)

Online article: The changing patchwork of the child’s age of consent for data processing across the EU (January 2019)
Children

Our services are **not intended for** – and we don’t direct them to – **anyone under 13**.
And that’s why we do not knowingly collect personal information from anyone under 13.

In addition, **we may** limit how we collect, use and store some of the information of EU users between 13 and 16. In some cases, this means we will be **unable to provide certain functionality to these users**.

If we need to rely on **consent** as a legal basis for processing your information and your country requires consent from a parent, **we may require your parent’s consent before we collect and use that information**.
<table>
<thead>
<tr>
<th>Consent</th>
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</thead>
<tbody>
<tr>
<td><strong>Facebook</strong></td>
</tr>
<tr>
<td>We collect, use and share the data: <strong>consistent with your consent</strong>, which you may <strong>revoke</strong> at any time.</td>
</tr>
</tbody>
</table>

| **Google** |
| We ask for **your agreement to process your information for specific purposes** and you have the right to **withdraw** your consent at any time. **It’s for:** |
| • **personalized** services like ads |
| • **voice and audio activity for speech recognition** |

| **Snap Inc.** |
| We’ll ask for **consent to use your information for specific purposes**. If we do, we’ll make sure you can **revoke** your consent. |

| **TikTok** |
| If you choose to share your **precise location** with us, we will also use your data to provide you with **location based services**, such as **advertising** and other **personalised content** and where you have chosen to receive personalised adverts from us and/or our partners, our legal basis is **consent.** |
Consent for

- processing data with special protections
  so we can share with those you choose and personalise your content
- facial recognition technology
- data that advertisers and other partners provide us with about your activity off Facebook
- sharing data that personally identifies you with advertisers
- access to your GPS location, camera or photos

Information such as your name or email address, that by itself can be used to contact you or identifies who you are
Contract

Article 6(1)(b) GDPR

“processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”

2 CONDITIONS:

1. objectively necessary
2. for either or
Children and contracts

“the controller must ensure that it complies with the relevant national laws on the capacity of children to enter into contracts.

Furthermore, to ensure compliance with the fairness and lawfulness principles”
<table>
<thead>
<tr>
<th>facebook</th>
<th>Google</th>
<th>Snap Inc.</th>
<th>TikTok</th>
</tr>
</thead>
<tbody>
<tr>
<td>We collect, use and share the data as necessary to fulfill our <strong>Facebook Terms of Service</strong> or <strong>Instagram Terms of Use</strong>.</td>
<td>We process your data to provide a service you’ve asked for under a contract. For example, we process your payment information when you buy extra storage for Google Drive.</td>
<td>A reason we might use your information is because you’ve <strong>entered into an agreement with us</strong>. For example, when you <strong>buy</strong> an On-Demand Geofilter, we need to use some of your information to collect payment.</td>
<td>To perform our contract with you, we will use your information to:</td>
</tr>
<tr>
<td>For all people who have the legal capacity to enter into an enforceable <strong>contract</strong>, we process data as necessary to perform our contracts with you.</td>
<td></td>
<td></td>
<td>• <strong>personalise and provide tailored content</strong></td>
</tr>
</tbody>
</table>

**Contract**
To provide, **personalise** and improve our Facebook Products

To promote **safety**, integrity and security

To **transfer**, transmit, store or process your data outside the EEA - the US and other

To **communicate** with you

To provide a consistent and seamless experiences throughout Facebook products

“if you choose not to provide certain data, the **quality of your experience** using the Facebook Products may be affected.”
What is **actually necessary** to process for a performance of a contract (point 28):

“the fact that **some processing** is covered by a contract does not automatically mean that the processing is necessary for its performance.

For example, article 6.1(b) is **not a suitable legal ground for building a profile** of the user’s tastes and lifestyle choices based on his click-stream on a website and the items purchased.

This is because the data controller **has not been contracted to carry out profiling**, but rather to deliver particular goods and services, for example. Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them “necessary” for the performance of the contract.”
Article 6.1(f) GDPR

processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party,

except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data,

in particular where the data subject is a child.”
Balancing test(s)

[1] the **nature and source of the legitimate interest** and whether the data processing is **necessary** for the exercise of a fundamental right, is otherwise in the public interest

[2] the **impact on the data subject** and their **reasonable expectations** about what will happen to their data, as well as the **nature** of the data and **how they are processed**

[3] additional safeguards which could limit undue impact on the data subject, such as **data minimisation**, **privacy-enhancing technologies**; increased transparency, general and unconditional **right to opt-out**, and **data portability**.
What do we need to consider when choosing a basis for processing children’s personal data?

Balancing test(s)

(1) purpose test
(2) necessity test
(3) balancing test

Children’s INTERESTS
RIGHTS FREEDOMS
Children and legitimate interests

Opinion 2/2009 on the protection of children's personal data
(General Guidelines and the special case of schools)

Adopted on 11 February 2009

situations may arise where the best interest of the child and
his/her right to privacy appear to compete.

In such cases, data protection rights may have to
yield to the principle of best interest
<table>
<thead>
<tr>
<th>Platform</th>
<th>Process for:</th>
<th>Provide and improve our services</th>
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<tbody>
<tr>
<td>Facebook</td>
<td>We collect, use and share the data:</td>
<td></td>
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<tr>
<td></td>
<td>as necessary for our (or others') legitimate interests, including</td>
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<td></td>
<td>our interests in providing an innovative, personalized, safe, and</td>
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<td>profitable service</td>
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<td></td>
<td>unless those interests are overridden by your interests or fundamental</td>
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<td></td>
<td>rights and freedoms that require protection of personal data.</td>
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<tr>
<td></td>
<td>Process for:</td>
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<tr>
<td></td>
<td>• Providing, maintaining, and improving our services</td>
<td>Provide and improve our services</td>
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<tr>
<td></td>
<td>• Developing new products and features</td>
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<tr>
<td></td>
<td>• Understanding how people use our services</td>
<td></td>
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<tr>
<td></td>
<td>• Customizing our services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Marketing</td>
<td></td>
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<tr>
<td></td>
<td>• Providing advertising</td>
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<tr>
<td></td>
<td>• Detecting, preventing, or otherwise addressing fraud, abuse, security, or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>technical issues</td>
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<tr>
<td></td>
<td>• Protecting against harm</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Performing research that improves our services</td>
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<td></td>
<td>• [...]</td>
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<td></td>
<td>An important point to understand about legitimate interest is that our</td>
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<td></td>
<td>interests don’t outweigh your right to privacy, so we only rely on</td>
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<td></td>
<td>legitimate interest when we think the way we are using your data doesn’t</td>
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<td></td>
<td>significantly impact your privacy or would be expected by you</td>
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<tr>
<td>Google</td>
<td>Improve and develop Research</td>
<td></td>
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<tr>
<td></td>
<td>Keep the Platform safe</td>
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<td></td>
<td>Advertising</td>
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<td></td>
<td>[...]</td>
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<tr>
<td>TikTok</td>
<td>And to ensure that you are old enough to use our Services (as required by</td>
<td></td>
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<tr>
<td></td>
<td>law).</td>
<td></td>
</tr>
<tr>
<td>Snap Inc.</td>
<td>Legitimate interest</td>
<td></td>
</tr>
</tbody>
</table>
Legitimate interests

People under the age of MAJORITY (13-18) – no contract
BUT when they use services, it’s FB’s LEGITIMATE INTEREST to:

- Provide, personalise and improve the Facebook Products (special protection)
- Promote safety, integrity and security
- Provide non-marketing communications
- To create, provide, support and maintain innovative products and features
- To secure our platform and network, to verify accounts and activity, combat harmful conduct

FOR ALL PEOPLE, including those under the age of majority – for providing measurement, analytics and other business services:

- reporting to advertisers and partners
- helping them understand their customers
- marketing communications
- research and innovate for social good
- “to further the state-of-the-art or academic understanding on important social issues to affect our society and world in a positive way”
- […]

FOR ALL PEOPLE, including those under the age of majority – for providing measurement, analytics and other business services:

- reporting to advertisers and partners
- helping them understand their customers
- marketing communications
- research and innovate for social good
- “to further the state-of-the-art or academic understanding on important social issues to affect our society and world in a positive way”
- […]
“The purpose of the collection must be **clearly** and **specifically identified**: it must be detailed enough to determine what kind of processing is and is not included within the specified purpose[…].

For these reasons, a purpose that is vague or general, such as for instance 'improving users' experience', 'marketing purposes', 'IT-security purposes' or 'future research' will - without more detail - usually not meet the criteria of being ‘specific’". (point 16)
Conclusions

Initial focus on consent as the “main” ground

Other grounds widely used (instead)

Controllers must process data:

• Lawfully and also fairly

• Transparently – more concrete information – understandable to children!

• In line with the purpose limitation and data minimisation obligations

• Take account of child’s best interest when evaluating their rights and interests
Ingrida Milkaite  
PhD researcher  

ingrida.milkaite@ugent.be  

@ingridamilkaite

Prof. dr. Eva Lievens  
e.lievens@ugent.be  

@evalieve

Universiteit Gent  
Ghent University  
@ugent