Exploring the crossroads between audiovisual media regulation and data protection

Prof. dr. Eva Lievens
50th EPRA meeting, Athens, 24 October 2019
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<td>The General Data Protection Regulation and the processing of children’s data</td>
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Introduction: the crossroads between audiovisual media regulation and data protection
right to development (article 6 UNCRC)
right to freedom of expression (article 13 UNCRC)
right to privacy (article 16 UNCRC)
right to have access to diverse information + protection against harmful content (article 17 UNCRC)
right to play (article 31 UNCRC)
right to protection from commercial exploitation (article 32 UNCRC)
right to development
(article 6 UNCRC)

right to freedom of expression
(article 13 UNCRC)

right to privacy
(article 16 UNCRC)

right to have access to diverse information + protection against harmful content
(article 17 UNCRC)

right to play
(article 31 UNCRC)

right to protection from commercial exploitation
(article 32 UNCRC)

best interests of the child
(article 3 UNCRC)

right to be heard
(article 12 UNCRC)

NRAs

DPAs
Sign in to confirm your age
This video may be inappropriate for some users.
Article 6a AVMSD

1. Member States shall take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction, which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme. The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures.

2. Personal data collected or otherwise generated by media service providers pursuant to paragraph 1 shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.

[Recital 21] The establishment of child protection mechanisms by media service providers inevitably leads to the processing of the personal data of minors. Given that such mechanisms aim at protecting children, personal data of minors processed in the framework of technical child protection measures should not be used for commercial purposes.
Article 28b AVMSD

1. Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:
   (a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1);

3. Those measures shall consist of, as appropriate:

   (f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;

   (h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;

Personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to points (f) and (h) shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.

Member States shall establish the necessary mechanisms to assess the appropriateness of the measures, referred to in paragraph 3 taken by video-sharing platform providers. Member States shall entrust the assessment of those measures to the national regulatory authorities and/or bodies.
56. States should require the use of effective systems of age-verification to ensure children are protected from products, services and content in the digital environment which are legally restricted with reference to specific ages, using methods that are consistent with the principles of data minimisation.
The General Data Protection Regulation and the processing of children’s data
Regulation!
(binding legislative act; must be applied in its entirety across the EU)

Aim: reduce fragmentation

173 recitals
99 articles
Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.
(38) Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.
The GDPR & children

Article 6: lawfulness – legitimate interests – overridden interests of children

Article 8: parental consent

Article 12: transparent information

Article 17: right to erasure

Article 25: privacy by design/default

Article 35: data protection impact assessment

Article 40: codes of conduct

Article 57: DPAs awareness

Recital 38: specific protection

Recital 58: transparent information

Recital 65: right to erasure

Recital 71: profiling

Recital 75: risks – DPIA

Recital 58: transparent information

Recital 65: right to erasure

Recital 71: profiling

Recital 75: risks – DPIA
Principles

Data subject rights

Obligations for controllers
Principles
(art. 5 GDPR)

- lawfulness, fairness and transparency
- accountability
- purpose limitation
- integrity and confidentiality
- data minimisation
- storage limitation
- accuracy
Principles (art. 5 GDPR)

- Lawfulness, fairness and transparency
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Integrity and confidentiality
- Accountability

*For specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.*

*Adequate, relevant and limited to what is necessary in relation to the purposes.*
Art. 6: Processing shall be **lawful** only if and to the extent that at least one of the following applies:

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<th>Category</th>
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<td>Consent</td>
<td>the data subject has given consent to the processing of his or her personal data for one or more specific purposes</td>
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<td>Contract</td>
<td>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</td>
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<tr>
<td>Legal obligation</td>
<td>processing is necessary for compliance with a legal obligation to which the controller is subject</td>
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<td>Vital interests</td>
<td>processing is necessary in order to protect the vital interests of the data subject or of another natural person</td>
</tr>
<tr>
<td>Public interest</td>
<td>processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller</td>
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<tr>
<td>Legitimate interests</td>
<td>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.</td>
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Art. 6: Processing shall be **lawful** only if and to the extent that at least one of the following applies:

- **Consent**
  - the data subject has given consent to the processing of his or her personal data for one or more specific purposes

**Article 8 GDPR**

- information society services directly offered to a child
  - child < (13-14-15-)16
- parental consent
- reasonable efforts to verify consent is given by holder of parental responsibility
Data subject rights

- Right to information
- Right of access
- Right to data portability
- Right to rectification
- Right to object
- Right not to be subject to automated individual decision-making
- Right to erasure ('to be forgotten')
[Recital 71] Measure evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her should not concern a child.

[Article 29 WP] organisations should, in general, refrain from profiling [children] for marketing purposes.

[Article 12] The controller shall take appropriate measures to provide any information […] relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.

[Recital 65] That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet.
(Obligations for) Data Controllers (and Processors)

- Responsibility
- Data protection by design and by default
- Records of processing activities
- Cooperation with the supervisory authority
- Security of processing
- Notification of a personal data breach
- Data protection impact assessment
- Data Protection Officer
- Codes of conduct and certification
AVMSD x GDPR = challenges!

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<td>• What about data collected or generated other than for the purpose of protective measures?</td>
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<td>• Protect minors from harmful commercial communications, including behavioural targeted advertising itself</td>
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Guidelines to respect, protect and fulfil the rights of the child in the digital environment

57. States should take measures to ensure that children are protected from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing. This includes ensuring that business enterprises do not engage in unfair commercial practices towards children, requiring that digital advertising and marketing towards children is clearly distinguishable to them as such, and requiring all relevant stakeholders to limit the processing of children’s personal data for commercial purposes.

Council of Europe, Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment
AVMSD x GDPR = challenges!

**GDPR compliant age verification (and other technical measures)**
- Processing of personal data for the purpose of age verification should comply with the principles laid down in the GDPR (data minimisation, purpose limitation, fairness, lawful grounds…)
- Age verification should not lead to excessive data processing: usually the only attribute that needs to be known is whether a certain individual is under a certain age (not exact date of birth, not even exact age)
- Use of profiling for determining age?

**Avoiding commercial exploitation of children’s data**
- Data obtained in the context of protective measures (art. 6 + 28b AVMSD) should not be processed for commercial purposes, such as direct marketing, profiling and behavioural targeted advertising
- What about data collected or generated other than for the purpose of protective measures?
- Protect minors from harmful commercial communications, including behavioural targeted advertising itself

**Avoiding impact on other children’s rights**
- Certain service providers might exclude children from accessing their services because they feel it is too burdensome to comply with certain obligations, with a potential impact on children’s right to freedom of expression, access to information, play and right to development.

Avoiding impact on other children’s rights
AVMSD x GDPR = solutions?

**DP-b-D/D**
Data Protection-by-Design and Data Protection-by-Default (article 25 GDPR)

**DPIAs**
Data Protection Impact Assessments (article 35 GDPR): take into account full range of children’s rights

**CoC**
Codes of conduct (article 40 GDPR)
A look towards the future: An integrated approach to the rights of the child in the digital environment – Opportunities for NRAs and DPAs
Opportunity 1:

NRAs & DPAs: talk to each other!
The rights of the child in the digital environment are **interlinked**. Realising those rights necessitates an **integrated** approach which entails **cooperation** between different regulatory authorities and other stakeholders.
Opportunity 2:

NRAs & DPAs: talk to children!
Co-design workshops with children on their understanding of data collection and processing & child-friendly information formats

- 4 workshops (4 groups at a time)
- 84 children in total
- @ 2 schools in Gent, Belgium
- Age 9-12 years (grade 5 / 6)
Child-friendly information and data / media literacy is essential.

Some data collection and processing practices, however, are so complex and opaque that restrictions for certain (esp. commercially exploitative) practices in respect of children are necessary.

Regulatory authorities, including NRAs & DPAs, need to take up their crucial role in ensuring that the full range of children’s rights is respected, protected and fulfilled in the digital environment.
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Do you want to know more about children and data protection?

Follow our research project:

A children's rights perspective on privacy and data protection in the digital age: a critical and forward-looking analysis of the General Data Protection Regulation and its implementation with respect to children and youth