Data Protection Commission:
Public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation

Submission by the Ombudsman for Children's Office

March 2019

Contents

Recommendations of the Ombudsman for Children's Office

Transparency and the right to be informed about the use of personal data (Articles 12-14 GDPR)

- The OCO would welcome consideration being given by the DPC as to whether it can offer additional guidance to organisations on providing transparency information to children in a concise way given that the GDPR's requirements in this regard mitigate against succinctness.

- The OCO suggests that the DPC might highlight its expectation that organisations which process children's personal data should be able to demonstrate their recognition of and respect for children's right to information about the use of their personal data.

- The OCO encourages the DPC to urge all organisations that process children's personal data to take a child-friendly, rights-respecting approach by developing information that is addressed directly to children and young people and available to them in a variety of formats.

- The OCO suggests that the DPC encourage organisations to consult with children and young people on the development of information, where it is practicable for them do so.

Right of access (Article 15 GDPR)

- In relation to children making access requests for their own personal data, the OCO encourages the DPC to promote a contextual approach, whereby individual organisations are advised to assess the particular circumstances of their processing (including the nature of the personal data they hold) and to respect children's rights, treat children's best interests as a priority and have regard to children's evolving capacities when determining whether to accept and accede to an access request made by a child or young person.

- Having regard to the DPC's advisory powers under Article 58(3)(b) of the GDPR, the OCO would welcome if the DPC could assess whether existing legislation that mitigates against children and young people being able to make an access request themselves should be amended in light of children's right of access under the GDPR.

- Taking into account children and young people's evolving capacities and preferences as well as a parent's entitlement to a rebuttable presumption that they are acting in their child's best interests, the OCO suggests that the DPC promote awareness among organisations that parents/guardians need to be able to make access requests on behalf of their children and that, subject to permissible restrictions, they should accede to such access requests unless there is sufficient evidence that doing so would be contrary to the best interests of the child.

- The DPC might recommend that organisations can encourage parents and children to jointly make access requests for children's personal data where it is appropriate to do so.

Right to erasure (Article 17 GDPR)

- The OCO encourages the DPC to consider the points and recommendations made by the OCO in relation to the right of access when it is deliberating on what guidance to provide on implementing children and young people's right to erasure.

- In light of Recital 65 and Article 17(1)(f) of the GDPR, it would be helpful for the DPC to clarify any specific implications that may arise in the context of the internet and information society services directed to children for the erasure of children's personal data and for erasure requests made by children or by parents/guardians on their behalf. The DPC might also consider the age of digital consent in this regard.

Age verification (Article 8 GDPR)

- The OCO encourages the DPC to communicate an expectation that relevant online service providers which rely on consent as a lawful basis for processing children's personal data should be able to demonstrate that they have put effective methods in place to verify a) that a young person is 16 or over and therefore can consent themselves to the processing of their personal data and b) that a person consenting to the processing of the personal data of a child under 16 in these circumstances is actually the child's parent/guardian.

- Having regard to Article 8 of the GDPR, in circumstances where a current service user is at or above the minimum age to use an information society service, but below the age of digital consent provided for under section 31(1) of the 2018 Act, an appropriate approach may be for the online service provider to seek the consent of the child's parent/guardian and to block the child from accessing the service until the consent of their parent/guardian has been obtained.

Directing marketing

- Noting the current lack of clarity about the scope to prohibit children's personal data from being processed for direct marketing purposes in a manner that is compatible with the GDPR, the OCO encourages the DPC to develop guidance that promotes children's position as rights holders who are entitled to be protected from commercial exploitation, including exploitative and manipulative marketing practices, and to have their rights and best interests treated as a priority.

- The OCO suggests that the DPC might consider and build on the ICO's guidance on legitimate interests and marketing to children when providing guidance to organisations on the factors they should consider when balancing their own legitimate interests in conducting direct marketing and the rights and interests of children. In this regard, the OCO recommends that the DPC might usefully advise organisations to carry out a legitimate interests assessment and communicate its expectation that organisations will:
    - protect children and their personal data from risks that children may not fully understand and from consequences that they may not envisage

- put children's interests ahead of their own interests
- take account of sector specific guidance on marketing in order to make sure that children's personal data is not used in a way that would or could lead to their exploitation or otherwise harm them.

Profiling for marketing purposes

- Having regard to the rights and best interests of children, the OCO encourages the DPC to support a prohibition on profiling of children for marketing purposes, in particular where such profiling has *"similarly significant effects"* to children's fundamental legal rights and freedoms or legal status. The OCO would welcome and encourage an examination by the DPC of how a legally permissible prohibition might be achieved, including by giving consideration to the scope that may be offered by section 32(1)(e) of the 2018 Act and the mechanism provided for under Article 40(7)-(9) of the GDPR in this regard.

Introduction

In December 2018, the Data Protection Commission (DPC) launched a public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation (GDPR). In January 2019, the DPC launched a second stream of this consultation, focused on facilitating children and young people to share their views on a range of issues concerning their personal data and their rights as data subjects.

With reference to its obligations under Article 57 of the GDPR and Section 32 of the Data Protection Act 2018 (2018 Act), the DPC has clarified that the purpose of this public consultation is *"to give all stakeholders an opportunity to have their say on issues around the processing of children's personal data, the specific standards of data protection applicable to children, and the rights of children as data subjects."*[1] In this regard, the DPC has indicated that the responses it receives will inform its work to produce guidance materials, including guidance for children and young people and for organisations that process children's personal data. Following the consultation, the DPC is also planning to *"work with industry, government and voluntary sector stakeholders and their representative bodies to encourage the drawing up of codes of conduct to promote best practices by organisations that process the personal data of children"*.[2]

The Ombudsman for Children's Office (OCO) welcomes the DPC's decision to initiate a public consultation about the processing of children's personal data and children's rights as data subjects under the GDPR. The OCO also welcomes the DPC's decision to implement a dedicated consultation stream focused on seeking the views of children and young people themselves.

As the DPC highlights in its public consultation document, a notable feature of the GDPR is the special attention it gives to the protection of children's position as data subjects and of children's personal data. The rationale for this special attention is evident in Recital 38 of the GDPR, which states that *"[c]hildren 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."*[3]

This recognition of the special protection due to children is in keeping with international children's rights standards, which are informed by and promote an acknowledgement that children are more vulnerable to exploitation by virtue of their evolving capacities. However, as exemplified by the UN Convention on the Rights of the Child (UNCRC), this emphasis on the special protection due to children is framed by a recognition of children as active subjects of rights. Therefore, from a children's rights perspective, a key challenge in the context of efforts to interpret and implement children's rights as data subjects is to ensure that measures taken to protect children's position as data subjects and their personal data do not unduly curtail children's freedom to exercise their rights as data subjects.

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[1] Data Protection Commission, *Public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation* (December 2018), p.8.
[2] *Ibid*, p.9.
[3] European Union, *Regulation (EU) 2016/679 (General Data Protection Regulation)*.

Having ratified the UNCRC in 1992, Ireland has an obligation under international law to respect, protect and fulfil the rights of children set out in the Convention. As indicated by Article 4 of the UNCRC, the State is the primary duty bearer in this regard. In light of the DPC's status as an independent statutory body and the obligations of the State and its actors to uphold children's rights and to ensure that non-State actors, including the business sector, operate in accordance with children's rights,[4] the OCO encourages the DPC through the work it undertakes further to this public consultation to encourage and support all organisations involved in processing children's personal data to:

- recognise children's status as subjects of rights
- respect, protect and uphold children's rights
- take a child-centred, rights-based approach to the treatment of children as data subjects and of their personal data.

Among other things, this approach will acknowledge children's evolving capacities as rights holders and uphold core children's rights principles, namely children's right to non-discrimination (Article 2, UNCRC); children's right to have their best interests treated as a primary consideration in all actions concerning them (Article 3, UNCRC); children's right to life, survival and development (Article 6, UNCRC); and children's right to be heard (Article 12, UNCRC). In this regard, and taking into account the considerable diversity that necessarily exists among children and young people under 18 years of age and among organisations that collect and process their personal data, the OCO is of the view that a consistent thread that should run through the collection and processing of all children's personal data by all organisations is a demonstrable commitment to acting in the best interests of children.

The Ombudsman for Children's Office (OCO) is an independent statutory body. One of the OCO's core statutory functions under the Ombudsman for Children Act 2002, as amended (2002 Act) is to promote the rights and welfare of children up to the age of 18 years. The OCO has prepared this submission pursuant to Section 7(1)(b) of the 2002 Act, which provides for the Ombudsman for Children to encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures that are designed to promote the rights and welfare of children.

The overall aim of this submission, which focuses on several issues raised by the DPC in its public consultation document, is to offer a view on how certain provisions of the GDPR can be implemented in a manner that is consistent with children's rights. In this regard, it may be helpful to clarify at the outset that the OCO is aware that data subject rights are contextual and that both the GDPR and the 2018 Act provide for limitations and restrictions. Taking into account Article 1 of the UNCRC and section 29 of the 2018 Act, it may also be helpful to clarify that references to children and young people in this submission refer to children and young people under the age of 18 years.

[4] See UN Committee on the Rights of the Child, *General Comment No.5 – General measures of implementation of the Convention on the Rights of the Child* (2003), para. 42; Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008); Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2011); UNICEF, The UN Global Compact and Save the Children, *Children's Rights and Business Principles* (2012); and UN Committee on the Rights of the Child, *General Comment No.16 on State obligations regarding the impact of the business sector on children's rights* (2013), p.3 and p.8f.

I. Children as data subjects and the exercise of their data protection rights

Transparency and the right to be informed about the use of personal data (Articles 12-14 GDPR)
Transparency is a key component of one of the core principles of the GDPR that data controllers are responsible for and obliged to demonstrate compliance with (Article 5(1)(a), GDPR). In this regard, Article 12(1) of the GDPR requires controllers to:

> "*take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 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."*

Reinforced by the guidance provided in Recital 58 of the GDPR in relation to the transparency principle, this explicit reference to and emphasis on the provision of information to children under Article 12(1), is welcome from a children's rights perspective. Aligned with the GDPR's broad recognition of children as data subjects with the same rights as adults over their personal data, this clause appears to envisage that information will be provided in a manner that is *directly* accessible and intelligible to children and young people. As such, it can be seen to be consistent with the following recommendation made by the UN Committee on the Rights of the Child in a report published following its day of general discussion on digital media and children's rights in 2014:

> *"States [should] ensure that all children have meaningful and child-friendly information about how their data is being gathered, stored, used and potentially shared with others. In this regard, States should ensure that age-appropriate privacy settings, with clear information and warnings, are available for children using digital media and ICTs."*[5]

Accordingly, the OCO very much welcomes the DPC's plans to provide information and guidance to children and young people on their rights as data subjects. Many children and young people in Ireland are unlikely to be familiar with data protection, the extent to which their personal data is processed by organisations, and their rights as data subjects. The provision of accessible information to them and to their parents/guardians in this regard is a necessary prerequisite to the exercise of their rights as data subjects.

As regards organisations that process children's personal data, given the considerable differences in capacity that exist between children and young people under 18, taking a child-centred, rights-respecting approach to implementing the obligation to *"take appropriate measures"* to provide the required information "*in a concise, transparent, intelligible and easily accessible form, using clear and plain language"* will involve developing more than one version of that information for children and young people if it is to be directly intelligible to them and, in the case of children and young people with less capacity, if parents/guardians are to be supported to facilitate their children's understanding of the information.

[5] UN Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion on "Digital media and children's rights"* (2014), para.103.

If variations in age, capacity, needs and preferences among children and young people are to be adequately taken into account, the formats as well as the language in which information is provided need to be considered. While child-friendly written information may suffice in some instances, the provision of information in audio, visual and/or audio-visual formats will be more accessible, intelligible and engaging for many children and young people.

In light of the OCO's experience of consulting with children and young people about their preferences in relation to information provision, we would suggest that organisations that collect and process children's personal data, including organisations whose services and products are aimed at both adults and children, should aim to provide transparency information in a variety of complementary formats. In this regard, audio-visual formats can be particularly effective and engaging for children and young people and the provision of concrete examples, scenarios and case studies/stories can support their understanding.

From our experience of developing information with and for children and young people, we would also suggest that, where practicable, organisations will benefit from seeking the views of children and young people themselves and from facilitating children and young people to contribute to the development of information materials in one or more ways. If such an approach is not feasible, organisations might seek guidance from organisations that have experience of producing information for children and young people and/or look at examples of information that has been produced for children whose ages and capacities are similar to those of the children whose personal data they collect and process.

Taking into account the amount of transparency information that organisations are obliged to provide to data subjects, which arguably mitigates against succinctness, and the diversity of organisations that collect and process children's personal data, including as regards their experience of producing information for children and the resources available to them to do so, it is evident that implementing a child-friendly, rights-respecting approach presents challenges. As such, the OCO suggests that the DPC might encourage all organisations - including organisations that provide products or services to both adults and children - to adopt this approach while acknowledging and allowing that it will take time to implement properly and that there will be practical limitations, including resource constraints, on what different organisations will be able to achieve. In this regard, a key message that could merit highlighting by the DPC, including through future guidance, is its expectation that organisations which process children and young people's personal data will approach implementation of the transparency principle in a manner that demonstrates their recognition of and respect for children and young people's right to information about the use of their personal data.

Recommendations:

- The OCO would welcome consideration being given by the DPC as to whether it can offer additional guidance to organisations on providing transparency information to children in a concise way given that the GDPR's requirements in this regard mitigate against succinctness.
- The OCO suggests that the DPC might highlight its expectation that organisations which process children's personal data should be able to demonstrate their recognition of and respect for children's right to information about the use of their personal data.

- The OCO encourages the DPC to urge all organisations that process children's personal data to take a child-friendly, rights-respecting approach by developing information that is addressed directly to children and young people and available to them in a variety of formats.
- The OCO suggests that the DPC encourage organisations to consult with children and young people on the development of information, where it is practicable for them to do so.

Right of access (Article 15 GDPR)

Under Article 15 of the GDPR, data subjects, including children and young people, have a right of access to their personal data. As the DPC notes in its public consultation document, the GDPR does not prescribe when, or in what circumstances, a child or young person can make an access request themselves for their personal data. Nor does it prescribe when, or in what circumstances, a parent/guardian can make an access request for their child's personal data.[6]

From a children's rights perspective, the practice of setting minimum ages for children must have a purpose and that purpose should be consistent with children's rights under the UNCRC, including by avoiding arbitrary discrimination against children on the grounds of age. Minimum ages can be and are prescribed for a variety of legitimate reasons – for example, to protect children from exploitation and abuses of power and to support children's development. In this regard, and taking into account the reference to children's evolving capacities under Article 5 of the UNCRC, it is important to keep in mind, however, that age is a broad indicator of capacity and that other factors, including children's circumstances, experiences, needs and abilities influence their capacities. As such, when considering whether to prescribe or recommend a minimum age, it is important not only to identify a specific purpose for doing so that is consistent with children's rights and best interests, but also to assess whether an age-based approach is the most effective way of achieving that specific purpose.[7]

In relation to the right of access, and taking into account Recital 38 of the GDPR, it is not immediately evident what specific purpose or what *"specific protection"* would be achieved if the DPC was to recommend an *overarching* minimum age at which children and young people should be able to make an access request for their personal data. In practice, many children may be unlikely to make access requests, relying instead on their parent/guardian to do so on their behalf because they do not have the capacity to make an access request themselves or preferring their parent/guardian to do so on their behalf. However, given the diversity of organisations that process children's personal data, the different amounts and types of children's personal data they process, and the different lawful bases on which and purposes for which they do so, it appears to the OCO that recommending an overarching minimum age that should apply in *all* circumstances may amount to an unnecessary curtailment of children's exercise of their right of access.

Instead, we suggest that the DPC could promote a more contextual approach, whereby individual organisations are advised:

[6] Data Protection Commission, *supra* note 1, p.12.
[7] Children's Rights Information Network, *Age is Arbitrary: Setting Minimum Ages* (April 2016).

- to assess the particular circumstances of their processing, including the nature of the personal data they hold
  and
- to respect children's rights, treat children's best interests as a priority and have regard to children's evolving capacities

when determining whether to facilitate children and young people to make access requests themselves and, subject to permissible restrictions, whether to accede to an access request made by a child or young person. Organisations might also be advised to consider, among other things, whether it will be appropriate to encourage children and young people to talk with their parent/guardian before making an access request and/or to jointly make an access request for their personal data with their parent/guardian.[8]

In this regard, the OCO is aware that certain domestic legislation mitigates against children and young people being able to make an access request themselves for their personal data - for example, Section 9(f) of the Education Act 1998 requires schools to ensure that parents of students, and students who have reached the age of 18, have access to records kept by the school relating to the progress of the student in their education. Taking into account the DPC's role as the supervisory authority for the purposes of the GDPR and its advisory powers under Article 58(3)(b) of the GDPR, the OCO would welcome if the DPC could assess whether existing legislation that mitigates against children and young people being able to make an access request themselves should be amended in light of children's right of access under the GDPR.

In relation to the circumstances in which a parent/guardian should be able make an access request for their child's personal data, several matters need to be considered. In the first instance, and as noted above, there are children and young people who, for age and/or other reasons affecting their capacity, will not be able to make an access request themselves and who will therefore be dependent on a parent/guardian to make an access request and to exercise their right of access on their behalf. Furthermore, there are children and young people who will have the capacity to make an access request themselves, but who may prefer their parent/guardian to do so on their behalf or who may want to jointly make an access request with their parent/guardian. Facilitating parents/guardians in such circumstances to make an access request for their child's personal data on behalf of or with their child would appear to be consistent with a child-centred, rights-based approach and with children's rights, including under Articles 2, 3, 5, 6, 12 and 16 of the UNCRC.

As the DPC is aware a further key consideration in the Irish context concerns the rights and duties of parents. Bunreacht na hÉireann, and in particular Article 42, proceeds on the basis that the family is the decision maker in respect of matters which affect it and that parents make decisions concerning the welfare of their children. These principles were set out and endorsed by the Supreme Court in the seminal case of *North Western Health Board v. H.W and C.W [2001] 3IR 622.* In that case Mrs Justice Denham dealt with the position of the child in the family and in a passage from her judgement extracted the following constitutional principle:

[8] As the DPC will be aware, there are circumstances where it may not be appropriate for an organisation to encourage a child to talk to a parent/guardian before making an access request or to jointly make an access request for their personal data with their parent/guardian.

> *"The principle behind excluding the State from decision making in relation to the child where parents are exercising their responsibilities and duties is a constitutional principle. It is one of the fundamental principles of the Constitution. The Constitution describes a society which aspires to a community of families. Families are to be protected. This means that State interventions are limited."*

The principles laid down in this case were restated by the Supreme Court in *N v. The Health Service Executive and Others [The Baby Ann Case] [2006] 4IR 374.*

These cases recognise and endorse the right of parents to make decisions about matters which will, or may, affect the health and welfare of their children. These principles can be observed in operation in relation to the application of the Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (S.I. No. 218 of 2016), as amended by S.I. 558 of 2016. Section 37(8) of the Freedom of Information Act 2014 (2014 Act) states that the Minister may provide by regulations for the granting of FOI requests where the requester is the parent or guardian of the individual to whom the record relates or where that individual is deceased. The Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (S.I. No. 218 of 2016), as amended by S.I. 558 of 2016, have been made by the Minister (2016 Regulations).

The 2016 Regulations provide that a request for access to records which involves the disclosure of personal information relating to a minor shall be granted where the requester is the minor's parent or guardian and where, having regard to all the circumstances, access to the records would be in the minor's best interests. In this regard, in the case of *McK v The Information Commissioner* [2006] IESC 2, the Supreme Court held that:

> *"The [FOI] Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent … has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental … A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. …The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and, in considering the circumstances, her welfare is paramount."*

Therefore, a parent is entitled to a rebuttable presumption that access to their child's medical information is in the best interests of the child. However, the presumption may be overcome if sufficient evidence is presented to show that the release of such medical information would not be in the child's best interests. In considering whether sufficient evidence has been presented to overcome the presumption, the welfare of the child is paramount. In following this approach, the Commissioner acknowledges that the fundamental presumption operating in favour of a requester who is the parent of the individual to whom the information relates cannot be lightly displaced.

Having regard to the provisions of Article 42A of the Constitution, which came into effect in April 2015, including the consideration that has been given by the courts to the best interests test since the adoption of Article 42A, the OCO's understanding is that Article 42A would not impact on the rebuttable presumption that a parent is acting in the best interests of their child in relation to their child's data protection rights.

In light of the above, it appears that the effect of the presumption that a parent is acting in accordance with the best interests of their child is that, subject to permissible restrictions, organisations need to accept an access request made by a parent on behalf of their child in relation to their child's personal data unless they have sufficient evidence that it would not be in the best interests of the child to do so.

In many circumstances, handling an access request from a parent on behalf of their child in relation to their child's personal data in accordance with this rebuttable presumption may be unlikely to present difficulties. As regards organisations that provide services (for example, support or counselling services) to children and young people on a confidential basis, it appears that such organisations need to consider their duty of confidence to children and young people. Furthermore, where such organisations receive an access request from a parent for a copy of their child's personal data, it appears that they should inform the child of and seek the child's views on the request in the context of considering a) whether there may be evidence that it would not be in the best interests of the child to give a copy of the child's personal data to the child's parent/guardian and, equally, b) whether there might be any detriment to the child if their parent/guardian cannot access the information in question about their child.

Finally, it may be worth noting that organisations which collect and process children's personal data will not always or necessarily be aware of a child's circumstances or of the reasons why a parent is making an access request in relation to their child's personal data. As such, it is foreseeable that a situation could arise in which processing an access request from a child's parent and providing the parent with a copy of the child's personal data will be contrary to the child's best interests. Since this situation is foreseeable, it would be helpful for the DPC to consider if it can provide guidance on whether and, if so, how organisations can mitigate appropriately against this risk.

Recommendations:

- In relation to children making access requests for their own personal data, the OCO encourages the DPC to promote a contextual approach, whereby individual organisations are advised to assess the particular circumstances of their processing (including the nature of the personal data they hold) and to respect children's rights, treat children's best interests as a priority and have regard to children's evolving capacities when determining whether to accept and accede to an access request made by a child or young person.
- Having regard to the DPC's advisory powers under Article 58(3)(b) of the GDPR, the OCO would welcome if the DPC could assess whether existing legislation that mitigates against children and young people being able to make an access request themselves should be amended in light of children's right of access under the GDPR.
- Taking into account children and young people's evolving capacities and preferences as well as a parent's entitlement to a rebuttable presumption that they are acting in their child's

best interests, the OCO suggests that the DPC promote awareness among organisations that parents/guardians need to be able to make access requests on behalf of their children and that, subject to permissible restrictions, they should accede to such access requests unless there is sufficient evidence that doing so would be contrary to the best interests of the child.

- The DPC might recommend that organisations can encourage parents and children to jointly make access requests for children's personal data where it is appropriate to do so.

Right to erasure (Article 17 GDPR)

As the DPC highlights in its public consultation document, the right to erasure is not an absolute right: Article 17 of the GDPR affords adults and children the right to erasure of their personal data in certain specified circumstances and without undue delay. The special attention given to children in respect of the right to erasure is welcome. In this regard, the OCO notes the ICO's perspective, in light of Recital 65 of the GDPR and having regard to the necessity test, that *"there will generally be an increased expectation of what may be considered 'necessary' to protect the rights of the child"* and that the right to erasure is *"more likely to prevail"* in circumstances where personal data has been provided by a child.[9]

The questions posed by the DPC in relation to the right to erasure mirror questions 3 and 4 posed by the DPC in respect of the right of access. In this regard, it appears that the same broad considerations arise in relation to the right to erasure as arise in relation to the right of access. Therefore, we suggest that the DPC might refer to the points and recommendations made in the previous section of this submission in the context of its deliberations on what guidance to provide in relation to a child making an erasure request to an organisation to have their personal data erased and a parent/guardian making an erasure request on behalf of their child to have their child's personal data erased.

The specific reference made to the internet in Recital 65 and to the offer of information society services directed to children in Article 17(1)(f) appear noteworthy. It would be helpful for the DPC to clarify any specific implications that may arise in these contexts for the erasure of children's personal data and for erasure requests made by children or by parents/guardians on their behalf.

It may also be worthwhile for the DPC to clarify any particular implications of the age of digital consent in this regard. As provided for under section 31 of the 2018 Act, the age of digital consent has been set at 16 years in Ireland, with the exception of preventative or counselling services. The implications of this are that one lawful basis on which relevant information society services can process the personal data of a 16 or 17 year old is if they have obtained the consent of a 16 or 17 year old to do so. Where the consent of 16 and 17 year olds is the lawful basis for processing, it appears that 16 and 17 year olds whose personal data is collected on this basis in these circumstances should be able to make an erasure request in respect of their personal data. In this regard, Article 7(3) of the GDPR provides that *"[i]t shall be as easy to withdraw as to give consent"*. As such, 16 and 17 year olds who have consented to the processing of their personal data in these circumstances should be able to expect that the process for getting their personal data erased will

[9] Information Commissioner's Office, *Children and the GDPR* (March 2018), p.44.

be as easy as the process used to obtain their consent in the first place. We note the view of the ICO that the general principle articulated under Article 7(3) should apply to any processes related to the right to erasure and that processes for exercising the right to erasure should be easy for all data subjects, including children and young people, to access and to understand.[10]

Where a parent/guardian of a 16 or 17 year old makes an erasure request on behalf of their child to have their child's personal data erased, it would appear appropriate for the information society service, having regard to the best interests of the young person and the role of the young person's parent in this respect, to inform the young person and take their views into account.

In addition, in circumstances where the consent of a parent/guardian *("holder of parental responsibility"*) is the lawful basis on which an information society service of this kind may process the personal data of a child under 16, it would appear logical that the parent/guardian should be able to make a subsequent erasure request on behalf of their child in relation to their child's personal data. It appears to the OCO that this should not mean, however, that the service provider should necessarily preclude the child concerned from making an erasure request themselves in these circumstances.

Recommendations:

- The OCO encourages the DPC to consider the points and recommendations made by the OCO in relation to the right of access when it is deliberating on what guidance to provide on implementing children and young people's right to erasure.
- In light of Recital 65 and Article 17(1)(f) of the GDPR, it would be helpful for the DPC to clarify any specific implications that may arise in the context of the internet and information society services directed to children for the erasure of children's personal data and for erasure requests made by children or by parents/guardians on their behalf. The DPC might also consider the age of digital consent in this regard.

II. Safeguards

Age verification (Article 8 GDPR)

Having regard to the DPC's questions in relation to age verification, the OCO is not best placed to comment on a) what methods should be used to verify that a young person is 16 or over and therefore can access an information society service without parental consent and b) what methods should be used and constitute *"reasonable efforts"* (Article 8(2), GDPR) by an information society service to verify that a person providing consent for a child under 16 in these circumstances is in fact the child's parent/guardian. However, we note the ICO's guidance in this regard, which highlights that, among other things, the verification methods used need to be consistent with the principle of data minimisation (Article 5(1)(c), GDPR).[11]

[10] Information Commissioner's Office, *supra* note 9, p.44.
[11] Information Commissioner's Office, *supra* note 9, pp.25-27.

From the OCO's perspective, it is vital that verification methods used are fit for purpose. The age of digital consent, together with the need for online service providers who rely on consent as their lawful basis for processing children's personal data to verify that a young person is 16 or over and that a person providing consent for a child under 16 in these circumstances is in fact the child's parent/guardian, are intended as protective measures. These measures will hold little meaning or value as such without effective verification methods being put in place. Arguably, relevant online service providers should not be able to rely on consent as a lawful basis for processing children's personal data if they do not have effective verification methods. Furthermore, in light of the ICO's observation that *"verification will become easier over time as the technology becomes available"*,[12] the OCO would be concerned if the *"reasonable efforts"* expected of such providers in the interim were to be relativised to the extent that they dilute the overall purpose of verification. In this regard, we note the following recommendation included in a 2018 Recommendation of the Committee of Ministers to Council of Europe Member States concerning children's rights in the digital environment:

> *"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."*[13]

Correspondingly, the OCO encourages the DPC to communicate its expectation that online service providers which rely on consent as a lawful basis for processing children's personal data should be able to demonstrate that they have put effective verification methods in place.

As regards the age of digital consent, the DPC points out in its public consultation document that, while there was no law setting the age of digital consent in Ireland before 25 May 2018, many online service providers required users to be at least 13.[14] The DPC will be aware of existing research and data indicating the extent to which younger children have social networking profiles, for example, despite age restrictions.[15] From the OCO's perspective, it is vital that online service providers enforce age restrictions effectively and that the onus is on the service provider to ensure that no child below the minimum age to use their service can do so.

In circumstances where a current service user is at or above the minimum age to use an online service, but below the age of digital consent provided for under section 31(1) of the 2018 Act, an appropriate approach may be for the online service provider to seek the consent of the child's parent/guardian and to block the child from accessing the service until the consent of their parent/guardian has been obtained. An approach of this kind would appear to be consistent with Article 8 of the GDPR. Was an online service provider to raise the minimum age at which a child can

[12] Information Commissioner's Office, *supra* note 9, p.27.
[13] 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* (July 2018), para.56.
[14] Data Protection Commission, *supra* note 1, p.13.
[15] See, for example, O'Neill, B and Dinh, T, *Net Children Go Mobile: Full Findings from Ireland* (2015); Growing Up in Ireland, *Key Findings for Cohort '08 at 9 years old – Relationships and socio-emotional well-being* (November 2018), p.8; Cybersafeireland, *Annual Report 2017* (September 2018), p.18f.; and Everri, M. and Park, K. *Children's online behaviours in Irish primary and secondary schools 2016-2018. Zeeko Research Report* (2018).

use its service to coincide with the age of digital consent, it appears logical that the provider would block any existing service user from accessing the service until they reach the age of digital consent. In both scenarios, it is worth bearing in mind that section 31(3)(a) of the 2018 Act requires a review of the operation of the age of digital consent provided for under section 31(1) to commence no more than three years after it came into effect (i.e. no later than May 2021) and that section 31(3)(b) requires this review to be completed no more than one year after it is initiated.

Recommendations:

- The OCO encourages the DPC to communicate an expectation that relevant online service providers which rely on consent as a lawful basis for processing children's personal data should be able to demonstrate that they have put effective methods in place to verify a) that a young person is 16 or over and therefore can consent themselves to the processing of their personal data and b) that a person consenting to the processing of the personal data of a child under 16 in these circumstances is actually the child's parent/guardian.
- Having regard to Article 8 of the GDPR, in circumstances where a current service user is at or above the minimum age to use an information society service, but below the age of digital consent provided for under section 31(1) of the 2018 Act, an appropriate approach may be for the online service provider to seek the consent of the child's parent/guardian and to block the child from accessing the service until the consent of their parent/guardian has been obtained.

III. Profiling and marketing activities concerning children (Articles 21-22 GDPR)

Directing marketing

The DPC will be familiar with research examining children and marketing, including as regards children's susceptibility to and influence by marketing practices and as regards the prevalence and characteristics of online marketing targeting children. In this regard, a study published by the LSE in 2018 notes that:

> *"Some of the key issues related to children's exposure to online advertising arise from their inability to distinguish between website content and advertisements, difficulty in understanding the relationship between website content provider and the advertiser, and issues related to collecting children's data."*[16]

Among the overall findings of a 2016 EU-funded study on the impact of online marketing on children's behaviour were that children are exposed to sophisticated, non-transparent marketing practices in online games, mobile applications and social media sites, which they do not always understand and that online marketing can affect children's behaviour without them being aware of it.[17] A more recent report by Ofcom in the UK, which looked at children and parents' media use

[16] Livingstone, S., Stoilove, M., Nandagiri, R., *Children's data and privacy online. Growing up in a digital age* (December 2018), p.25.

[17] Lupiáñez-Villanueva, F. et al, *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour* (2016).

and attitudes also indicates that children can find newer forms of online advertising hard to identify. According to this report:

- About six in ten 12 to 15 year olds who go online are aware of personalised advertising, in so far as they are aware that other people might see different adverts online to the adverts they see. A similar number are aware that vloggers may be being paid to endorse a product they say favourable things about. However, the research also suggests that children can find it hard to identify these adverts in practice, especially on social media.
- In relation to advertising on Google, despite being distinguished by a box with the word 'Ad' in it, a minority of 8 to 11 year olds (28%) and of 12 to 15 year olds (43%) who use search engines can correctly identify sponsored links on Google as advertising.[18]

A discussion paper on children and digital marketing published by UNICEF in 2018 suggests that the position of children as rights holders is not being adequately considered in the context of advertising:

> *"As advertising has become more social, networked and omnidirectional, children have been cast simultaneously as valuable targets and profitable influencers, or as legal liabilities and potential reputational disasters. This split in perspective fails to appreciate the real position that children hold in the advertising ecosystem: that of rights holders, entitled to be protected from violations of their privacy and deserving of an internet free from manipulative and exploitative practices."*[19]

That children's status as rights-holders may not be sufficiently recognised is concerning. In addition to providing for children's right to seek, obtain and impart information (Article 13), the UNCRC also promotes *"the protection of the child from information and material injurious to his or her well-being"* (Article 17(e)). The UNCRC itself does not make explicit reference to advertising or marketing in this regard. However, with reference to relevant international standards and frameworks, including the United Nations' 'Protect, Respect and Remedy' Framework and the Guiding Principles on Business and Human Rights adopted by the Human Rights Council, the UN Committee on the Rights of the Child has underscored the responsibility of States to ensure that business activities and operations do not have a negative impact on children's rights. Noting that the mass media industry, including advertising and marketing industries, *"can have positive as well as negative impacts on children's rights"*, the UN Committee makes specific reference to the long-term impact on children's health of products such as *"cigarettes and alcohol as well as food and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives"*. The Committee also observes:

> *"Children may regard marketing and advertisements that are transmitted through the media as truthful and unbiased and consequently can consume and use products that are harmful. Advertising and marketing can also have a powerful influence over children's self-esteem, for example, when portraying unrealistic body images"*.

[18] Ofcom, *Children and Parents: Media Use and Attitudes Report* (November 2017), pp.149-157.
[19] Nyst, C., *Children and Digital Marketing: Rights, risks and opportunities* (July 2018), p.4.

Accordingly, the UN Committee recommends that States:

> *"should ensure that marketing and advertising do not have adverse impacts on children's rights by adopting appropriate regulation and encourage business enterprises to adhere to codes of conduct and to use clear and accurate product labelling and information that enable parents and children to make informed consumer choices."*[20]

This emphasis on the State's role to encourage, facilitate and indeed require business to undertake child-rights due diligence and other measures to ensure their activities and operations respect children's rights has been reiterated by the UN Committee, including in a report arising from its day of general discussion on digital media and children's rights in 2014 and in its concluding observations and recommendations to Ireland in 2016, following its most recent examination of Ireland's progress to fulfil its obligations to children under the UNCRC.[21]

At European level, the Council of Europe, of which Ireland is a Member State, has also addressed the State's role as regards encouraging and requiring business enterprises to meet their responsibilities to respect children's rights. In this regard, a recent Recommendation on guidelines to respect, protect and fulfil the rights of the child in the digital environment makes explicit reference to advertising and marketing, advising that Members States should require relevant business enterprises to limit the processing of children's personal data for commercial purposes:

> *"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."*[22]

In relation to the GDPR, Recital 47 states that *"[t]he processing of personal data for direct marketing purposes **may** be regarded as carried out for a legitimate interest"* (emphasis added). The OCO notes the ICO's guidance on legitimate interests, which suggests that as long as it is carried out in compliance with e-privacy laws and other legal and industry standards, it is likely that direct marketing is a legitimate interest in most cases. In this regard, the ICO indicates that this does not automatically mean that all processing for marketing purposes is lawful on this basis as relevant organisations still need to show that their processing passes the necessity and balancing tests. According to the ICO, among the factors that should be considered when looking at the balancing test are: whether people would expect their details to be used in a this way; the potential nuisance

[20] UN Committee on the Rights of the Child, *General Comment No.16*, *supra* note 4, p.3 and p.8f.
[21] UN Committee on the Rights of the Child, *supra* note 5, para.103; UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (March 2016), paras. 23-24.
[22] Council of Europe, *supra* note 13, para.57.

factor of unwanted marketing messages; and the effect that the chosen method and frequency of communication might have on more vulnerable individuals.[23]

As regards children, the GDPR does not prohibit organisations from relying on legitimate interests as a lawful basis if they are processing children's personal data. However, they need to ensure that they meet all of the principles of GDPR when relying on legitimate interests as their lawful basis for processing children's personal data. Furthermore, the GDPR's explicit references to children in relation to legitimate interests as a lawful basis for processing and in relation to marketing and the creation of user profiles are noteworthy, indicating as they do that organisations must give particular weight to protecting children's data:

- Article 6(1)(f) of the GDPR makes explicit reference to children in providing that processing is lawful where it "*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."* (emphasis added)
- Recital 38 of the GDPR stipulates that the *"specific protection"* which children merit with regard to their personal data *"should apply **in particular** 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."* (emphasis added)

This special attention to children is echoed by the ICO in its guidance on legitimate interests, which suggests that a legitimate interests assessment might be a useful tool to help ensure that children's interests are properly considered.[24] In addition to advising that one of the factors relevant organisations need to consider when doing a balancing test is whether they are processing children's data,[25] the ICO underscores that organisations:

- need to give extra weight to children's interests and have a more compelling interest to justify any potential impact on children on the basis of legitimate interests[26]
- must take extra care to ensure that children's interests are protected[27]
- must give particular weight to protecting children's data and make sure that they properly consider and protect children's interests, rights and freedoms[28]
- need to put children's interests ahead of their own interests in circumstances where they are processing children's data[29]
- have a responsibility to protect children from risks that they may not fully appreciate and from consequences that they may not envisage.[30]

[23] Information Commissioner's Office*, Lawful basis for processing: Legitimate interests* (March 2018), p.28.
[24] *Ibid*, p.31.
[25] *Ibid*, p.5.
[26] *Ibid*, p.31.
[27] *Ibid*, p.4.
[28] *Ibid*, p.11 and p.18
[29] *Ibid*, p.21
[30] *Ibid*, p.31.

As regards marketing to children, the ICO advises, among other things, that relevant organisations:

- need to take account of children's reduced ability to recognise and critically assess the purposes behind the process and the potential consequences of providing their personal data
- must explain the lawful basis for processing in a way that children understand
- need to tell children about their absolute right to object to direct marketing, as per Article 21(2) of the GDPR, and to stop processing a child's personal data for the purposes of direct marketing if they are asked to
- need to take account of sector specific guidance on marketing in order to make sure that children's personal data is not used in a way that might lead to their exploitation.[31]

With regard to sector specific guidance in Ireland, the Advertising Standards Authority for Ireland has produced specific guidance in relation to marketing to children and young people under 18 years of age. Among other things, this guidance advises that marketing communications addressed to children:

- should contain nothing that is likely to result in physical, mental or moral harm to children or that is likely to frighten or disturb them and, as such, it:
  - should not portray children in a manner that offends against accepted standards of good taste and decency
  - should not encourage children to enter into unsafe situations or strange places or talk to strangers
  - should not show children in morally or physically dangerous situations or behaving dangerously in the home or outside
- should not exploit the loyalty, credulity, vulnerability or lack of experience of children and therefore it:
  - should not make children feel inferior or unpopular for not buying an advertised product
  - should not make children feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a particular product
- should not feature products that are unsuitable for those children
- should not exaggerate what is attainable by an ordinary child using the product and should not make it difficult to judge the actual size, characteristics and performance of any product advertised
- should not ask children to disclose personal information about themselves or their families without having first obtained permission from their parents or guardians
- should not denigrate a healthy lifestyle or encourage an unhealthy lifestyle or unhealthy eating or drinking habits
- should not mislead children as to the potential benefits from consumption of the product, either physically, socially or psychologically.[32]

[31] Information Commissioner's Office, *supra* note 9, p.28f.

[32] Advertising Standards Authority for Ireland, *Manual of Advertising Self-Regulation with the Code of Standards for Advertising, Promotional and Direct Marketing in Ireland* (6th Edition). As the DPC will be aware, the Broadcasting Commission of Ireland has produced detailed guidance on commercial communications directed to children. Among other things, the Children's Commercial Communications Code stipulates that *"[c]hildren's commercial communications shall not*

The OCO is aware that Section 30 of the 2018 Act, which provides that *"[i]t shall be an offence for any company or corporate body to process the personal data of a child … for the purposes of direct marketing, profiling or micro-targeting"*, has not been enacted because it has been deemed to be incompatible with the GDPR and, if commenced, would breach EU law.[33] The OCO is also aware that a Private Members' Bill, the Data Protection (Amendment) Bill 2018, is currently at Second Stage in Dáil Éireann. This Bill aims to protect children's personal data from being processed for marketing purposes and seeks to replace section 30 of the 2018 Act with a new text that would impose a prohibition on certain forms of automated processing of children's data.[34] It is currently unclear whether or not the provisions of this Bill may be compatible with the GDPR. In the absence of clarity about what scope may exist within the parameters of the GDPR to prohibit children's personal data from being processed for the purposes of direct marketing, the OCO is of the view that the potential currently offered within the parameters of the GDPR to ensure that children's rights and best interests are treated as the primary consideration needs to be maximised. It appears to the OCO that the ICO's guidance on legitimate interests and on marketing to children is useful and therefore merits attention in this regard.

Recommendations:

- Noting the current lack of clarity about the scope to prohibit children's personal data from being processed for direct marketing purposes in a manner that is compatible with the GDPR, the OCO encourages the DPC to develop guidance that promotes children's position as rights holders who are entitled to be protected from commercial exploitation, including exploitative and manipulative marketing practices, and to have their rights and best interests treated as a priority.
- The OCO suggests that the DPC might consider and build on the ICO's guidance on legitimate interests and marketing to children when providing guidance to organisations on the factors they should consider when balancing their own legitimate interests in conducting direct marketing and the rights and interests of children. In this regard, the OCO recommends that the DPC might usefully advise organisations to carry out a legitimate interests assessment and communicate its expectation that organisations will:
    - protect children and their personal data from risks that children may not fully understand and from consequences that they may not envisage
    - put children's interests ahead of their own interests
    - take account of sector specific guidance on marketing in order to make sure that children's personal data is not used in a way that would or could lead to their exploitation or otherwise harm them.

ask children to submit private information or details regarding themselves, their family or friends, unless the commercial communication is as part of a campaign that relates to their safety, health or wellbeing." (p.10). See Broadcasting Commission of Ireland, *Children's Commercial Communications Code* (2013) and *General Commercial Communications Code* (2017).

[33] See Dáil Éireann debate on the GDPR on 24 July 2018, at www.oireachtas.ie/en/debates/question/2018-07-24/623/?highlight%5B0%5D=623

[34] The First Stage of the Dáil Éireann debate on this Bill, which took place on 29 November 2018, is available at www.oireachtas.ie/en/debates/debate/dail/2018-11-29/18/.

Profiling for marketing purposes

Profiling is defined as follows in Article 4(4) of the GDPR:

> *"Profiling means any form of automated processing of personal data consisting of the use of personal data to evaluate certain aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements"*

Article 22 of the GDPR, which concerns automated individual decision-making, including profiling, makes no specific reference to children, which indicates that the same basic rules apply to children as adults. As per Article 22(1), children have the right not to be subject to decisions based solely on the automated processing, including profiling, of their personal data where those decisions have a legal or similarly significant effect on them, unless one of the exceptions set out under Article 22(2) applies.[35]

Recital 71 sets out that solely automated decision-making, including profiling, with legal or similarly significant effects "*should not concern a child*". In its Guidelines on Automated individual decision making and Profiling, the Article 29 Working Party (WP29)[36] outlines that, given that the wording of Recital 71 is not reflected in Article 22 itself, the WP29 does not consider that this represents an absolute prohibition on this type of processing in relation to children. However, in the light of Recital 71, the WP29 recommends that, as a rule, controllers should not rely upon the exceptions in Article 22(2) to justify it.[37]

The WP29 acknowledges that there may be *"some circumstances in which it is necessary for controllers to carry out solely automated decision-making, including profiling, with legal or similarly significant effects in relation to children, for example to protect their welfare"*. If this processing is required, the WP29 notes that the processing may be carried out on the basis of the exceptions in Article 22(2)(a), (b) or (c), as appropriate.[38]

A decision which has *"similarly significant effects"* on a child needs to have an impact on them that is equal or equivalent to affecting their fundamental legal rights and freedoms or legal status. Having regard to Recital 38 of the GDPR, the WP29 Guidelines point out that *"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."*[39]

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[35] The OCO notes that the rules in Article 22 of the GDPR relate to solely automated decisions (which can include profiling) rather than to the process of profiling in itself. This means that profiling that is not used to make decisions about particular individuals, or profiling that feeds into a wider decision-making process that has a human element, is not covered by the Article 22 rules. Neither are solely automated decisions (including profiling) which do not have a legal or similarly significant effect on the data subject. See Information Commissioner's Office, *supra* note 9, p.32.

[36] The Article 29 Working Party is now known as the European Data Protection Board.

[37] Article 29 Data Protection Working Party, *Guidelines on Automated individual decision making and Profiling for the purposes of Regulation 2016/679* (as last revised and adopted on 6 February 2019), p. 28.

[38] *Ibid*, p.28.

[39] *Ibid*, p.29.

In this regard, and recognising that children represent a more vulnerable group in society, the WP29 Guidelines recommend:

> *"Organisations should, in general, refrain from profiling them for marketing purposes. 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."*[40]

It might be inferred from the WP29's recommendation that organisations should, in general, refrain from profiling children for marketing purposes that children's rights may be best protected when their personal data is not profiled for these purposes.[41] Notably, the ICO's guidance advises that even if the *"similarly significant effect"* bar is not met, organisations should have regard to the WP29 recommendation that they should abstain from profiling children for the purposes of marketing. Where organisations decide to profile children for marketing purposes, the ICO advises organisations to make sure that they are able to justify their decision and to demonstrate that they have adequately protected children whose personal data they are processing.[42] In this regard, the ICO advises organisations that the factors they should take into account in the context of behavioural advertising and when deciding whether a solely automated decision has *"similarly significant effects"* on a child are:

- the choices and behaviours of children that they are seeking to influence
- the way in which these choices and behaviours might affect children
- the child's increased vulnerability to behavioural advertising
- wider evidence, including prohibitions and limits on marketing certain products to children set out in advertising standards.[43]

When viewed together, Recitals 38 and 71 of the GDPR and the WP29's aforementioned recommendation suggest that a prohibition on profiling children for marketing purposes may be permissible in circumstances where such profiling would have *"similarly significant effects"* to children's fundamental legal rights and freedoms or legal status. However, it is not clear what the scope and nature of a legally permissible prohibition might be. It appears to the OCO that children should not be subjected to profiling for marketing purposes, in particular where such profiling would have *"similarly significant effects"*. The following analysis contained in a report published by UNICEF on children and digital marketing merits consideration in this respect:

> *"… new forms of digital marketing confound existing ethical and legal understanding about fair advertising practices … Some innovative forms of advertising aim to subliminally influence children, including when they are engaged in games or learning …*

[40] *Ibid*, p.29.
[41] See UNICEF, *Children's Online Privacy and Freedom of Expression: Industry Toolkit* (May 2018), p.16.
[42] Information Commissioner's Office, *supra* note 9, p.34.
[43] *Ibid*, p.4.

When such practices are underpinned by covert data collection for the purpose of profiling child consumers, this puts children at further risk. … Profiling children and undermining their privacy for the purpose of monetizing their Internet usage data arguably amounts, under certain circumstances, to economic exploitation. … Exposure to pervasive and intrusive commercial influences can potentially influence the way a child develops. Along with the well-established negative health impacts of marketing for foods high in fat, sugar and salt, digital advertising may contribute to the sexualization of children, entrench gender stereotypes, create body image issues, stigmatize poverty, or reduce parents' authority and influence. Children may also experience discrimination as a result of digital advertising, depending on how it is targeted. Even when digital advertising is designed to avoid these outcomes, it may inure children to commercialization and commodification".[44]

From the OCO's perspective, a consolidation of the thrust of Recitals 38 and 71 and the WP29's recommendation into a legally permissible prohibition on profiling children for marketing purposes, in particular where it has *"similarly significant effects"*, would be welcome and consistent with a child-centred approach where children's rights and best interests are prioritised. In this regard, the OCO notes that among the recommendations supported by the Committee of Ministers of the Council of Europe in its 2018 Recommendation on Guidelines to respect, protect and fulfil the rights of the child in the digital environment is a recommendation proposing a legal prohibition on profiling of children:

"Profiling of children, which is any form of automated processing of personal data which consists of applying a "profile" to a child, particularly in order to take decisions concerning the child or to analyse or predict his or her personal preferences, behaviour and attitudes, should be prohibited by law. In exceptional circumstances, States may lift this restriction when it is in the best interests of the child or if there is an overriding public interest, on the condition that appropriate safeguards are provided for by law."[45]

Recommendation:

- Having regard to the rights and best interests of children, the OCO encourages the DPC to support a prohibition on profiling of children for marketing purposes, in particular where such profiling has *"similarly significant effects"* to children's fundamental legal rights and freedoms or legal status. The OCO would welcome and encourage an examination by the DPC of how a legally permissible prohibition might be achieved, including by giving consideration to the scope that may be offered by section 32(1)(e) of the 2018 Act and the mechanism provided for under Article 40(7)-(9) of the GDPR in this regard.

[44] Nyst, C., *supra* note 19, p.18.
[45] Council of Europe, *supra* note 13, para.37.

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