WHITE & CASE

Data Protection and Usage for Minors

March 2024

Hope Anderson

Partner, Los Angeles
White & Case
hope.anderson@whitecase.com

formerly at Snap and eBay

Anna Morgan

Partner, Head of Privacy & Data Protection

Bird & Bird Ireland

Formerly General Counsel and Deputy Commissioner at the Irish Data Protection Commission (2016 – 2022)

Aaron Ting

ActBlue

Director & AGC
Head of Privacy

Practice Areas

- Internet Regulation
- Privacy and Security
- Consumer Protection
- Competition and Antitrust

Different Approaches for U.S. and EU

Recent legislation highlights differences in the US and EU regulatory approaches to minors' online safety and privacy.

Youth Legal Trends in the US

- Age Standards (e.g., U13, U16, U18)
- Prevention of Harm
  - Age-Appropriate Design vs Content
- Access to Services
  - Age Verification, Parental Consent
- Feature-Specific Safeguards
- Enforcement Issues

Prevention of Harm standards

- **CA AADC**: Consider best interests of children when designing, developing, and providing services.
- **KOSA Duty of Care |** Exercise reasonable care in creation and implementation of any design feature to prevent and mitigate [enumerated behaviors and harms].
- **TX SCOPE:** Implement a strategy to prevent a known minor's exposure to harmful content.
- Void for vagueness under **14A**?

Tension with 1A and CDA 230

- Harmful Content vs Harmful *Design*
  - Addictive technology and features (e.g., multi-state cases, NY bill)
  - Are functional design decisions also protected speech? (OH case)
- Are these effectively *content-based* restrictions?
  - AR exceptions for messaging, news/sports/entertainment providers, e-commerce, cloud storage services, etc.
- Undue burden on expression and access to speech?
  - Minors' rights (*Brown v. Entertainment Merchants Ass'n*)

Access to Services

- **Age Assurance**
  - "Estimation" (e.g., AADC)
  - "Verification" (AR, LA)
    - "Commercially reasonable" methods
    - Government IDs
- **Parental Consent (AR, PKSM Act)**
  - Practical challenges; existing COPPA approaches have tradeoffs
- **App Store-level obligations**

Feature-Specific Safeguards

- **Algorithmic Feeds & Recommendation Systems**
  - Prohibitions/bans (e.g., NY, CA)
  - Opt-out or control (e.g., KOSA)
- **Push Notifications**
  - Features that encourage or increase frequency, use, time spent, or activity (e.g., KOSA)
- **Time Restrictions**
  - Blackout periods (e.g, UT)
  - Controls for time spent (e.g., LA)
- **Parental Tools**
  - Management settings (LA) vs monitoring/account access (UT)

Enforcement Issues

- **Enforcement by State AGs and/or FTC**
  - Risk of state-by-state standards for age-appropriate design, prevention of harm
- **Private Right of Action**
  - PROA with rebuttable presumption of harm and causation (UT)
  - Product liability claims

The EU Approach: Children and the GDPR

Recital 38 of the GDPR

*"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."*

- Article 24 – controller obligations
- Article 25 – data protection by design and default
- Children have the same rights as adults over their personal data:
  - "*A child is a human being in the complete sense of the word. For this reason, a child must enjoy all the rights of a person, including the right to the protection of their personal data*." (WP29)

A Principles-Based Law: Examples when Processing Children's Personal Data

Transparency

- Information to be provided in "*a concise, transparent, intelligible and easily accessible form, using clear and plain language"* (Article 12(1).
- For children, this means that the content should be child-friendly and tailored to the age groups of the audience.

Data Minimisation

- Collect only personal data that is necessary and proportionate to processing.
- Data protection by design and by default obligations require controllers to implement by default appropriate technical and organisational measures to ensure only necessary personal data is collected (Article 25(2)).

Purpose Limitation

- Any DPIA undertaken with regard to the processing of children's personal data (e.g. the use of a particular age verification mechanism) should assess whether the processing operation in question complies with this principle (among others).
- This means that personal data of children should only be used for the purpose(s) for which it was collected and not used for any other purpose(s).
- Article 25(2) also requires default technical and organisational measures concerning purpose limitation to be implemented.

Accountability

- This principle requires organisations to take appropriate steps to determine 1) if they are collecting personal data of children; and 2) then to ensure that they comply with the higher standards of protection required of controllers under the GDPR when processing children's personal data.
- This derives in part from the controller responsibilities under Article 24(1) which require controllers to take account of risks associated with processing and to implement appropriate technical and organisational measures.

The Age of Digital Consent

When consent is relied on as the legal basis for processing (Art. 6(1)(a).

Article 8(1) sets the age of digital consent at 13 – 16 (depending on EU/EEA Member State law).

If a child is under the age of digital consent, consent must be given or authorised by the parent/ guardian.

NB! Age verification for the purposes of ensuring highest level of data protection is a *different purpose* to verification of parental consent when consent is relied on as the legal basis for processing.

EU/EEA Supervisory Authority Guidance

- Importance of international children's law framework – UN Convention on the Rights of the Child
- EU/EEA supervisory authority guidance :
  - the Irish Data Protection Commission's Fundamentals for a Child-Oriented Approach to Data Processing;
  - the Dutch Code for Children's Rights;
  - the French CNIL's 8 recommendations to enhance the protection of children online; and
  - the Norwegian Datatilsynet's guidance on consent for minors.
  - Sweden's Datainspektionen has published guidance on children's online rights
  - The Spanish AEPD's decalogue of principles on age verification and protection of minors from inappropriate content
- The EDPB has indicated in its Work Programme 2023/2024 that its Guidelines on children's data are expected to be published over the course of 2023/ 2024.

The UK Regime: the Children's Code

- The UK ICO's Children's Code (Age Appropriate Design Code) arguably most comprehensive set of guidelines for processing of children's personal data - key priority for the ICO
- Children's Code frequently the gold standard for global children's privacy programmes
- Children's Code - ensuring that organisations design products and process children's personal data in the **best interests of the child (UNCRC)**
- Information society services likely to be accessed by children (under the age of 18)

Recent trends – regulatory decisions

- Public-by-default accounts and settings
- Child-specific transparency information
- Legal basis for processing children's data – parental consent?
- Age verification/ age assurance
- Parental controls
- DPIAs essential
- Platform design – fairness and deceptive design

Practical Tips – EU/EEA/ UK

- Child centric service/ platform design
- Protection for all under 18s (differing levels)
- Efficacy of age verification/ age assurance – don't use self-declaration or age gates
- Default settings critical - don't put it all on parents!
- Intersection with online safety

Thank you!


Obrigado
Danke
Sağol
Thank you
Terima kasih
Hvala
Kiitos
Köszö