

Data Protection and Privacy under Pressure

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Transatlantic tensions, EU surveillance, and big data

Gert Vermeulen
Eva Lievens
(Eds)



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Targeting children with personalised advertising

How to reconcile the (best) interests of children and advertisers¹

VALERIE VERDOODT² & EVA LIEVENS³

Children are increasingly confronted online with targeted advertising that is personalised on the basis of their personal characteristics and behaviour. The tracking, profiling and targeting practices that enable personalisation are sophisticated and opaque, and as such, significantly impact children's ability to make carefully considered and critical commercial decisions or decisions concerning their privacy and personal data. This raises important issues from a children's rights perspective, particularly for their rights to development, privacy and protection against economic exploitation. Nevertheless, the digital advertising industry plays an important role in the creation and maintenance of good-quality content and digital environments for children. Whereas the regulatory framework in place already covers existing tracking, profiling and targeting practices, this chapter questions whether the framework is appropriate for reconciling the interests of advertisers and children.

1. CHILDREN('S RIGHTS) AND PERSONALISED ADVERTISING

Children grow up in a commercial environment in which they, from an early age, come across advertising for a multitude of products and services.⁴ Throughout their childhood, they learn how to cope with the overload of such

¹ This chapter builds on research carried out in the framework of two research projects: (1) AdLit: Advertising Literacy in a New Media Environment Investigating Minors' Persuasion Knowledge in Relation to New Advertising Formats, Research Fund Flanders and (2) 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, Special Research Fund Ghent University.

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³ Assistant professor of Law & Technology, Faculty of Law, Ghent University. Email: e.lievens@ugent.be.

⁴ Barrie Gunter, *Kids and Branding in a Digital World* (Manchester University Press 2016) 1.

commercial information and develop critical decision-making skills.⁵ Scholars refer in this regard to children's 'advertising literacy', which includes their advertising-related knowledge, attitudes, and skills, such as the ability to recognise commercial messages, to understand the persuasive intent of such messages, and to critically evaluate them. Children already display some level of brand consciousness at a very young age (even starting from the age of 2 years old).⁶ This is part of the reason why advertisers and marketers target children from the earliest stages of their lives, essentially transforming them into young consumers. Moreover, the digital environment, in which children spend a lot of their time,⁷ is increasingly permeated with sophisticated and personalised forms of advertising.⁸ Increased computing capabilities allow commercial entities to track children's online behaviour and preferences, on the basis of which they are then profiled and targeted with tailored marketing campaigns.⁹ While the advertising industry argues that personalised advertising (eg online behavioural advertising or location-based advertising) is more relevant and efficient¹⁰, the tracking, profiling and targeting of children may raise significant questions from a children's rights perspective.

⁵ Veroline Cauberghe and others, 'Reclamewijsheid Bij Kinderen En Jongeren: Onderzoeksrapport in Opdracht van Vlaams Ministerie van Cultuur, Jeugd, Sport En Media' (2012) <<https://biblio.ugent.be/publication/4130480/file/4130494>>; Esther Rozendaal and others, 'Reconsidering Advertising Literacy as a Defense Against Advertising Effects' (2011) 14 *Media Psychology* 333.

⁶ Gunter (n 4) 2; Liselot Hudders and others, 'Shedding New Light on How Advertising Literacy Can Affect Children's Processing of Embedded Advertising Formats: A Future Research Agenda' (2017) 46 *Journal of Advertising* 333.

⁷ Stéphane Chaudron and others, *Young Children (0-8) and Digital Technology: A Qualitative Exploratory Study across Seven Countries*. (Publications Office 2015) <<http://dx.publications.europa.eu/10.2788/00749>>; Sonia Livingstone, John Carr and Jasmina Byrne, 'One in Three: Internet Governance and Children's Rights' (Centre for International Governance Innovation and the Royal Institute of International Affairs 2015) 22 <<https://www.cigionline.org/publications/one-three-internet-governance-and-childrens-rights>>.

⁸ Valerie Verdoodt, Damian Clifford and Eva Lievens, 'Toying with Children's Emotions, the New Game in Town? The Legality of Advergaming in the EU' (2016) 32 *Computer Law & Security Review* 599.

⁹ Amanda Lenhart and Mary Madden, 'Teens, Privacy and Online Social Networks' <<http://www.pewinternet.org/2007/04/18/teens-privacy-and-online-social-networks/>>.

¹⁰ Howard Beales, 'The Value of Behavioral Targeting' (2010) 1 *Network Advertising Initiative* <<https://pdfs.semanticscholar.org/e2eb/6726f5a29d9c14dafaf056be9a3ade877b0a.pdf>>. Sophie C Boerman, Sanne Kruijkemeier and Frederik J Zuiderveen

This chapter analyses how these personalised advertising practices are currently regulated, while looking through the lens of the children's rights framework. In the first section, targeted and personalised advertising is conceptualised, and the potential impact thereof on children's advertising literacy is discussed. Secondly, the regulatory framework that is relevant for such types of advertising is mapped. Ultimately, the chapter questions how the regulatory framework may contribute to the reconciliation of the different interests of children and advertisers in the digital environment.

1.1. Tracking, profiling and targeting: three different steps

Before personalised advertisements are targeted at children, a chain of events takes place.

First, children's personal data are collected, on the basis of which the commercial message may be tailored. For instance, for online behavioural advertising¹¹ – a specific form of personalised advertising – this would be the tracking or monitoring of children's online behaviour.¹² It may consist *inter alia* of tracking their search history, media consumption (eg videos, songs, news articles) and communication data.¹³ The majority of existing online tracking technologies is based on cookies, or use cookies as the backbone.¹⁴ KOSTA

Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) 46 *Journal of Advertising* 363.

¹¹ Boerman and others define online behavioural advertising as: "*the practice of monitoring people's online behaviour and using the collected information to show people individually targeted advertisements*". Boerman, Kruikemeier and Zuiderveen Borgesius (n 10). According to the IAB Europe Framework, OBA is "*the collection of data from a particular computer or device regarding web viewing behaviours over time and across multiple web domains not under common control for the purpose of using such data to predict web user preferences or interests to deliver online advertising to that particular computer or device based on the preferences or interests inferred from such web viewing behaviours*." See also: Article 29 Data Protection Working Party, 'Opinion 2/2010 on Online Behavioural Advertising WP 171' (2010) <http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm>.

¹² Other forms include location-based advertising or for instance social ads including friends' names, or advertising based on other elements such as a person's age, sex, etc.

¹³ Frederik J Zuiderveen Borgesius, 'Mensen Aanwijzen Maar Niet Bij Naam Noemen: Behavioural Targeting, Persoonsgegevens En de Nieuwe Privacyverordening' (2016) *Tijdschrift voor Consumentenrecht en handelspraktijken* <<https://www.ivir.nl/publicaties/download/1786>>.

¹⁴ Georgia Skouma and Laura Léonard, 'On-Line Behavioral Tracking: What May Change after the Legal Reform on Personal Data Protection', *Reforming European Data*

clarifies that cookies are files that contain certain information on specific users and their interests and preferences.¹⁵ The information is transmitted via the cookie from a server to the web browser of the user and back each time the user accesses a server's page using the same browser. As a result, KOSTA explains, the website 'knows' what language or the type of advertising specified users prefer.¹⁶ Other popular technologies include plugins and device fingerprinting.¹⁷ In 2015, an international network of data protection authorities conducted a privacy sweep of 1494 children's websites and apps, which showed that 67% of the websites and apps were in fact collecting children's personal data and 50% shared this personal data with third parties.¹⁸

A second step that forms part of the serving of personalised advertising consists of profiling. Profiling can be understood as a data mining method, which involves data harvesting and conversion of data into profiles. More specifically, BOSCO et al. describe profiling as an (semi-)automated process to examine large data sets in order to create classes or categories of characteristics.¹⁹ The categories can be used to generate profiles (ie sets of correlated data) of *inter alia* individuals, groups or places. Subsequently, statistical methods can be used to generate analytical information regarding future trends or to predict future behaviours or developments. In other words, profiling transforms data into a new form of knowledge, by identifying patterns that are invisible to the human eye.²⁰ A similar definition was adopted in the Recommendation

Protection Law (Springer 2015); Frederik J Zuiderveen Borgesius, 'Personal Data Processing for Behavioural Targeting: Which Legal Basis?' (2015) 5 *International Data Privacy Law* 163; E Kosta, 'Peeking into the Cookie Jar: The European Approach towards the Regulation of Cookies' (2013) 21 *International Journal of Law and Information Technology* 380.

¹⁵ Kosta (n 14).

¹⁶ *ibid.*

¹⁷ Ibrahim Altaweel, Nathan Good and Chris Jay Hoofnagle, 'Web Privacy Census' [2015] *Technology Science* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703814>.

¹⁸ Global Privacy Enforcement Network, 'Children's Privacy Sweep' (2015) <<http://194.242.234.211/documents/10160/0/GPEN+Privacy+Sweep+2015.pdf>>.

¹⁹ Francesca Bosco and others, 'Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and Perspectives from European Data Protection Authorities', *Reforming European Data Protection Law* (Springer 2015) 4.

²⁰ Mireille Hildebrandt, 'Profiling: From Data to Knowledge' (2006) 30 *Datenschutz und Datensicherheit-DuD* 548; Claude Castelluccia, 'Behavioural Tracking on the Internet: A Technical Perspective' in Serge Gutwirth and others (eds), *European Data*

of the Committee of Ministers of the Council of Europe on the protection of individuals with regard to automatic processing of personal data in the context of profiling.²¹ According to that Recommendation, profiling is an automatic data processing technique that consists of applying a 'profile' to an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.²² This Recommendation specifies that profiling entails that data on individual behaviour or characteristics is collected, which is analysed to correlate certain behaviour(al characteristics), and then the correlation is applied to an identified or identifiable person in order to deduct previous, current or future characteristics.

Third, on the basis of a specific consumer profile, advertisers tailor their commercial messages to have a more persuasive effect. Messages are targeted at persons, including children, who have been profiled as potentially interested in or receptive to the products or services that are promoted.

1.2. Persuasive tactics and the impact on children's advertising literacy skills

It has been argued that personalised advertising techniques allow a more effective transmission of the commercial message, as advertisers can respond explicitly to a specific user's developmental level and knowledge base.²³ This is a distinct advantage when it comes to building a strong and lasting personal interaction and connection with the child consumer. Indeed, studies have shown that commercial messages that correspond with the interests and behaviour of consumers will lead to a more positive brand attitude, as the message is perceived as less intrusive, more relevant and useful, ultimately increasing consumers' purchase intentions.²⁴ In addition, YAN et al. found that

Protection: In Good Health? (Springer Netherlands 2012) <http://www.springerlink.com/index/10.1007/978-94-007-2903-2_2>.

²¹ Council of Europe, *The Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling, Recommendation CM/Rec(2010)13 and Explanatory Memorandum* (Council of Europe 2010).

²² *ibid.*

²³ Sandra L Calvert, 'Children as Consumers: Advertising and Marketing' (2008) *The Future of Children* 205; Cauberghe and others (n 5).

²⁴ Laura F Bright and Terry Daugherty, 'Does Customization Impact Advertising Effectiveness? An Exploratory Study of Consumer Perceptions of Advertising in Customized Online Environments' (2012) 18 *Journal of Marketing Communications* 19; Anindya Ghose and Sha Yang, 'An Empirical Analysis of Search Engine Advertising:

the click-through rates of advertisements employing behavioral targeting techniques increased enormously.²⁵ However, regardless of the effectiveness of such techniques, other important considerations should be taken into account when deciding whether it is fair that advertisers target children with this type of advertising.

First, the tracking of consumers' online information and activities often happens covertly. BOERMAN et al. argue that this covertness may be harmful as well as unethical, since consumers are not aware of the persuasive techniques used.²⁶ Furthermore, although the advertising sector has rapidly adopted personalisation techniques, research on the effects thereof on children's advertising literacy remains scarce.²⁷ DE PAUW ET AL. recently found that while children between 9 and 11 recognised a personalised advertisement (not integrated in the media content), few of them immediately understood that the advertisement was based on previous browsing behaviour. In general, children's commercial literacy increases gradually as they get older. For instance, research has shown that children between 12 and 16 years old have less knowledge of social media advertising and are less critical than youngsters above 16 years.²⁸ However, studies on personalised advertising and adolescents, a group of avid social media users who are frequently exposed to such advertising, paint an interesting picture. The level of personalisation of advertising may be different depending on the types and amount of personal data used.²⁹ If the level of personalisation of a commercial message is too

Sponsored Search in Electronic Markets' (2009) 55 *Management Science* 1605; Robert S Moore, Claire Allison Stammerjohan and Robin A Coulter, 'Banner Advertiser-Web Site Context Congruity And Color Effects On Attention And Attitudes' (2005) 34 *Journal of Advertising* 71.

²⁵ Jun Yan and others, 'How Much Can Behavioral Targeting Help Online Advertising?', *Proceedings of the 18th international conference on World wide web* (ACM 2009). <<http://dl.acm.org/citation.cfm?id=1526745>>; Pieter De Pauw and others, 'From Persuasive Messages to Tactics: Exploring Children's Knowledge and Judgement of New Advertising Formats' (2017) *New Media & Society* 1.

²⁶ Boerman, Kruikemeier and Zuiderveen Borgesius (n 10).

²⁷ Brahim Zarouali and others, "'Do You like Cookies?'" Adolescents' Skeptical Processing of Retargeted Facebook-Ads and the Moderating Role of Privacy Concern and a Textual Debriefing' (2017) 69 *Computers in Human Behavior* 157

²⁸ Cauberghe and others (n 5).

²⁹ Boerman, Kruikemeier and Zuiderveen Borgesius (n 10).

high, consumers may view this as a breach of their privacy.³⁰ ZAROUALI et al. confirmed this in a recent study on the impact of retargeting on adolescents.³¹ First, the direct effect of retargeted advertising on adolescents' purchase intention was indeed higher than for non-retargeted advertising, meaning that in general adolescents responded quite favourably to this advertising technique. However, the study also found that a retargeted ad indirectly leads to a negative effect on the purchase intention when adolescents are made aware that their personal information was being used to target the commercial message at them. In other words, personalisation techniques may also trigger skepticism and privacy concerns. In addition, ongoing research by ZAROUALI et al. uncovered rather worrying findings about adolescents' understanding of personalised advertising techniques employed in social media. Preliminary results of the study show that although the level of advertising literacy of children for these techniques gradually increases when they get older, almost half of 17 year olds have a really low understanding of persuasion tactics.³²

1.3. Balancing children's and advertisers' interests

In the context of personalised advertising, several children's rights are at stake. The largely opaque practices and techniques employed, paired with children's low level of advertising literacy vis-à-vis personalised advertising most importantly affects children's right to development (article 6 United Nations Convention on the Rights of the Child; UNCRC), right to privacy (article 16 UNCRC) and right to protection against economic exploitation (article 32 UNCRC). In addition, article 3 UNCRC states that in all actions concerning children their best interests should be the primary consideration (article 3 UNCRC).³³ In other words, this principle requires governments, public and private bodies to conduct child impact assessments and evaluate the impact of any proposed law, policy or decision on children's rights.³⁴ The first paragraph of article 3 UNCRC seems to indicate that the best interests of a child

³⁰ Marjolijn L. Anteunis and Guda Van Noort, 'Interactivity effects in social media marketing on brand engagement: an investigation of underlying mechanisms' (2011) The 10th ICORIA 2011 Berlin: June 23rd-25th 2011: conference programme.

³¹ Zarouali and others (n 27).

³² Brahim Zarouali and others, 'Adolescents' advertising competences and institutional privacy protection strategies on social networking sites: Implications for regulation' (Forthcoming) AdLit Project.

³³ General UN Committee on the Rights of the Child, 'General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)' (2003) para 45.

³⁴ *ibid.*

must be assessed individually. However, in many decisions related to the digital environment this is not what happens in practice.³⁵ For instance, when setting an age threshold from which a child can consent with the processing of his or her personal data in the context of information society services (infra), rather than an individual assessment, the best interests of children as a group or in general are at the centre of the consideration. The principle also requires that States must ensure that the best interests of the child are taken as a primary consideration in decisions and actions undertaken by the private sector. In the context of personalised advertising, this could be interpreted as requiring that the parties involved in the advertising chain must consider the best interests of children when profiling children, and tailoring and targeting their advertisements to this particular group of consumers.

From the perspective of the rights to development, privacy and protection from economic exploitation, it is important to acknowledge that children often do not grasp the scope of underlying data processing activities and business models of online actors.³⁶ Moreover, research has shown that children generally consider themselves as having a right to privacy online from their parents or peers (ie social privacy), but do not understand that their privacy may also be infringed upon by (State or) commercial actors.³⁷ The right to privacy also has an important participatory dimension for children, as it is essential for their individual autonomy and self-determination, and a precondition of participation. It is important to realise that personalised advertising has the capacity not only to compartmentalise children, but also to shape their preferences and interests accordingly, ultimately affecting their autonomy and development. In this regard, SAVIRIMUTHU warns that the increased

³⁵ Eva Lievens and others, 'Children's Rights and Digital Technologies', in Ursula Kilkelly and Ton Liefwaard (eds), *International Children's Rights Law* (Springer 2018) (forthcoming).

³⁶ According to the OECD for example, children lack the awareness and capacity to foresee the potential long-term privacy consequences of the disclosure of their personal data online. OECD, 'The Protection of Children Online - Recommendation of the OECD Council, Report on Risks Faced by Children Online and Policies to Protect Them' (2012).

³⁷ Lievens and others (n 35); Ofcom Office of Communications, 'Social Networking A Quantitative and Qualitative Research Report into Attitudes, Behaviours and Use' (Ofcom Office of Communications 2008).

role of algorithms in defining children's consumer experience should not disregard the value of a child's emotional space, which should not be subject to the inside the box-thinking that underpins profiling-based decisions.³⁸

These considerations should be offset against the fact that advertising revenue allows for the development of children's media content and digital platforms. At the moment, the dominant business model for online services remains advertising-based. Users often do not have to pay for the services, but in exchange personal information is collected and advertisements are part of the environment. As such, the creation of content and online spaces enables the exercise of other children's rights, including *inter alia* their right to information, to access and to participation in digital media. Moreover, for children to grow up to be critical, informed consumers, within these spaces they should have the opportunity to develop and practice advertising literacy skills which are needed to make balanced commercial decisions. The regulatory framework in place, encompassing both self-regulation and legislation, should enable the reconciliation of the interests of children and advertisers in relation to personalised advertising.

2. PERSONALISED ADVERTISING IN THE CURRENT REGULATORY FRAMEWORK

2.1. Collecting and processing of children's personal data under the GDPR and the proposed ePrivacy Regulation

At the EU level, the collection and processing of children's data is covered by the General Data Protection Regulation ("GDPR")³⁹ and the ePrivacy Directive (*infra*). The GDPR, which was adopted by the European Union Parliament and Council on 27 April 2016, and will be applicable as of 25 May

³⁸ Joseph Savirimuthu, 'Unfair Commercial Practices, the Consumer Child and New Technologies: What Should We Regulate? Some Policy Provocations' (2014) <<https://www.liverpool.ac.uk/media/livacuk/law/european-childrens-rights-unit/BriefingNote.pdf>>.

³⁹ Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

2018,⁴⁰ applies to (most often fully or partially automated)⁴¹ processing⁴² of personal data⁴³ (Article 2 GDPR). This revised regulatory framework is underpinned by the idea that individuals should have control of their own personal data.⁴⁴ The GDPR pays particular attention to children and acknowledges that they merit 'specific protection' regarding their personal data. This is because children are less aware of the risks and the consequences of the processing of their personal data on their rights.⁴⁵ Moreover, the GDPR recognises that the processing of children's personal data may result in risks to their rights and freedoms.⁴⁶ Specific protection should be awarded to children especially when their personal data is processed in the context of marketing and profiling, or in relation to services offered directly to a child.⁴⁷ Ad-

⁴⁰ Until then the Data Protection Directive (Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31) remains applicable.

⁴¹ As well as to '*processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*' (art 2 GDPR).

⁴² Processing is '*any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction*' (art 4(2) GDPR).

⁴³ Personal data is '*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*' (art 4 (1) GDPR).

⁴⁴ Recital 7 GDPR.

⁴⁵ Recital 38 GDPR.

⁴⁶ Recital 75 GDPR.

⁴⁷ Recital 38 GDPR.

vertisers that want to process children's personal data for the delivery of personalised advertising⁴⁸ will have to comply with the principles and requirements⁴⁹ for data controllers⁵⁰ and the specific protection for children in the GDPR. One of these requirements entails that personal data may only be processed to the extent that there is a 'legitimate ground' justifying the processing.⁵¹ In the context of personalised advertising, the consent of the data subject⁵² or the legitimate interest of the controller are possible legitimisation grounds. If the former is relied upon as a legitimate ground for processing children's personal data, article 8 of the GDPR requires verifiable parental consent for the processing of personal data of children under 16 (or lower⁵³) in the context of 'information society services'⁵⁴ directly offered to a child.⁵⁵ Regarding the latter ground, recital 47 GDPR specifies that 'direct marketing'

⁴⁸ It has been argued by behavioural targeting companies that, as long as they do not tie names to data they hold about individuals, they do not process any personal data, and that, therefore, the data protection framework does not apply to them. Zuiderveen Borgesius, however, argues that when data is used to single out an individual to target him or her with tailored advertising, the data protection legislation should apply: Zuiderveen Borgesius (n 13).

⁴⁹ This includes inter alia the principles of fairness, transparency, data minimisation, accuracy, purpose limitation, storage limitation, but also obligations with regard to data subjects' rights. For a comprehensive overview see Brendan Van Alsenoy, 'Regulating Data Protection: The Allocation of Responsibility and Risk among Actors Involved in Personal Data Processing' (2016) <<https://lirias.kuleuven.be/handle/123456789/545027>>.

⁵⁰ A data controller is the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; Art 4 (8) GDPR.

⁵¹ Art 6 GDPR.

⁵² The consent has to be freely given, specific, informed and unambiguous. The definition of consent can be found in recital 32 GDPR and article 4 (11) GDPR.

⁵³ Member States may lower this threshold to a minimum of 13 years. For a mapping of the recent national guidance and proposals in this context, see Eva Lievens and Ingrida Milkaite, 'Better Internet for Kids - Age of Consent in the GDPR: Updated Mapping' <<https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=2019355>>.

⁵⁴ Information society services (eg social media, search engines, apps) often rely on personalised advertising as an essential element of their business model.

⁵⁵ For more information see Eva Lievens and Valerie Verdoodt, 'Looking for Needles in a Haystack: Key Children's Rights Issues in the General Data Protection Regulation' [2017] Computer Law & Security Review.

may constitute a legitimate interest for the controller and hence offer a legitimation ground other than the consent of the data subject.⁵⁶ This, however, must entail a careful balancing of the legitimate interest of the controller against the interests, fundamental rights and freedoms of children.⁵⁷ If children are involved, the GDPR clarifies that their interests may override those of the controller more easily, implying a heavier responsibility for controllers using this ground for processing (Article 6, 1) (f) GDPR). Yet, in relation to direct marketing it has been argued by the Belgian Privacy Commission that obtaining consent remains a best practice.⁵⁸ Also in relation to online behavioural advertising it has been argued by scholars that consent is the only appropriate legitimation ground.⁵⁹

The ePrivacy Directive⁶⁰ contains rules for the processing of personal data in the electronic communication sector and the free movement of such data and of electronic communication equipment and services.⁶¹ As such, it forms an additional layer of protection, complementing⁶² the GDPR. At the moment,

⁵⁶ Recital 47 GDPR.

⁵⁷ In this regard, Macenaite and Kosta argue that this processing ground potentially protects children more than relying on consent, should data controllers fully consider all factors of data processing and ensure children's interests and fundamental rights are duly taken into account. Milda Macenaite and Eleni Kosta, 'Consent for Processing Children's Personal Data in the EU: Following in US Footsteps?' (2017) 26 *Information & Communications Technology Law* 146.

⁵⁸ Belgian Privacy Commission, 'Recommendation No. 02/2013 of 30 January 2013 Regarding Direct Marketing and the Protection of Personal Data' (2013) <https://www.privacycommission.be/sites/privacycommission/files/documents/aanbeveling_02_2013.pdf> 12.

⁵⁹ Zuiderveen Borgesius (n 14).

⁶⁰ Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37, which was amended in 2009 by the Parliament and Council Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11 (hereafter the ePrivacy Directive).

⁶¹ Recital 24 ePrivacy Directive: 'any information' that is stored on the terminal equipment of a user, rather than personal data.

⁶² It is a *lex specialis* to the GDPR and as such complements it.

the current ePrivacy Directive, which already covers popular tracking technologies such as cookies⁶³, is under review. In January 2017, the European Commission launched its proposal for an ePrivacy Regulation,⁶⁴ which is set to replace the ePrivacy Directive and align the rules for electronic communications with the new standards of the GDPR.⁶⁵ The proposed Regulation significantly expands its scope of application, *inter alia* by explicitly including Over-the-Top communications services or 'OTTs' (ie online services that could to a certain extent substitute traditional media and telecom services, such as Skype, WhatsApp, Facebook Messenger).⁶⁶ It also brings about important changes for the players involved in targeted advertising, by requiring the same type of consent as in the GDPR for the placement and accessing of cookies or the use of other tracking technologies (eg device finger printing).⁶⁷ According to the most recent draft legislative resolution of the European Parliament, users need to be provided with granular settings for consent, distinguishing between different categories: (1) tracking for commercial purposes or for direct marketing for non-commercial purposes (eg behavioural adver-

⁶³ Article 5(3) of the Directive provides that the installation of and access to cookies on users' terminal equipment (eg smartphones, laptops) is only allowed with their consent, except for 'functional cookies' or 'similar technologies'.

⁶⁴ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) 2017.

⁶⁵ The European Commission hopes to finalise the Regulation by the 25th of May 2018, when the GDPR becomes applicable. The draft proposal was discussed and voted by the LIBE committee of the European Parliament (EP) in October 2017.

⁶⁶ Regarding territorial scope, it does not only envisage entities in the EU, but any electronic communication service provided to end-users within the EU and devices located in the EU, regardless of the service provider's location.

⁶⁷ Art 7(4) of the GDPR requires consent to be 'freely given, specific, informed and unambiguous' and must be expressed by way of a 'statement or by a clear affirmative action.' Recital 20 of the Parliament's draft legislative resolution requires in relation to tracking that "*users should receive all information about the intended processing in clear and easily understandable language.*" European Parliament, Draft legislative resolution on the proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (2017) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0324&language=EN>> (hereafter 'EP Draft Legislative Resolution').

tising); (2) tracking for personalised content; (3) tracking for analytical purposes; (4) tracking of location data; (5) providing personal data to third parties (including providing unique identifiers to match with personal data held by third parties).⁶⁸ Furthermore, one of the amendments explicitly states that the regulation should prevent the use of tracking or cookie walls (ie a barrier that users can only pass if they consent to tracking by third parties)⁶⁹. According to the EP, “*tracking walls do not help users to maintain control over their personal information and privacy or become informed about their rights*”.⁷⁰

Yet, whereas the GDPR explicitly recognises children as a vulnerable group of individuals that deserve specific protection when it comes to the processing of their personal data (supra), especially in the context of profiling and marketing, the original proposal for an ePrivacy Regulation contained no references to children.⁷¹ However, as children are increasingly targeted directly by services tailored to a young audience it would make sense to align the proposed Regulation with the GDPR, by recognising that children need specific protection when it comes to the processing of their communications data. As mentioned above, research has shown that children have little or no understanding of and knowledge about the tracking technologies used and the extent and sensitivity of the data collected for personalised advertising.⁷² These findings resonate in the viewpoint of the Article 29 Working Party, who argued in 2013 that in the best interest of the child companies ‘*should not process children’s personal data for behavioural advertising purposes, neither directly nor indirectly, as this will be outside the scope of a child’s understanding and therefore exceed the boundaries of lawful processing*’.⁷³ Moreover, it has been argued in this context, for instance by BEUC, that specific limitations on

⁶⁸ Recital 23 EP Draft Legislative Resolution.

⁶⁹ Frederik J Zuiderveen Borgesius and others, ‘Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the EPrivacy Regulation’ (2017) 3 European Data Protection Law Review 353.

⁷⁰ Recital 22 EP Draft Legislative Resolution.

⁷¹ Most notably, article 8 GDPR is not reflected in the proposal.

⁷² This includes a reference to the specific standard of consent as introduced by art 8 GDPR.

⁷³ Article 29 Data Protection Working Party, ‘Opinion 02/2013 on Apps on Smart Devices, WP202’ (2013) <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf>; Article 29 Data Protection Working Party, ‘Opinion 2/2010 on Online Behavioural Advertising WP 171’ (n 11).

the collection and use of children's communication data are needed.⁷⁴ In the Opinion of the Committee on the Internal Market and Consumer Protection,⁷⁵ these ideas were integrated in a proposal for a new recital 16a:

Regulation (EU) 2016/679 of the European Parliament and of the Council explicitly recognises the need to provide additional protection to children, given that they may be less aware of the risks and consequences associated with the processing of their personal data. This Regulation should also grant special attention to the protection of children's privacy. They are among the most active internet users and their exposure to profiling and behaviourally targeted advertising techniques should be prohibited.

Parallel to the consideration included in recital 38 of the GDPR, a new recital 23a was proposed confirming the need for specific protection with regard to children's online privacy, as they are less aware of the risks and consequences associated to their online activities, as well as less aware of their rights. For that reason, the IMCO Opinion stresses that specific safeguards are necessary in relation to the use of children's data, notably for the purposes of marketing and the creation of personality or user profiles. As a result of these considerations, the Opinion proposed a new paragraph 1 to be added to article 6 asserting that

Electronic communications data that is generated in the context of an electronic communications service designed particularly for children or directly targeted at children shall not be used for profiling or behaviourally targeted advertising purposes.

In addition, a new paragraph 4a to article 8 was proposed stating that '*[t]erminal equipment that is intended particularly for children's use shall implement specific measures to prevent access to the equipment's storage and processing capabilities for the purpose of profiling of its users or tracking their behaviour with commercial intent.*'

⁷⁴ Beuc, 'Data Collection, Targeting and Profiling of Consumers Online' (2010) <<http://www.beuc.eu/publications/2010-00101-01-e.pdf>>.

⁷⁵ European Parliament Committee on the Internal Market and Consumer Protection, Opinion on the proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (2017) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0324&language=EN>>.

However, in the end, these amendments, which would have had a significant impact on current advertising practices that target and personalise commercial messages to and for children, were not included in the EP's Draft Legislative Resolution.

In relation to the profiling of children, recital 75 GDPR states that processing personal data "in order to create or use personal profiles" may give rise to risks to the rights and freedoms of natural persons.⁷⁶ As profiling is a complex and 'invisible'⁷⁷ process, which is very difficult to understand for adults, let alone children, the GDPR did aim to introduce specific protection for children in relation to profiling.⁷⁸ First, it is recognised in recital 38 that circumstances in which personal data of children are processed in order to create personal or user profiles require extra protection. There is no further guidance, though, as to how this protection should be put into practice. In any case, data subjects must be informed about the fact that profiling is being deployed and the potential consequences thereof.⁷⁹ Especially when this occurs vis-à-vis children, the information provided will need to be clear and understandable for them.⁸⁰ In relation to profiling for direct marketing purposes, data subjects, including children, also have the right to object at any time to profiling to the extent that it is related to direct marketing.⁸¹ The data controller needs to clearly and explicitly inform the data subject of this right.⁸² Second, according to recital 71, a decision which may include a measure evaluating personal aspects relating to a data subject, which is based solely on automated processing and produces legal effect for or similarly significantly affects the data

⁷⁶ Recital 75 GDPR underlines that the processing of personal data may result in a risk to the rights and freedoms of natural persons, in particular "[...] where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, *in order to create or use personal profiles*" (emphasis added by the authors).

⁷⁷ See the work of Esther Keymolen, who has coined the notion 'invisible visibility' in relation to online interactions: Esther Keymolen, *Trust on the Line: A Philosophical Exploration of Trust in the Networked Era* (Wolf Legal Publishers 2016); Esther Keymolen, 'Onzichtbare Zichtbaarheid. Helmuth Plessner Ontmoet Profiling' (2006).

⁷⁸ Lievens and Verdoodt (n 55).

⁷⁹ Recital 60 GDPR.

⁸⁰ Art 12 GDPR. Lievens and Verdoodt (n 55).

⁸¹ Recital 70 and art 21, (2) GDPR.

⁸² Recital 70 GDPR.

subject, should not concern children.⁸³ In its recent guidelines on automated individual decision-making and profiling, the Article 29 Working Party (“Working Party”) confirms that there is no absolute prohibition on the profiling of children in the GDPR.⁸⁴ Indeed, the Working Party recognises that under certain circumstances it may be necessary for controllers to carry out such decision-making, for instance to protect children’s welfare. Nevertheless, the Working Party stresses that targeted advertising may, depending on the particular characteristics of the case, have a ‘similarly significant’ effect on individuals. Factors that may influence the assessment thereof are, for instance, the intrusiveness of the profiling process, the expectation and wishes of the individuals concerned, the way the advert is delivered, or the particular vulnerabilities of the data subjects targeted. Especially in relation to children, the Working Party recognises that they “can be particularly susceptible in the online environment and more easily influenced by behavioural advertising” and, therefore, “organisations should, in general, refrain from profiling them for marketing purposes.”⁸⁵ Interestingly, it should be noted that a ‘child’ is not defined in the GDPR. The question thus arises whether this statement by the Working Party refers to all under 18-year olds. The same observation can be made in relation to the EP draft legislative resolution on the e-Privacy Regulation.

From a children’s rights perspective, a number of crucial concerns arise with regard to the rules on the profiling of children. It has been argued that profiling children may restrict their right to privacy, as well as their right to development.⁸⁶ According to ARIELY and BERNS, the creation of profiles may negatively impact children’s development, as the collection and use of personal data for the purpose of profiling may undermine children’s rights to experiment with and critically reflect upon their interactions.⁸⁷ In that regard, the

⁸³ Recital 71, first paragraph, final sentence GDPR.

⁸⁴ However, the Working Party recommends data controllers not to rely upon the exceptions in Article 22 (2) GDPR to justify such profiling (ie necessary for the performance of a contract, authorised by law, consent of the data subject). Article 29 Data Protection Working Party, ‘Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679’ (2017).

⁸⁵ *ibid* 26.

⁸⁶ Lievens and Verdoodt (n 55).

⁸⁷ Dan Ariely and Gregory S Berns, ‘Neuromarketing: The Hope and Hype of Neuroimaging in Business’ (2010) 11 *Nature Reviews Neuroscience* 284; also cited by Savarimuthu (n 38).

lack of control by children over their personal data may harm their capacities to develop, get to know and experiment with their own identity.⁸⁸

2.2. Personalised advertising in the Unfair Commercial Practices Directive?

Another layer of protection for children in the context of personalised advertising may be found in EU legislation on unfair commercial practices (ie the Unfair Commercial Practices Directive, “UCP Directive”).⁸⁹ Aside from protections against misleading advertising⁹⁰, the UCP Directive protects consumers against so-called ‘aggressive’ commercial practices. Marketing techniques are deemed aggressive if they “*by harassment, coercion or undue influence significantly impair the freedom of choice or conduct of the average consumer*”.⁹¹ While actual harassment or coercion (eg the use of physical force) can hardly be argued to occur in the context of personalised advertising, undue influence could perhaps arise. Article 2 (j) of the UCP Directive specifies that undue influence means “*exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision*”. In this regard, the European Consumer Organisation (BEUC) has argued that advertisers hold a position of power as they collect a lot of personal information of consumers (including children) without them being aware of what is happening.⁹² Moreover, the repetitive aspect of behavioural advertising (eg through retargeting on social media) may put pressure on children, while the selection of advertising based on the presumed consumer choice may prevent the display of other advertisements thereby restricting the comparison with other advertisements and, hence, making an informed commercial decision.⁹³ The qualification of ‘undue influence’ will depend on the specificities of the particular case, and when children are involved, their vulnerability should be taken into account.⁹⁴

⁸⁸ *ibid.*

⁸⁹ Verdoodt, Clifford and Lievens (n 8) 599.

⁹⁰ For a clear overview see *ibid.*

⁹¹ Art 8 UCPD.

⁹² Beuc (n 74) 6.

⁹³ *ibid.*

⁹⁴ Forbrugerombudsmanden, ‘Guidance on Children, Young People and Marketing’ (2014) <<https://www.consumerombudsman.dk/media/14560/guidance-on-children-young-people-and-marketing.pdf>>.

3. SELF-REGULATION AND TARGETING CHILDREN WITH PERSONALISED ADVERTISING

In addition to existing legislation that is relevant to certain forms of advertising, there is a strong tradition of self-regulation⁹⁵ in the advertising sector. At international, European and national level, advertisers have committed to observing certain standards that are often laid down in codes of conduct, which are enforced by self-regulatory bodies.⁹⁶ Such codes of conduct also contain provisions in relation to advertising aimed at children, direct marketing and behavioural advertising.

Section D7.4 of the ICC Consolidated Code,⁹⁷ for instance, states that children of 12 years and younger should not be targeted by a behavioural advertising campaign. Along the same lines, in the Framework for OBA,⁹⁸ created by the Interactive Advertising Bureau Europe (IAB Europe), companies agree not to create segments for OBA purposes that are specifically designed to target children, meaning people age 12 and under.⁹⁹ This Framework is also guiding

⁹⁵ Self-regulation entails the creation, implementation and enforcement of rules by a group of actors, industry in particular, with minimal or no intervention by the state; Eva Lievens, *Protecting Children in the Digital Era: The Use of Alternative Regulatory Instruments* (Brill 2010).

⁹⁶ It has been argued before that drawbacks of self-regulation are a lack of effective enforcement and often mild sanctions; however, the advertising sector is one of the sectors where – depending on the self-regulatory body in question – decisions on violations of the codes of conduct are often complied with. See Eva Lievens, ‘Is Self-Regulation Failing Children and Young People? Assessing the Use of Alternative Regulatory Instruments in the Area of Social Networks’, in Seamus Simpson and others (eds), *European media policy for the twenty-first century: Assessing the past, setting agendas for the future* (Routledge 2016).

⁹⁷ International Chamber of Commerce, ‘Advertising and Marketing Communication Practice Consolidated ICC Code’ <<https://cdn.iccwbo.org/content/uploads/sites/3/2011/08/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English.pdf>>.

⁹⁸ The IAB Europe is a European business organisation that develops industry standards, offers legal advice, education and training and conducts research for the European digital advertising industry. The Framework is self-regulatory and creates obligations for any of the members that self-certify their compliance with the principles: <<https://www.iabeurope.eu/policy/iab-europe-eu-framework-for-online-behavioural-advertising/>>.

⁹⁹ The framework also contains obligation related to notice and choice, including the principles that internet users must be given notice of the OBA data collection and use practices by the relevant third parties as well as the website operator (ie of its OBA arrangements with third parties), and that third parties have to provide internet users

the activities of the European Interactive Digital Advertising Alliance, which has been set up by a coalition of the European advertising industry, including advertisers, the advertising agency sector, the direct marketing sector, the advertising network sector and the media sector. Its main objective is to licence the “Online Behavioural Advertising Icon” to companies that are involved in the OBA business across Europe. This icon notifies consumers of data collection for OBA purposes and the delivery of OBA advertising to them, and refers consumers to an online portal: ‘www.youronlinechoices.eu’, which intends to offer information on the practice of OBA and where consumers can turn off OBA by some or all companies.¹⁰⁰ Research into the effectiveness of the OBA icon, however, has found that only one-quarter of the respondents remembered OBA disclosure icons, and only 12% remembered seeing a tagline (eg, “Why did I get this ad?” or “AdChoices”) and correctly selected the tagline they had seen from a list. Also, none of the taglines were understood to be links to pages where you can make choices about OBA, nor did they increase knowledge about OBA.¹⁰¹ However, it has been argued that the standard icon could effectively increase OBA awareness and understanding when

with a mechanism to exercise their choice regarding the use of their data for OBA purposes. It has been argued, for instance, by King and Jensen that in general the IAB principles do not offer consumers sufficient transparency nor do they ensure meaningful access to the information contained in the consumer profiles that are used for behavioral advertising purposes; Nancy King and Pernille Wegener Jessen, ‘Profiling the Mobile Customer – Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioural Advertisers Target Mobile Phones? – Part II’ (2010) 26 Computer Law & Security Review 595.

¹⁰⁰ When accessing the portal, the user will be asked to select his or her location. The user must then navigate to “Your Ad Choices”, at which point the site collects the users’ “status” from the participating companies. Once complete, the individuals can either “turn off” individual companies one by one or scroll down to the setting “turn off all companies”. Brendan Van Alsenoy and others, ‘From Social Media Service to Advertising Network - A Critical Analysis of Facebook’s Revised Policies and Terms’ <<https://www.law.kuleuven.be/citip/en/news/item/facebook-revised-policies-and-terms-v1-2.pdf>>. However, according to the Article 29 Data Protection Working Party, such an opt-out approach “is not an adequate mechanism to obtain average users informed consent” for purposes of online behavioural advertising. Article 29 Data Protection Working Party (n 11) 15.

¹⁰¹ Boerman, Kruijkemeier and Zuiderveen Borgesius (n 10).

accompanied by an explanatory label stating, “This ad is based on your surfing behavior”.¹⁰² It remains to be seen whether this finding is also valid vis-à-vis children.

With regard to direct marketing, the Federation of European Direct Marketing (FEDMA), an organisation representing the Direct and Interactive Marketing sector at the European Level, has adopted a Code of Practice for the Use of Personal Data in Direct Marketing.¹⁰³ According to the FEDMA Code, direct marketing is to be understood as: “*the communication by whatever means (including but not limited to mail, fax, telephone, on-line services etc...) of any advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals*”.¹⁰⁴ The Code contains, general principles on data protection applied to direct marketing, but also specific provisions that apply to the processing of children’s personal data. The Code defines children as “*any individual aged under 14 years old unless otherwise defined in national legislation/self-regulation*”. Direct marketers that collect children’s personal data are required to make ‘every reasonable effort’ to ensure that the concerned child and/or the parent are properly informed about the purpose(s) for processing the data. Such a notice should be prominent, readily accessible and understandable by children. Direct marketers also have to obtain parental consent prior to the processing of the data, in accordance with applicable laws and self-regulation. Furthermore, they do not only have to obtain parental consent, but they also have to use every reasonable endeavour to verify whether the consent was actually given by the parent of the concerned child (and for instance not by the child himself). According to the Code, parents should be able to exercise their children’s rights as data subjects. More specifically these rights are (in line with EU data protection legislation) the right to object to the processing of their child’s data or to the disclosure of that data to a third party, the right to access and rectification or deletion of the data in case the processing does not comply with applicable data protection legislation. Finally, in relation to

¹⁰² Guda van Noort, Edith G Smit and Hilde AM Voorveld, ‘The Online Behavioural Advertising Icon: Two User Studies’, *Advances in Advertising Research (vol IV)* (Springer 2013), 365.

¹⁰³ The Code was drafted in collaboration with the Article 29 Working Party; see Article 29 Data Protection Working Party, ‘Opinion 4/2010 on the European Code of Conduct of FEDMA for the Use of Personal Data in Direct Marketing, WP 174’ (2010) <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_en.pdf>.

¹⁰⁴ Please note that this not necessarily means that the commercial message is also personalised.

games, direct marketers should not demand more personal data than is strictly necessary when children want to participate in a game, when they may receive a prize or in relation to any other activity involving a promotional benefit.

Complementary to the provisions of the Code of Practice, FEDMA also adopted an Electronic Communications Annex that contains provisions specifically applicable to online direct marketing (or electronic mail marketing).¹⁰⁵ According to this annex, direct marketers who want to process children's data will have to inform them about the processing. This information has to be expressed in easily understandable language. Moreover, direct marketers will have to obtain prior parental consent for the processing of personal data of children who have not yet reached the age required by law to give their consent. Important to note is that parents may withdraw their consent at any point in time. Direct marketers are also required to have an age verification mechanism in place. The mechanism should be able to guarantee that the age of the child as well as the authenticity of the parental consent has been effectively checked. The Annex does not provide any further guidance regarding the type of mechanism, but merely requires that direct marketers use 'reasonable efforts'. Furthermore, the Annex contains certain limitations direct marketers need to keep in mind:

- Data of family members: These data cannot be collected from the child, without the permission of the person to whom the data refer.¹⁰⁶
- Sensitive data¹⁰⁷: Direct marketers may not invite children to share this type of data without the prior consent of their legal representative.
- Incentivise children to share more data: Direct marketers may not incentivise children to provide their own personal data or personal data of a

¹⁰⁵ FEDMA, 'European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-Line Annex)' <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf>.

¹⁰⁶ Nevertheless, data regarding the identity and address of the parent or legal representative may still be processed for authorisation and verification purposes. FEDMA (n 105).

¹⁰⁷ Sensitive data are data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or the processing of data concerning health or sex life of the child, as well as the financial situation of the child or any third party such as their friends or family. FEDMA (n 105).

third party for marketing purposes, in exchange for a material or virtual reward.¹⁰⁸

4. RECONCILING CHILDREN'S AND ADVERTISERS' (BEST) INTERESTS

The digital advertising industry undoubtedly plays an important part in the creation and maintenance of content, services and digital spaces for children. The sophistication and opaqueness of today's tracking, profiling and targeting practices, however, make it difficult for children to make carefully considered and critical commercial decisions or decisions concerning their privacy and personal data, and as such, raise issues related to their rights to development, privacy and protection against economic exploitation. The current regulatory framework provides for certain specific protections for children in this context. However, this chapter questioned whether this framework is appropriate for reconciling the interests of advertisers and children. While the current data protection and privacy laws and policies cover existing tracking, profiling and targeted advertising practices, certain improvements may be proposed.

First, the GDPR foresees in specific protection for children, which is laudable, but it remains problematic that the text does not contain a definition of a 'child'. This leads to uncertainty regarding the age group(s) to which certain protection measures should apply. This could be clarified by data protection authorities and the Article 29 Working Party or the European Data Protection Board. Furthermore, aside from refraining from profiling children for marketing purposes, general default limitations on the collection of personal data of children should be considered.¹⁰⁹ In this regard, data controllers, also in the advertising sector, should take up their responsibility, and carry out an in-depth data protection impact assessment,¹¹⁰ with attention for the best interests and rights of children, when setting up digital marketing campaigns. The age and level of maturity of the child will also play an important role in such an assessment.

¹⁰⁸ This includes invitations to provide personal data in order to be able to participate in a game of chance, tombola or lottery. FEDMA (n 105).

¹⁰⁹ Kathryn C Montgomery and Jeff Chester, 'Data Protection for Youth in the Digital Age: Developing a Rights-Based Global Framework' (2015) 1 *European Data Protection Law Review* 291.

¹¹⁰ Art 35 and recital 91 GDPR.

Second, the ePrivacy Regulation should be aligned with the GDPR, as was proposed in the IMCO Opinion of October 2017, by recognising that children require specific protection when it comes to the processing of their communications data. Adding specific limitations on the collection and use of children's communications data and special protection for terminal equipment or software that is developed for children would be a step forward. Finally, a prohibition for services specifically targeted towards children to use profiling and behavioural marketing techniques would be beneficial for the protection of children's rights (eg the right to privacy and to protection against economic exploitation). However, the same concern regarding the fact of whether this applies or should apply to all under 18-year olds arises.

Third, the Unfair Commercial Practices Directive may provide additional protection for children against personalised advertising, as this advertising practice may qualify as a form of undue influence. It could even be considered to add behavioural advertising practices aimed towards children to the blacklist of practices which are under all circumstances deemed unfair.

Fourth, the industry has been very active in self-regulating personalised advertising practices (ie direct marketing and online behavioural advertising). While it could be argued that the commitment not to create segments targeting children for 12-year olds and under is laudable, it does not provide any protection for children above the age of 12, even though these targeted advertising practices may also have significant privacy implications for 12 to 18-year olds.¹¹¹ Moreover, different ages can be found in different self-regulatory instruments (eg 12 and under, under 14s), which could lead to confusion. Existing self-regulatory initiatives focus mostly on information provision and transparency (eg notice requirements, labelling), as well as on the requirement of (verifiable) parental consent for personalised advertising, rather than on actual limitations on the processing of children's personal data for marketing and advertising practices. Whereas such limitations might go against commercial interests of advertisers, the best interests of children might require this, also taking into account the fact that for advertising to be innovative and fun for children, collecting and using children's personal data is not a precondition.

Finally, research has shown that children's level of advertising literacy gradually develops over the years. Therefore, for them to grow up to be ad-literate adults, they should be able to practice their commercial decision-making skills throughout their childhood. As a part of their rights to development and

¹¹¹ King and Wegener Jessen (n 99).

education, they should be taught from an early age about how to cope with advertising, also in the digital environment, at school and by their parents.

5. SELECTED LITERATURE

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