 

**Submission for the Concept Note for a General Comment on children’s rights in relation to the digital environment**

The consultation is prepared by Privacy Salon, which is a Belgian not for profit organization that has as main goal to raise awareness about social and ethical consequences of new technologies in collaboration with the Research Group Law, Science, Technology and Society of the Faculty of Law and Criminology of the Vrije Universiteit Brussel.

Key messages:

* Children should become active rights holders in the digital environment.
* It is critical that children obtain critical digital literacy skills to survive and thrive in the digital age, whereby parents, teachers and caregivers need to be empowered to help children gain these skills.
* Critical awareness needs to be raised of social harms of automated-decision making systems and AI such as discrimination and cumulative disadvantage
* Both the public and private sector need to take children’s rights seriously
* States should have an active duty of care to respect, protect and take positive measures to safeguard all children’s digital rights and to reaffirm the responsibility of the public and private sector in this respect.
* Children’s rights should not only be thought of as participatory rights but also as welfare and development rights.

1. **How can children’s views and experiences be expressed and taken into account when formulating policies and practices which affect their access to, and use of, digital technologies?**

Children are active users of digital technologies, but they are absent where decisions are made. In addition to subjects of protection, children need to become active rights holders. This means that children and young people can play a significant role as agents of change, of transformation through their participation and engagement in decision-making processes, in accordance with their evolving capacities and gradually increasing autonomy. Specifically, if we examine their rights under the scope of the digital environment and incorporate them in the digital society it is important to think of children’s rights in terms of development rights, respecting children’s right to privacy and human dignity is essential: to be respected as an independent moral actor, to develop autonomy and flourish in life. Respecting children’s privacy promotes a different type of self-concept, it supplies a prerequisite for the development of personal responsibility. Hence, protecting children’s privacy has important implications for their growth into responsible adults.[[1]](#footnote-1) Since they express their opinions, make decisions and are responsible for them, they feel that they belong, that they are integrated into society, and they can develop a sense of justice.[[2]](#footnote-2) This implies that when drafting policies and legislation with regards to new technologies it is important that not only children’s privacy is respected but that children and also their parents and caretakers are consulted and involved in a process of co-creation in policy making, and that non-legal experts working with children are also consulted when drafting laws and policy. Co-creation should become the new normal, so that children can contribute and jointly produce a mutually valued outcome.[[3]](#footnote-3) In this way, children can learn by doing, gain empathy and are encouraged for experimentation. It is a ‘win-win’ process in which both sides can gain an advantage. On the one hand children feel listened to, taken seriously and able to contribute to decisions which affect their lives. On the other hand, authorities, legislative bodies, civil society gain useful input so that measures and regulations adopted can be more efficient.

Recent European legislation on Data Protection (GDPR, 2018), for instance, does not foresee any participatory rights for children with regards to processing of their data. The main message of the GDPR is that children merit specific protection, and more specifically that any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand (recital 58). Consent of children in relation to information society services is a special case. Where the child is below the age of 16 years, processing of personal data shall be lawful only if and to the extent that consent is given or authorized by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years. (article 8). Finally, activities addressed specifically to children shall receive specific attention, however this is not further specified (article 57).

From a children’s rights perspective the article on consent is questionable. In practice, this would divide all children into two groups: children that are capable to consent to the processing of their personal data from 13-16 years old[[4]](#footnote-4) and children that are dependent on parental approval of their online choices from 0-13 years old. Drawing such a strict line opposes the stages of physical and social child development[[5]](#footnote-5) and does not take into account that not all children grow up in the same circumstances and many grow up in vulnerable family situations where parents are not always in a position to provide consent for their children. Also, it requires the reconsideration of the general positive perception of the proposed parental consent from a legal point of view. In particular, it is necessary to evaluate whether the proposed measure is proportionate and whether it coincides with the human rights framework.

Under certain circumstances the responsibility to consent opposes the idea of children’s participation in the decision-making process that concerns them, an idea anchored in the UNCRC and that is recognized by both the EU and its Member States. Children’s rights to freedom of expression and privacy may be undermined in case when children’s access to information could become limited and dependent on parents. Also, the scope of their right to privacy would shrink as parents would be required to intervene in children’s private spaces to make informed choices, for example in their children’s video game or email account. Therefore, it can be observed that the parental consent may sometimes contradict with the key principles of human rights law enshrined in the UNCRC.

To make sure children’s views and experiences can be expressed and taken into account when formulating policies and practices it should be obligatory for national and international governments to consult and actively engage children from all ages, consult children’s (rights) experts when drafting privacy and data protection policies, by organizing events to hear their opinions, conduct surveys with experts and children and take not only participatory but development rights of children seriously in in the light of the digital environment they are growing up in.

1. **How can discrimination (originating offline or online) be effectively addressed, to ensure all children have their rights realized in a digital world?**

Two types of discrimination can be distinguished in the digital environment, which we will focus more on: discrimination in access to digital technology, and discrimination as a result of the use of technology and automated decision-making systems (both offline and online). First, it is essential for children to possess digital literacy to survive and thrive in the digital age.[[6]](#footnote-6) Digital illiteracy is one of the main reasons for the limited access to digital technology. Two axes of digital knowledge need to be developed for increasing children’s critical awareness. The first axis is communication, given that children use technology and social media as means of communication and socialization. The second axis concerns technical and privacy skills for the use of technology.

To implement both of them, resources are required for digital equipment and tools for schools and society. However, apart from investment in resources, time investment is required for not only children’s, but also for teachers’ and parents’’[[7]](#footnote-7) digital training about the proper use of technology. Digital literacy and privacy awareness skills, mainly regarding children’s communication on social media platforms, need to be given at school. This implies that teacher’s training courses need to take technical and privacy skills up in their curriculum. In addition, this implies that teachers and schools have to change how they integrate technologies in the classroom. New media must be combined with new teaching approaches, which empower children to work with technology and raise critical awareness about the risks. In this way, the ‘learning digital divide’ can be limited.[[8]](#footnote-8) Finally, access to technology means access to the open and pluralistic world of Internet, which leads to access to information and freedom of expression. Therefore, it is of vital importance to protect the social rights of all children, also for instance undocumented children giving them the chance to enjoy equal opportunities and provide possibilities at schools, libraries and community centers for these children to access the internet.

Secondly, an increasing concern is discrimination as the result of the use of technology and automated decision- making systems both offline and online. A wide variety of decisions affecting people's lives are increasingly automated by means of algorithms, Big Data and Artificial Intelligence both in the private and public sector. Nevertheless, direct risks of automated decisions include wrong or biased decisions (false positives and false negatives) resulting in social sorting, discrimination, stigmatisation and contributing to cumulative disadvantage whereby marginalized communities in societies are disproportionately targeted by discriminatory technologies.[[9]](#footnote-9) So far, there are no specific requirements to disclose either training data used[[10]](#footnote-10) for designing decision-making rules and models or the algorithms used for applying these rules to new cases. As a result, there is very little transparency about how these systems work. This lack of transparency provides a breeding ground for distrust or rejection. Due to the lack of transparency and a lawfulness procedure, this discrimination is difficult to identify and prove[[11]](#footnote-11).

In European data protection legislation, for instance, a Data Protection Impact Assessment (DPIA) is required, however, as the assessment is specifically focused on compliance with the GDPR the assessment of the discriminatory risks of a certain technology might not be sufficient. In addition, attention for participatory and development rights and children’s rights more in general will be insufficient. It is therefore recommended that where it concerns automated-decision making systems that are geared towards children, a children’s rights impact assessment is conducted that encompasses a DPIA. Creating critical awareness of bias and potential of discrimination of these technologies is essential not only with policy-makers and professionals but also with parents, caregivers and children. Governments and policy-makers need to invest in knowledge and research into bias, but also the ethics and potential social harms such as discrimination and cumulative disadvantage. Finally, it is essential to ensure proportionality, accountability, transparency and oversight. The GDPR provides the right to explanation, and states that “data subjects should be provided with meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject” (article 13 GDPR). By ensuring that data protection is embedded in the early conception phase of any algorithm it minimizes the risks of potential discriminatory results and increases trust between the data subject and the data controller.[[12]](#footnote-12) Apart from data protection by design, children’s right by design should be implemented in cases where data processing of children is concerned especially in the public sector. Further, it is essential that independent sectorial interdisciplinary ethics bodies are installed that include apart from ethicists also data protection specialists, children’s rights experts, computer scientists, social scientists and in some cases psychologists and/or pedagogues that evaluate and ethically assess new technologies before they are implemented.

**3.** **How should the General Comment treat the role of parents and other caregivers?**

Parents and caregivers face new challenges and issues on a regular basis as children and young people become more adept at using the Internet, technology and social media. Children and young people use smartphones, tablets, smart IoT toys, gaming consoles, and other smart devices, often without parental supervision or guidance.[[13]](#footnote-13) Whatever the age of the child, internet challenges are present. Along with policy-makers, one first step is for parents to identify and maintain good practices in online child protection. Regarding digital parenting there are two main interconnected issues, familiarizing of parents with technology and its risks and how they manage the proper use of technology by their children. With regard to parents’ monitoring behavior a distinction should be made between high and low income countries.[[14]](#footnote-14) Ιn high income countries it is observed that parents and caregivers are increasingly using enabling forms of mediation such as sharing some online experiences with their children and guiding them in the use of privacy settings, advice services and critical evaluation of online content and behavior. This shift is influenced by parents’ own growing experience with and expertise in using digital media. It’s also the outcome of several years’ worth of multi-stakeholder efforts to raise parental awareness and encourage their engagement, often led by governments and child welfare organizations. However, in middle- and low-income countries, it seems that parents favor restrictive mediation. This is partly because some cultures are more authoritarian in their parenting style. Another reason is that in the absence of supportive resources, anxious parents feel their only recourse is to protect their children by limiting their access. It is also because the wider public debate has yet to embrace a conception of children as active citizens and, therefore now, also as digital citizens. It is notable that children in European countries are more likely to tell a parent if they experience a problem online, than in other parts of the world. Perhaps this reflects a more encouraging emphasis on enabling rather than restriction among European parents. Certainly, it suggests the need for greater investment in support and guidance of parents in the global South.[[15]](#footnote-15) To conclude, the role of the parents and caregivers should be adaptive to the needs of the digital world and to the children’s real needs in so far, their circumstances allow for this.[[16]](#footnote-16) Similarly, to children they should get the opportunity to become empowered digital citizens and be aware of both the benefits and risks of new technology.

1. **How should the practices of businesses operating in the digital environment support the realization of children's rights?**

Children are not only rights holders, they are also stakeholders in business as companies interact with them on a daily basis as workers, consumers and community members. Despite this children have not been adequately considered by business. The incorporation of children’s rights into corporate due diligence processes is most often limited to child labor. Children’s specific needs should be recognized in every stage of design, production, function and action of the implementation of new technologies by businesses and public services, which deliver products and services for children. Although they do not necessarily have to develop a stand-alone child rights policy, it is important that all companies include a statement of their commitment to fulfill their duties on all human rights, including children’s rights, in their existing policies and codes of conduct, making also provisions that address specific child rights impacts.[[17]](#footnote-17) For example, with regard to privacy policies made for websites or software GPDR principles are important in this respect, such as the principle of transparency.[[18]](#footnote-18) GDPR provisions for privacy by design and privacy by default principles increase children’s privacy significantly. In accordance with the principle of privacy by design, enterprises need to take the protection of personal data into consideration in each new service or business process that utilizes such data. At the same time the principle of privacy by default requires that the strictest privacy settings should be in use as a default setting when a customer acquires a new product or service. These new principles can be considered as the executive forces in increasing the children’s data privacy.[[19]](#footnote-19) However, businesses should carefully take into account three defining factors for child friendly privacy policies.[[20]](#footnote-20) The first one is that children face the new ICT challenges, such as ‘datafication, ‘dataveillance’, ‘monetisation’[[21]](#footnote-21), which have not been dealt with before. Thus, child-friendly strategies need to be developed to mitigate them. Children’s lack of critical awareness of technological harms for their current and future well-being is the second factor. When drafting policies for children[[22]](#footnote-22) and especially when it comes to consent should be taken into account that not all children grow up in the same circumstances and many grow up in vulnerable family situations where parents are not always in a position to provide consent for their children. Physical and mental health and the socio-economic or family circumstances play a pivotal role to the meaningful understanding of rights violations and means of protection.

Nowadays, the environment that children grow up is commercialized. Thus, children receive a huge load of commercial information, having to handle it and develop critical decision-making skills. This is called ‘advertising literacy’. Children spend a lot of their time online where they face sophisticated, interactive and personalized forms of advertising. The specific tactics of new forms of commercial communication, including their integrated, interactive, personalized nature as well as their emotive appeal, are particularly appealing to children. As such, they allow for a more effective persuasive commercial message, as they positively influence children’s attitudes towards products or brands and have a real impact on their purchasing decisions. Indeed, many children have great difficulty applying their advertising literacy skills when it comes to these new tactics or advertising trends.[[23]](#footnote-23) Accordingly, it remains crucial for children to be able to recognize and understand the persuasive tactics of these new forms of commercial communication. It is also important to note that all children are born with fundamental rights and freedoms and should not be discriminated against for being children, or on any other basis, such as on gender, race, religion. Thus, they do not have to be discriminated in advertising as well. Besides, the fact that children are vulnerable does not mean that they will be not advertised at all, but they need a specific merit of protection and regulation. For instance, in Europe specific protection is also offered on FEDMA[[24]](#footnote-24) Code of Conduct on E-Commerce and Interactive Marketing, as long as and on Audiovisual Commercial Communication Directive of European Union.[[25]](#footnote-25)

One first best practice could be a proactive monitoring of advertisements online. Due to the lack of effective enforcement, it can be regarded that formal cooperation between alternative regulatory bodies and governmental agencies could be also a best practice. Further, businesses should always keep in mind and try to maximize opportunities and minimize risk. The private sector should be regulated in such a way that they embed children’s rights in their agenda and take implementing measures for a better cooperation with policy-makers and international stakeholders.[[26]](#footnote-26) Finally, business enterprises and other stakeholders should undertake due diligence in order to identify, prevent and mitigate their impact on the rights of the child in the digital environment. In this way, they should perform regular child-rights risk assessments in relation to digital technologies, products, services and policies and to demonstrate that they are taking reasonable and proportionate measures to manage and mitigate such risks.

1. **How can States better realize their obligations to children's rights in relation to the digital environment?**

States, who ratified the UNCRC have a legal duty to safeguard children’s rights. A strategic approach to policymaking in the digital domain should therefore rest on protection, education and participation, focused around digital literacy, as explained above. From an early age and throughout their development, children should be taught about their digital rights, the opportunities of the internet, as well as the risks it poses and how to confront them. In this way children will be empowered with the knowledge to make informed choices about their activity online and how to critically respond to new technologies that are being implemented in their lifeworld and contribute in an informed way to policy.

First of all, states should have an active duty of care to respect, protect and take positive measures to safeguard all children’s digital rights. Further, states should determine to contribute effectively to ensuring that consistent policies are being devised, in co-creation with children that take into account the interdependence of opportunities and risks in the digital environment and the need to ensure that appropriate measures are in place so that the rights of the child are respected, protected and fulfilled. Emphasis should be given to the fact that states have the primary responsibility not only to respect, protect and fulfill the rights of the child but also to reaffirm the rights, role and responsibility of parents or caregivers to provide, in a manner consistent with the best interests and evolving capacities of the child, appropriate direction and guidance for children to exercise their rights.[[27]](#footnote-27)

For this reason, strategic approaches are required for respecting, protecting and fulfilling the rights of the child in the digital environment, based on the standards established by the UNCRC.[[28]](#footnote-28) States should also require enterprises to meet their responsibility to respect children’s digital rights and encourage them to cooperate with relevant state stakeholders, civil society organizations and children, taking into account relevant international and European standards and guidance.[[29]](#footnote-29)

As far as the development of digital literacy is concerned, as already mentioned it is worth mentioning that the development of media and information literacy and digital citizenship education is required, in order to ensure that children have the competence to engage in the digital environment wisely and the resilience to cope with its associated risks. Digital literacy education should be included in the basic education curriculum from the earliest years, taking into account children’s evolving capacities.[[30]](#footnote-30) Digital literacy should be effectively promoted in the settings where children use the internet, especially schools and organizations working with and for children. States should also promote and support the digital literacy of parents or caregivers through the State’s established mechanisms for reaching parents as an essential means of creating a safer and sustainable digital environment for children and families.[[31]](#footnote-31) Particular efforts should be made by states in cooperation with other relevant stakeholders, through the education and cultural system, to support and promote the digital literacy of children who have little or no access to digital technology for socio-geographical or socio-economic reasons, as well as sometimes for reasons of place of residence and also of children who have access to but do not use digital technology, who lack the skills to use or underuse digital technology for reasons of vulnerability, in particular for children with disabilities.

Specific measures and policies should be adopted to protect children from premature exposure to the digital environment due to limited benefits with respect to their particular physical, psychological, social and stimulation needs. 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 minimization.[[32]](#footnote-32)

States should share good practices on ways to address risks in the digital environment, in relation to both prevention and remedies.[[33]](#footnote-33) States should put in place public awareness-raising measures about counselling, reporting and complaint mechanisms.[[34]](#footnote-34) This requires proper legal frameworks which encompass the full range of unlawful acts which can be committed in the digital environment, where possible formulated in a technology-neutral manner, leaving room for the emergence of new technologies. Such frameworks should include definitions of offences, criminal, civil or administrative liability and sanctions for natural and legal persons, and provisions of services for children.

1. **Is the realization of children’s rights in the digital environment necessary to realize children’s rights in other environments?**

Thinking about realizing children’s rights in the digital environment should, apart from participatory rights, think of children’s rights as welfare and development rights. In other words, realizing children’s rights in the digital environment impacts their general welfare and development and will therefore also be necessary to realize children’s rights in other environments. Privacy as a welfare right refers to being protected from unwanted exposure of our body or our personal information as this can cause serious psychological, financial or even physical harm. Hereby, privacy is sought to avoid extrinsic harms caused when we cannot control access to ourselves. It should be noted that a problem with privacy as a welfare right is that it might conflict with children’s other important welfare interests such as sharing sensitive information that is needed for the care of the child. In this sense, privacy is not an absolute right and it always needs to be balanced with the child’s interest.[[35]](#footnote-35)

Development rights are given to the child in order to make possible the exercise of certain liberty rights as an adult. It is focused on the future and has also been described as “right to an open future”.[[36]](#footnote-36) Specifically, in relation to privacy this implies that it provides the right to be an independent moral actor. Children who are under constant surveillance and told what to do are deprived of their individuality and human dignity. If people grow up under constant surveillance, they “will be less likely to acquire selves that think of themselves as owning themselves”.[[37]](#footnote-37) Privacy in contrast promotes in people a different type of self-concept, it supplies a prerequisite for the development of personal responsibility. Hence, protecting children’s privacy has important implications for their growth into responsible adults.[[38]](#footnote-38) This, then, implies that children need their own space, both literally and figuratively, to realize their capabilities and flourish as human beings, to grow. In other words, if children’s capabilities to develop autonomy and personal responsibility and flourish are undermined by the digital environment this will impact realizing children’s rights in other environments. Moreover, as data-driven technologies are becoming ubiquitous in all aspects of daily life of children, realizing children’s rights in the digital environment is realizing children’s rights in general.

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