

The child right to protection against economic exploitation in the digital world

Submission to the Committee on the Rights of the Child in view of their intention to draft a General Comment on children's rights in relation to the digital environment (May 2019)

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1. Economic exploitation of children in the datafied world

The child's right to protection against economic exploitation, enshrined in Art. 32 UNCRC has up until now not received a lot of attention in relation to the digital environment. Although the UNCRC does not offer a definition of the notion 'economic exploitation', Art. 32 UNCRC is generally interpreted as the child's right to protection against child labour.¹ In this contribution we argue that, in the digital environment, children deserve protection against a myriad of economically exploitative practices.

Economic exploitation should thus be understood as being broader than child labour in the traditional sense. First, 'economic' implies that there is a material interest, i.e. a certain gain or profit through the production, distribution or consumption of goods and services.² Such a material interest may have an impact on the economy of either the State, the community or the family, such as the increased consumption of advertised goods or services which in turn leads to an increased gain or profit for the brand or company. Second, 'exploitation' means 'taking unjust advantage of another for one's own advantage or benefit'.³ More specifically, this includes manipulation, misuse, abuse, victimisation, oppression or ill-treatment.

The digital world in which children grow up offers great opportunities for children to learn, socialise and play, but it is also increasingly commercialised. The OECD has underlined that children face significant consumer risks when surfing online, related to *inter alia* embedded ads and privacy-invasive practices, as well as the exploitation of their incredulity and inexperience resulting in economic risks such as overspending or online fraudulent transactions. Behind the fun and playful activities available for children online lie different revenue models, creating value for companies (*the material interest*) by feeding children's data into algorithms and self-learning models to profile them and offer personalised advertising or by nudging children to buy or try to win in-app items to advance in the games they play (*manipulation*). The commercial aspects of the playful activities that children engage in when they access the digital environment are largely concealed to them (and often also to their parents). Such forms of exploitation can have a significant negative impact on various child rights, including their rights to development, privacy, freedom of thought and protection against economic exploitation. In order to adapt to the new reality – children as early adopters of new technologies accessing commercialised digital environments for play, communication and information from a very young age – specific measures against these forms of economic exploitation of children in the digital world are urgently needed.

2. Profiling and automated decision-making and the economic exploitation of children

One of the momentous challenges in the digital environment is to protect children from profiling and automated decision-making that might adversely affect them. Children's online behaviour is continuously recorded, often sold, analysed and acted upon. Advergames (i.e. games promoting a brand or product to the player) for example, collect personal information from the playing child in order to make the game visually more attractive to him or her, thus making them more susceptible for the underlying product. Connected toys can record, analyse and remember conversations of children, and may integrate targeted references to

products in those conversations. In addition to automated decisions for marketing purposes, profiling and automated decision-making are also used to make (other) far-reaching decisions, such as placing child data subjects on a blacklist, offering or withholding certain rights or options, establishing learning trajectories (based on what is called learning analytics) and other applications. Although automated decision-making can be used for the well-being of children (e.g. for health-related purposes), it also carries the significant risk of infringing children's rights and freedoms. The process and the nature of automated decision-making can be intrusive in itself, and the (possible) consequences of an automated decision can also be profound.

One of the concerns expressed by the Council of Europe regarding profiling and automated decision-making is that profiling, without the implementation of specific legal safeguards, may affect human dignity and infringe on fundamental rights and freedoms. Therefore, they advise to prohibit profiling unless allowed by law and in the best interests of the child. Yet, in EU data protection law only the automated decisions that produce legal or similarly significant effect are forbidden and despite the fact that attention is paid to the special position of children, it remains unclear how the protection of children should be managed in this respect.⁴ In the meantime, automated decisions could harm various children's rights. Automated decisions can lead to discrimination of children and unequal treatment (e.g. what is called digital redlining). Automated decisions can exclude (groups of) children, by not giving them similar opportunities in more or less the same circumstances. Think of adaptive learning programs by which the opportunities of some children are (unjustifiably) increased or reduced, compared to other children in the same circumstances.

The exclusion from sources of information or digital services can be a violation of Art. 2 UNCRC. In addition, automated decisions can violate the right to privacy of children, as defined in Art. 16 UNCRC, in connection with Art. 6 UNCRC. Pursuant to Art. 6 UNCRC, a child has the right to develop in harmony on a mental, physical, spiritual and social level. It may be the case that the continuous monitoring and commercialisation of children's data and identities has a negative impact on their development. Research shows that commercialisation in itself can have a negative impact on children. Automated decisions can enkindle materialistic values, negatively impacts the relationship between parents and children and, finally, can aggravate children's unhealthy lifestyles and cause health problems,⁵ which may also lead to a violation of Art. 6 UNCRC.

Profiling may entail inferring private and intimate information about children, such as sexual preferences, political, cultural or social background, race or health, without children sharing such information themselves (or even being aware of the profiles being created and used).⁶ From a commercial perspective these constructed digital persona can be valuable commodities, but by inferring (sensitive) data a child's right to be in control of developing his or her digital identity might be violated. Moreover, in light of Art. 32(1) UNCRC, the right to protection against economic exploitation, it could be argued that profiling and automated decision-making for commercial purposes are infringements of this right. Profiles of children are economically very valuable, because knowledge about their behaviour and interests enables companies to send targeted advertising and offer personalised products and services. Data are sometimes exploited multiple times and by multiple parties. For example, a website can sell behavioural data of a child to the highest bidder during real time bidding (exploitation moment 1), after which this bidder can use the knowledge to send an advertisement to this child in the hope that he or she buys a certain product (exploitation moment 2). Moreover, profiling practices can be seen as manipulative because there is an element of unfairness and deception by coding the digital environment such that children, without being sufficiently aware or understanding of it, are enticed to reveal far more data than would be justified in accordance with their expectations or preferences. Children are seduced by apps to obsessively click, swipe and like and spend more and more time online.⁷

Relatedly, the commercialisation of children's digital identities through profiling happens in ways that are often completely non-transparent to children and parents.⁸ Not only the fact that profiles are created and used, but also how they are created, who creates them, to whom they are sold and what consequences they have, remains opaque. Children (and their parents) can end up in a Kafkaesque computer says no situation in which the computer takes over the decision-making process without, for example, giving the data subject a further explanation or the ability to challenge an outcome. Predictions based on profiling can simply be incorrect (so-called false positives or false negatives), since on the basis of algorithms probabilities rather than objective truths are calculated. All this impacts various children's rights, such as their right access to reliable and transparent information, in particular if this information is relevant to their development and well-being (Art. 17) and their participation rights (particularly Art. 12 UNCRC).

In this context, there is an important tension between participation and protection, which States should keep in mind when developing guidance documents and policies in relation to profiling and automated decision-

making in respect of children. On the one hand, States should develop guidelines for increased transparency and raise awareness of profiling activities and behavioural advertising, both amongst children and parents. On the other hand, States should consider default limits to the processing of children's personal data for the creation and use of profiles and the making of automated decisions to protect children's rights and wellbeing. The age and level of maturity of the child will play an important role.⁹

3. The commercialisation of play and economic exploitation

Children and their families are also exposed to a commercialisation of play. They are being targeted by game and toy manufacturers, who embed commercial messages directly into children's gaming experiences both online and offline. Examples of such marketing strategies include the delivery of commercial messages through in-game advertising, advergaming, or even interactive, connected toys. In addition, gambling elements are integrated into children's games, such as slot machines or lootboxes. The growing amount of new types of easily accessible games online which include gambling elements exacerbates the societal concern that minors are being progressively exposed to gambling.¹⁰

The commercialisation of play may significantly affect how individual consumers (including children) operate within a sociocultural and economic framework that shapes their thinking patterns and feelings in the marketplace.¹¹ New advertising and marketing techniques arguably help shape this framework for children from a very young age.¹² The promotion of lifestyles based on consumption may also lead children to become more materialistic and attach more value to money.¹³ Therefore, the ubiquity of advertising and other commercial messages in children's play experiences, combined with the increasingly personalised and interactive nature may significantly impact their rights to development in conjunction with the right to freedom of thought. Additionally, the child's right to play (Art. 31 UNCRC) is also affected by the integration of commercial elements into play. Play — in digital form — has an important function in a child's development. The concept of 'play' under Art. 31 UN CRC refers to unstructured informal activities of children that are not controlled by adults. Moreover, it covers activities which are based on free choice and are not compulsory. Manipulating children by hiding advertisements in games or nudging them towards gambling or buying goods without them noticing calls into question children's ability to make informed commercial decisions, which may have long-lasting effects on their development and thereby affects their rights to development, play and freedom of thought.¹⁴

Nevertheless, the child's right to development also has an important participation dimension that should be kept in mind. Children will be unable to make a successful transition to adulthood unless they are given opportunities to practice their commercial decision-making skills.¹⁵ From this perspective, banning all commercial practices from children's lives would not be compatible with the right to development. Rather, children need to be protected from being unjustly manipulated for the economic benefit of commercial actors, for instance by taking action against aggressive or misleading advertising and hidden gambling and commercially exploitative practices aimed at children.

4. Digital child labour and economic exploitation

In the digital environment, some children have become an important source of income for their families by becoming (social media) influencers. Influencers are young people with an extensive audience on social media who present *themselves* as brands in order to sell products of *others*. Recruiting child influencers is a profitable instrument for companies given that these children can gain the trust and interest of other children because they are able to identify with or want to feel connected to the influencer. Child influencer work—depending on the age of the child—is often arranged and encouraged by parents and videos are staged and professionally edited by parents. In order to play their part, children can be required to dress up on a daily basis, follow scripts, and act in videos recorded by their parents while (knowingly or not) promoting products or services to their peers. Again, this does not satisfy the definition of 'play' as intended by the UNCRC; on the contrary, it bears more resemblance to work (e.g. child performers) and could constitute a new form of child labour. To date, there has been almost no discourse among regulators about the responsibility of brands when the influencer is a child.

A child's right to protection against economic exploitation could provide certain protections from influencer work in two different ways. First, Art. 32 UN CRC is generally associated with the protection of children against child labour, including harmful or hazardous work.¹⁶ Influencer activities are usually not 'hazardous' because of a lack of imminent or immediate danger, except if they have to perform dangerous stunts or if they are used for illicit activities like the production of child sexual abuse material. Second, Art. 32 UNCRC requires that influencer work is not harmful to a child's health, or physical, mental, spiritual, moral or social development, and it may not interfere with the child's education. This means these activities may not be overly time-consuming or

physically or emotionally demanding as it may not prevent children from growing up as productive members of society.¹⁷ However, if a child wants to remain a popular influencer, he or she will have to continuously publish vlogs, pictures and other content on social media platforms. Producing high-quality and entertaining content on a weekly or even daily basis takes a lot of time. The pressure to continue to perform will only increase.¹⁸ In both cases, however, under national laws, the protection of children from harmful/hazardous or high-pressure/emotionally demanding child work may be confined to employment relations, leaving influencer work and other forms of digital work of children (e.g. eSports)¹⁹ unregulated despite their potentially harmful effects, and, thus, children largely unprotected but for their parents setting restrictions.

5. Recommendations

States should acknowledge that the digital environment enables commercial exploitation of children in a variety of ways, and should extend the protection of Art. 32 UNCRC in order to protect children from such practices. Inspiration can be found in the first comprehensive policy document on the rights of the child in the digital environments worldwide, which was adopted by the Council of Europe in July 2018: Recommendation 2018(7) on Guidelines to respect, protect and fulfil the rights of the child in the digital environment. In this Recommendation, which builds on the UNCRC, it is emphasised that “*States should take measures to ensure that children are protected from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing. This includes ensuring that business enterprises do not engage in unfair commercial practices towards children, requiring that digital advertising and marketing towards children is clearly distinguishable to them as such, and requiring all relevant stakeholders to limit the processing of children’s personal data for commercial purposes.*”. In addition to this general principle, a number of other actions could be undertaken.

5.1 Children’s rights impact assessments

Many of the commercial practices that we have discussed above affect a number of children’s rights. A comprehensive, rights-based approach towards the protection of children from economic exploitation requires conducting children’s rights impact assessments (CRIAs), both by policymakers when drafting policies and legislations, and by individuals, organisations and companies before adopting such practices.

Art. 3 UNCRC requires that in all actions concerning children their best interests should be the *primary* consideration, requiring governments, public and private bodies to conduct child (rights) impact assessments and evaluate the impact of any proposed law, policy or decision on children’s rights. This requirement in itself provides a strong incentive to assess the risks to children’s rights resulting from the processing of their personal data and other commercial activities. When undertaking a CRIA a data controller or company should adopt a children’s rights perspective that considers the full range of children’s rights at stake. As we argued above, for instance, advertising that is targeted to children on the basis of profiling their personal characteristics or behaviour may not only compartmentalise children, but may also shape their preferences and interests accordingly, ultimately affecting their autonomy and their right to development. Inspiration for undertaking a CRIA could be gathered from more general child rights impact assessment tools, such as the ones developed by UNICEF. Two important principles that are put forward by the Committee are helpful in thinking about CRIAs. First, in situations where ‘protection’ factors affecting a child (e.g. implying a limitation or restriction of rights) need to be assessed in relation to measures of ‘empowerment’ (implying respecting children’s rights without restriction), the age and maturity of the child should be guiding factors. This means that different measures may be considered for younger and older children. Second, companies must consider that the capacities of children are not fixed, but will evolve. This entails that measures must be revised or adjusted based on physical, emotional, educational and other needs, and that possible scenarios for children’s development must be assessed and analysed in the short and long term.

5.2 Privacy by design

In the context of data protection, ‘privacy by design’ requires that controllers implement data protection principles such as data minimisation (don’t collect more data than absolutely necessary), accountability and transparency into the design of their data processing systems. It ensures that data protection becomes part and parcel of data processing systems without children and parents necessarily needing to fully comprehend the oftentimes complex internal data processing practices. Also, it provides opportunities to integrate individual (control) rights into the data systems operation, hence, potentially making them both more transparent and effective. Some data protection rights have particular importance in relation to children (e.g.

right to transparency and right not to be subjected to profiling, right to be forgotten). Example 1: in terms of transparency, a data protection by design solution would entail making transparency an integral part of the process of data processing practices, e.g. by clearly and instantaneously showing important events or changes in data processing systems to users or by giving them a visualisation of and accessible tools to tweak data processing in a control panel. In view of children it is important that they need to be geared to their perceptions, experiences and expectations. This requires research into what works for children at what ages, given their evolving capacities. Example 2: in relation to online profiling data processing processes can be designed in ways that automatically rule out personal data which holds attributes pertaining to persons under eighteen as well as refrain from applying the results of profiling processes to children. Example 3: the right to be forgotten is grounded in the idea that individuals should have control over their personal data and is often phrased in terms of the ‘clean slate’ argument: youthful sins should not haunt a person into adulthood. Implemented as a privacy by design strategy, the opportunity to erase data can be proactively offered to children upon reaching the age of majority (or earlier). The rationale underlying the privacy by design concept could also be extended to a children’s rights by design approach in respect of commercial activities and business’ responsibilities with respect to children’s rights.

5.4 Rethinking economic exploitation

The right to protection against economic exploitation (Art. 32 UNCRC) was originally meant to address child labour but has recently been reinterpreted in the context of targeting children with exploitative advertising. The further exploration of the interpretation of this particular child’s right in the context of new forms of exploitation like in-game gambling, internet-of-toys, child-influencers or children engaged in eSports, and the interplay with inter alia the rights to play, development and freedom of thought are crucial. States should review their labour legislation to capture the specificities of what may constitute digital child labour.

Background literature (articles can be obtained from the authors of this document):

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² General UN Committee on the Rights of the Child, 'UNCRC Discussion Day 1993, Economic Exploitation of Children, CRC/C/20' (1993) 1 <<http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/exploit.pdf>>.

³ *ibid.*

⁴ S. van der Hof, T.S.P. Hannema, Veilig opgroeien in een wereld vol algoritmes—De bijzondere bescherming van kinderen onder art. 22 Algemene verordening gegevensbescherming ('Growing up safely in a world full of algorithms—The special protection of children under Article 22 of the GDPR'), *Privacy & Informatie*, Afl. 6, December 2018.

⁵ P. Valkenburg, *Schermgangende Jeugd: over Jeugd en Media*, Amsterdam: Prometheus/Bert Bakker 2014, *supra* note 22. An illustration can be found in children's changing food choices, as research has revealed that children who played advergames promoting less healthy foods were more likely to select less healthy food options than those who played advergames promoting healthier food options, which may lead to long term health concerns such as obesity, K C Montgomery, J Chester, 'Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age' (2009) 45 *Journal of Adolescent Health* S18.

⁶ S. van der Hof, I agree... or do I? – A rights-based analysis of the law on children's consent in the digital world, 2017, p. 412-414.

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¹² For instance, the Special Rapporteur also underlines the potential risk of normalising commercialisation when embedding marketing and advertising programmes in the school environment, F. Shaheed, 'Report of the Special Rapporteur in the Field of Cultural Rights' (2014) A/69/286 <<https://digitallibrary.un.org/record/755488>> accessed 19 July 2018.

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¹⁷ *ibid.*

¹⁸ The example of child influencer *Lil' Tay* comes to mind, who was 'nudged' by her family to perform curse-laden monologues (often racial slurs), participate in controversial collaborations (with a convicted rapper), and fights with other influencers. When videos surfaced showing that Tay's older brother was feeding her lines, her fans were outraged and her popularity took a big hit. See for instance <https://www.thisinsider.com/lil-tay-instagram-posts-deleted-viral-video-2018-6>.

¹⁹ See e.g. <https://esportsobserver.com/protecting-children-young-people-esports/>.