

# Data protection safeguards for children ('digital age of consent')

## Consultation paper

### Department of Justice and Equality

#### **Objective of consultation**

1. The purposes of this consultation is to seek the views of interested parties on the statutory age of consent threshold ("age of digital consent") to be applied in Ireland in the case of information society services offered directly to children, as required by General Data Protection Regulation (GDPR).<sup>1</sup> These services include goods and services that are offered online, including social media. All submissions will be considered by the Tánaiste and Minister for Justice and Equality when formulating proposals for Government on the digital consent threshold to be incorporated into forthcoming data protection legislation.

#### **Children's right to data protection**

2. Children, like adults, have data protection rights under EU data protection law. They may not, however, depending on their age and their level of maturity and understanding, be in a position independently to exercise these rights. Their inability to exercise them does not imply an absence of such rights.
3. Children who are unable to exercise their rights because of their age or level of maturity and understanding have a right to be protected. But those who exercise rights on their behalf – usually parents and guardians – should also take due account of the evolution of understanding and maturity levels as children grow older. In this context, Article 5 of the UN Convention on the Rights of the Child recognises the right and duty of parents and guardians to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by children of their rights.
4. Article 12 of the UN Convention on the Rights of the Child goes on to provide that children who are capable of forming their own views enjoy the right to express these views freely in matters affecting them and that due weight be given to them.
5. Safeguards for children need to be accompanied by measures which, as they grow older, increase their awareness of risks and empower them to exercise their rights, including their data protection rights under EU law. They also need information on where to seek appropriate advice, and assistance where necessary.

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<sup>1</sup> REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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)

6. Apart from the important role of parents and guardians in this context, data protection authorities have an essential role to play in supporting awareness-raising activities and empowering children to exercise their rights. The GDPR, which will enter into force across the EU in May 2018, acknowledges that children may require additional support measures and it contains a number of provisions which are intended to deliver additional protection.
7. One of the important tasks allocated to Ireland's Data Protection Commissioner, and other data protection authorities, under the GDPR is to promote public awareness and understanding of risks to data protection, as well as the rights and safeguards enshrined in the new data protection law. In recognition of the specific risks arising for children, the Regulation requires that activities addressed to children must in future be given specific attention. This will require the development of appropriate child-friendly materials by the Commissioner which convey an understanding not only of the risks that may arise when personal information is supplied online but also the remedies that are available under data protection law.

#### **'Age of digital consent'**

8. Usage of new digital technologies is high among children. Those lacking sufficient levels of maturity and understanding may be particularly vulnerable to risks in the on-line digital environment. These include risks of abuse, grooming, cyber bullying, access to unsuitable materials and the potentially adverse impacts of direct marketing activity. When their physical or emotional safety and welfare is at stake, the need for adequate safeguards for children is beyond question. Parents and guardians have an essential role to play in this context and the best interests of the child remains the paramount guiding principle.
9. The GDPR goes further than requiring data protection authorities of Member States to give special attention to awareness-raising activities and materials targeted at children: Article 8 specifies conditions applicable to the processing of the personal data of children (e.g. collection, use, sharing, storage) in the context of their usage of information society services. It imposes an obligation on providers of online goods and services offered to children to seek to obtain the consent or authorisation of a child's parent or guardian where the child is under the age of 16 years. Member States are given the option of adopting a lower age, but no lower than 13 years. This means that the choice facing each Member State is whether to accept the age limit of 16-years set out in the GDPR or enact national legislation to specify a lower age limit, i.e. 13 years or possibly an age between 13 and 16. It boils down to whether a statutory requirement to obtain the consent of a parent or guardian is considered appropriate in the case of 13, 14 and 15 year olds.
10. It is widely acknowledged that operators of information society services have a particular responsibility towards children. Article 8 converts this responsibility into a statutory obligation with effect from May 2018. The lack of any face-to-face contact between provider and user presents an obvious difficulty, however. It is important to note, therefore, that the obligation on the provider is to "make reasonable efforts" to verify in such cases that consent is given or

authorised by the holder of parental responsibility “taking into consideration available technology”. It remains to be seen, therefore, how effective this mechanism will prove to be in achieving its objective of improved protection for children in the online environment.

11. A similar measure – from which the EU appears to have drawn some inspiration – has been in operation in the United States for a number of years. The Children’s Online Privacy Protection Act (COPPA) is a US federal law which entered into force in 2000. It applies in the case of children under the age of 13 and contains provisions on when and how operators of commercial websites and online services that collect, use or disclose personal information from children are required to seek verifiable consent from a child’s parent or guardian, and on the responsibilities they have to protect children's privacy and safety online, including restrictions on marketing activities. It is hardly surprising that there are divergent views on its effectiveness.
12. The requirement on operators is to make reasonable efforts, taking account of available technology, to ensure that a parent or guardian receives direct notice of the operator’s practices regarding the collection, use and disclosure of information from children. The contact information is supplied by the child. Oversight and enforcement of COPPA is the responsibility of the Federal Trade Commission.

### **Consultation**

13. The original text of the GDPR tabled by the European Commission in 2012 proposed a threshold of 13 years. However, during final negotiations with the European Parliament, this was increased to 16 years with an option being given to Member States to reduce it in their national law, but not below 13 years.
14. A range of divergent views have been advanced on the subject. Those supporting the retention of 16 years underline the importance of maintaining safeguards for young teenagers, including parental consent, while others who support the lower threshold stress the importance of empowering teenagers themselves to take control of their personal data, especially in the online environment.
15. The Tánaiste and Minister for Justice and Equality, Frances Fitzgerald, T.D., intends to bring a proposal to determine the ‘digital consent’ threshold in this jurisdiction to Government later this year. For the purposes of preparing such a proposal, she would welcome the views of interested parties, including bodies representing parents and young people, child protection bodies, privacy advocates and other interested parties.
16. The closing date for receipt of submissions is Friday, 2 December. Submissions may be sent by e-mail to [Digitalconsent@justice.ie](mailto:Digitalconsent@justice.ie) or by post to:  
Consultation on Digital Age of Consent  
Civil Law Reform  
Department of Justice and Equality

Bishop's Square  
Redmond's Hill  
Dublin 2.

17. It should be noted that the submissions received are subject to the Freedom of Information Act 2014 and may be released or published on foot of third party applications. Any submission containing commercially sensitive or private or confidential material should therefore clearly identify that portion of the submission which contains such information and specify the reasons for its sensitivity. The Department will consult with respondents regarding information identified by them as sensitive, before making a decision on any Freedom of Information request, and will treat any personal information in accordance with the Data Protection Acts 1988 and 2003.

18. Any queries about the contents of this consultation paper may be sent by e-mail to:  
[Digitalconsent@justice.ie](mailto:Digitalconsent@justice.ie).

**Department of Justice and Equality**  
**November 2016**

⇒ **Article 8 (Conditions applicable to child's consent in relation to information society services)**

1. Where point (a) of Article 6(1) applies [i.e. processing based on data subject consent], in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised 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.
2. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.
3. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

⇒ **Article 4(25) reads as follows:**

“information society service” means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council<sup>2</sup>;

⇒ **Point (b) of Article 1(1) of Directive (EU) 2015/1535 reads as follows:**

‘service’ means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- (i) “at a distance” means that the service is provided without the parties being simultaneously present;
- (ii) “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- (iii) “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

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<sup>2</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).