

5Rights' submission: EDPB guidelines 4/2019 on Article 25 (Data Protection by Design and Default)

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About 5Rights Foundation

The digital world was never imagined as an environment in which childhood would take place. It was invented by adults, for adults and designed with the idea that all users are equal. But if all users are treated equally, then children and young people are treated as adult.

5Rights Foundation exists to make systemic changes to the digital world to ensure it caters for children and young people, by design and default. We advocate for enforceable regulation and international agreements that allow children and young people to thrive online. We develop technical standards and protocols to help businesses redesign their digital services with children and young people in mind. We publish and lead across our four priority areas: Design of Service, Child Online Protection, Children and Young People's Rights, and Data Literacy.

Working closely with young people, 5Rights has been active in supporting the Age Appropriate Design Code, currently being developed by the Information Commissioner in the UK. The Code was introduced by 5Rights' Chair Baroness Kidron as part of the Data Protection Act 2018, and sets out the specific protections that children require for their data, by design and default.

Introduction

5Rights Foundation welcomes the opportunity to comment on the European Data Protection Board's draft guidelines on Article 25 Data Protection by Design and by Default. Our comments will focus on children and young people, who are largely absent from the proposed guidelines, despite making up nearly one in three of the online population.¹

The guidelines could provide important support to controllers, processors, and technology providers to ensure that they fulfil their obligations under Article 25, which is urgently necessary. In March 2018, the UK Government's report *Secure by Design* concluded that privacy concerns are given too low a priority in the design process, leaving consumers with the burden of having to proactively protect their own privacy.² In the same year, the Norwegian Consumer Council reported in *Deceived by Design* that digital platforms tended to be "privacy intrusive by

¹ One in Three: Internet Governance and Children's Rights, S. Livingstone, et al, Unicef, January 2016

² <https://www.gov.uk/government/collections/secure-by-design>

default”, with user journeys deliberately engineered to obscure and discourage privacy-friendly options.³ In June 2018, 5Rights’ *Disrupted Childhood* report highlighted the persuasive design techniques that are commonly used to nudge children towards decisions that reduce their privacy or extend their engagement.⁴ Additionally, information about children’s privacy is almost always presented in language that they cannot be expected to understand.⁵

These design norms and choice architectures don’t just undermine children’s privacy, they are inimical to children’s safety, rights and flourishing more broadly. In the digital age, the way a child’s data are processed and protected determines the content they see, the advertisement they see, the people they can be contacted by, and the ease with which their real time location can be tracked. It influences the information they have access to, the opinions they form, the emotions they feel, the identities they fashion, and crucially it impacts on their relationships with family, friends and the broader world. Increasingly, children’s data determine their educational, social, and health provision.

The Board will be aware that the UK’s Age Appropriate Design Code seeks to address many of these impacts, with the emphasis placed firmly on children’s privacy by design and default. The draft Code published for consultation in April 2019 mentions the word ‘default’ 71 times, there is an entire provision on ‘default settings’, and the first provision of the draft Code requires that *“The best interests of the child should be a primary consideration when you **design and develop** online services likely to be accessed by a child.”* Comprising of 15 standards for child-specific data protection, the Code provides an opportunity to redesign the digital world for children and young people by design and default.

Below, we set out the key sections of the draft guidelines that would benefit from giving specific attention to children. We then make the case for the EDPB to produce its own guidelines on the specific protection that children merit for their data, so as to build on the UK’s Code at a European level.

Children merit specific protection

Recital 38 of the GDPR states that *“children merit specific protection with regard to their personal data.”* In line with this, children are given specific attention in Recital 58 (the Principle of Transparency), Recital 65 (Right of Rectification and Erasure), Recital 71 (Profiling), and Recital 75 (Risks to the Rights and Freedoms of Natural Persons), as well as under Article 6

³ <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

⁴ <https://5rightsfoundation.com/static/5Rights-Disrupted-Childhood.pdf>

⁵ <https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html>

(lawfulness of processing), Article 8 (consent), Article 12 (transparency), Article 40 (codes of conduct), and Article 57 (public awareness).

Moreover, the requirement that children's best interests be a primary consideration in all matters that affect them is set out in both the UN Convention on the Rights of the Child⁶ and the Charter of Fundamental Rights.⁷

These recitals and articles offer the clear direction that *children merit specific protection* with regard to their personal data, but this is not reflected in the draft guidelines. They are mentioned only in paragraph 61, in relation to the 'comprehensibility' of information about data processing. Additionally, none of the examples used to illustrate the guidelines reference children either.

This is despite the fact that Article 25 is *particularly* important to children and young people. They are early adopters of technology, they "*may be less aware of the risks, consequences and safeguards concerned,*"⁸ and they therefore rely disproportionately on protection provided **by design and default**. Children are also likely to require different "*technical and organisational measures and safeguards*" compared to other/older data subjects, including different default settings, alternative transparency arrangements, and separate assessments of risk, in language and communications that they can understand.

We recommend that children should be given specific mention at each point in the guidelines to help controllers, processors and technology providers understand clearly the responsibilities they have to children and young people under 18.

Detailed comments on the draft text

In this section we set out the key sections of the draft guidelines that would benefit from mentioning children specifically. **Where we have suggested specific additional wording to the draft text, those suggested additions are in red.**

Executive summary (paragraph one)

"This requires that controllers implement appropriate technical and organisational measures and necessary safeguards, designed to implement data protection principles in an effective

⁶ <https://ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> Article 24

⁸ <https://gdpr-info.eu/recitals/no-38/>

manner and to protect the rights and freedoms of data subjects, particularly children and young people under 18 and other vulnerable groups.”

The guidelines would also benefit from an additional paragraph in the executive summary, which makes clear that children and young people under 18 are entitled to specific protection in relation to their data.

Paragraph 7 (Technical and organisational measures and safeguards)

“The controller shall (1) implement appropriate technical and organisational measures which are designed to implement the data protection principles and (2) integrate the necessary safeguards into the processing in order to meet the requirements of the GDPR and protect the rights of data subjects, giving particular consideration to children and young people under 18 and other vulnerable groups.”

Paragraphs 28-31 (Risk assessments)

These paragraphs fail to mention that children merit specific protection, both in general and in specific areas (outlined above). **Wording should be included to make sure that children and young people under 18 are given specific consideration as part of any risk assessment.**

For instance, paragraph 28 states that: *“The risk and the assessment criteria are the same: the assets to protect are always the same (the individuals, via the protection of their personal data), against the same risks (to individuals’ rights and freedoms)”*. This could lead to a situation in which controllers conduct Data Protection Impact Assessments (DPIAs) that treat all data subjects the same, failing to recognise that the *“likelihood and severity”* of risks may be different for different groups of data subjects (particularly children and young people under 18 and other vulnerable groups).

Controllers should therefore be given clear guidance in paragraphs 28-31 that *“the assets to protect”* are not necessarily *“always the same”*, and that children merit specific consideration in DPIAs. (**Note:** this will be an explicit requirement of the Age Appropriate Design Code).

Paragraphs 62, 63 (Lawfulness)

Article 4(11) of the GDPR stipulates that consent must be *“freely given”* and *“informed”*. Despite this, the evidence is clear that consent is rarely either freely given or informed, particularly where the data subjects are children. However, the design of service often acts as a substantial barrier to freely given and informed consent, due to so-called ‘nudge and sludge’

techniques,⁹ (see, for example, the 2019 report of the UK Parliament Joint Committee on Human Rights, *The Right to Privacy (Article 8) and the Digital Revolution*).¹⁰ **The guidelines would benefit from an additional bullet point under paragraph 63 that deals with this issue explicitly.**

For example:

- *“Gaining consent - consent must be freely given, specific, informed and unambiguous. In order to obtain freely given consent, it must be given on a voluntary basis. Particular consideration should be given to the capacity of children and young people to provide informed consent.”*

In addition, the ‘Balancing of Interests’ bullet should be amended as follows: *“Where legitimate interests is the legal basis, the controller must carry out an objectively weighted balancing of interests, giving particular consideration to children under the age of 18 and other vulnerable groups.”* This reflects the specific attention given to children under Article 6(f) of the GDPR (legitimate interests).

Paragraphs 72-74 (Accuracy)

Recital 65 of the GDPR (Rights of Rectification and Erasure) states that this right *“is relevant in particular where the data subject has given his or her consent as a child”*. The guidelines should draw this to controllers’ attention, either in paragraph 73 or as part of the relevant bullet point under paragraph 74 (*“Erasure/rectification”*).

To prompt users of the guidelines to consider how they could aide children and young people exercise their rights to rectification and erasure, the Board could recommend the inclusion of online tools to help with this to be included by default.

Paragraph 86 (Recommendations)

The following recommendation should be added under paragraph 86: *“Controllers, processors, and technology providers should consider their obligations to provide children with specific protection in complying with DPbDD.”*

⁹ <https://5rightsfoundation.com/static/5Rights-Disrupted-Childhood.pdf>

¹⁰ <https://publications.parliament.uk/pa/it201919/itselect/itrights/122/122.pdf> pages 22-23

EDPB guidelines for protecting children's data

5Rights believes that it is necessary for the Board to produce guidelines on what it means to provide children with specific protection in relation to their data. As we have mentioned, the UK's Information Commissioner has developed the Age Appropriate Design Code for this purpose. Set to become UK law in 2020, the Code will significantly increase the extent to which children in the UK are considered, in advance, in the design of the online services they use. The reality, however, is that the UK cannot provide children with the protection they need for their data unless that protection applies not just in one jurisdiction, but across many.

The GDPR has demonstrated Europe's ability to drive global norms that benefit all users. That same influence should be directed towards driving norms that will benefit children specifically. **5Rights calls on the Board to produce guidelines on the specific protection that children merit for their data, spelling out in unambiguous and practical terms what is expected of controllers, processors, and technology providers when data subjects are children and young people under 18.**

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