WHEN FREE ISN'T

BUSINESS, CHILDREN AND THE INTERNET

eNACSO

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eNACSO Board

About eNACSO

The European NGO Alliance for Child Safety Online (eNACSO) is a network dedicated to making the Internet and associated technologies better and safer for children and young people.

eNACSO promotes and supports advocacy actions at national, European and international level. Its work is based on the 1989 UN Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography.

eNACSO comprises comprises 20 leading children's rights and child protection NGOs from across the European Union and 6 from non eu member states.

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A PECULIAR PLACE

In the real world it is more or less taken for granted that, outside of the family, children by and large do not choose regularly to frequent environments which are predominantly adult. By choice they socialize and mix with their peers. But more than that, societies have also developed rules, codes and practices to shield children and young people from exposure to several aspects of the adult world. These include prohibiting children from engaging in a range of commercial transactions that could compromise their personal health, well-being and development. For example, children are generally not allowed to go into casinos or sex shops, and we have laws about the sale of harmful products such as tobacco and alcohol to children.

However, in the online world, with few exceptions, little or no effort has been made to reproduce or allow for such protective measures. For the most part, the Internet is open to all-comers. There are few or no checks at the door. This has many different and undesirable consequences for large numbers of children and young people.

While not ignoring the potential difficulties in establishing a closer alignment between real and virtual commercial practices as regards children, key players have hitherto not shown any real determination or burning desire to tackle this. Excuses for inaction lie thick on the ground. This must change.

According to some estimates, two out every 10 Internet users in the EU are under the age of 18.[1] In the 28 Member States of the European Union, very few people below that age will ever remember a time when the Internet was not readily at hand. For them it is not a thing apart. The Internet is an integral part of their lives, the vehicle through which young people interact with family, friends, all manner of entertainment, school, favourite sports teams and much else.

The Internet has become the dominant or organizing technology of the 21st century. The glitter, dazzle, promise and outstanding achievements of the Internet are clear, and they are a great testament to human ingenuity. But, by any reckoning, it is still far too soon to say what the long-term effects of the emergence of the Internet and associated technologies are going to be for us as individuals, for society as a whole and in particular for children's and young people's development, growth and passage into adulthood.

Governments and civil society should refuse to accept that the undesirable aspects of the Internet's impact on children and young people, some of which are documented in this report, are the inevitable price that we must all pay in perpetuity for the technology's many undoubted benefits.

The same ingenuity and investment that created cyberspace and all its glories should show an equal determination to ensure people are in control of it, not controlled by it or at its mercy. In this context, that means all avoidable risks to children and young people are eliminated or minimized to the greatest extent possible.

Every civilized society acknowledges its primary obligation to ensuring the security and nurturing of its young, and any policies or practices, in any field, which are incompatible or inconsistent with that purpose fall outside the bounds of acceptable behavior. This approach has been accepted in the physical world for many years, and it ought to be applied equally, without distinction, in the virtual one. No one would argue this is going to be easy.

1 Sonia Livingstone, John Carr and Jasmine Byrne: *One in Three: Internet Governance and Children Rights*. UNICEF Office of Research – Innocenti, 2016.

METHODOLOGY

The overall aim of this Policy Paper is to stimulate and contribute to a discussion on the potential development of better measures to protect children and young people from a range of online business practices, as part of a wider project designed to make the Internet a better place for kids.

The paper highlights how different Internet business models work, and provides examples of commercial practices that, typically, have flown under the radar of policymakers – and in many cases still do. All the examples and issues outlined in the paper were analyzed through the lens of the UN Convention on the Rights of the Child (UNCRC), which is the pillar upon which eNACSO bases its work.

The initial phase of the work was characterized by an extensive desk review and meetings with experts.

Various sources were taken into account during the desk phase, including reports, academic articles, and relevant scientific literature regarding the impact on children and adolescent development of alcohol consumption and several types of addictions (to video games, to pornography). Also reviewed was the current European legislative framework in relation to the sale of age-restricted goods, privacy, advertising and marketing to children.

The collected information was triangulated and analyzed with the aim of assessing the impact of the main Internet business models and the resulting online marketing practices on the lives of children. The analysis then looked at the extent to which these models and practices might comply with or break EU regulations or violate or uphold children's rights as enshrined in the UNCRC.

The outcomes and feedback received from eNACSO's child participation processes were integrated into the report. Focus groups with young people were organized with the aim of exploring children's and adolescents' perceptions of online advertising, data collection and privacy. These groups took place in the Netherlands,

Denmark, Austria, Italy and Romania. Quotes and examples from the meetings and focus groups are included in the body of this document.

Lastly, the draft was sent to experts in the field of data protection, advertising to children, alcohol policies and a legal firm for feedback, which was a lengthy but invaluable process to reach the final stage and publication.

CHILDREN. We have used the term child to mean any person below the age of 18, as defined in the UNCRC. However, this is not meant to suggest that when discussing approaches to young people's welfare online, identical issues arise for all young people across the whole age spectrum.

A FRAMEWORK FOR CHILDREN'S RIGHTS

While acknowledging and celebrating the many advantages which the Internet has brought to children, and viewing them in many respects as enhancing children's rights in some areas, the paper's principal focus is directed towards aspects of online commercial activity and related marketing practices that are likely to be in violation of articles 3, 13, 16, 17 and 32 of the UNCRC.[1]

The EU has declared that the protection of children is a central concern. The Consolidated Version of the Treaty on European Union (2008) states that the European Union shall promote the protection of the rights of the child.[2]

The European Charter of Fundamental Rights provides in Article 24 that children "have the right to such protection and care as is necessary for their well-being". The best interests of children must be a primary consideration in all actions relating to them, whether taken by public authorities or private institutions.

It is recognized that neither the Treaty nor the Charter of Fundamental Rights provides the Union with general legal competence to take action in the field of children's rights. It shares such authority with Member States as it does in relation to other areas of social policy (the areas set out in the Treaty) and aspects of consumer protection.[3] [4]

In 2011 the EU adopted the EU Agenda for the Rights of the Child.[5] The strategy document notes the introduction of the relevant provisions of the Treaty of Lisbon

1 ARTICLE 3: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. ARTICLE 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. ARTICLE 16: Protection of privacy. Children have the right to protection from interference with privacy, family, home and correspondence, and from libel or slander. ARTICLE 17: Access to appropriate information. The State shall ensure the accessibility to children of information and material from a diversity of sources, and it shall encourage the mass media to disseminate information, which is of social and cultural benefit to the child, and take steps to protect him or her from harmful material. ARTICLE 32: States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful of the child's health or physical, mental, spiritual, moral or social development.

2 Article 3 (3)

3 Article 4

4 To the extent that the areas are not covered by Articles 3 or 6.

5 COM (2011) 60 final

and the fact that all EU countries have ratified the United Nations Convention on the Rights of the Child.

It also references the Europe 2020 Strategy (IP/10/225) which set out a vision for the 21st century of a Europe in which children will have a better education, access to services and the resources they need. It sets out a strategic commitment to promote, protect and fulfil the rights of the child in all relevant EU policies.

"In the future, EU policies that directly or indirectly affect children should be designed, implemented and monitored taking into account the principle of the best interests of the child as enshrined in the EU Charter of Fundamental rights and in the UNCRC."

The document presents general principles and also sets out a number of areas where the EU can bring real added value to the protection of children. [6]

6 Other relevant material is to be found in: "The Report from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM" (2011) 556 final on the application of Council Recommendation of 24 September 1989 and of the Council of 2006 "Protecting Children in the Digital Age"

FREE?

Because of its origins within the academic and research communities, and also because there were at first no means available to pay for anything online anyway, the idea of "free" became very strongly associated with the Internet. It was part of its seductive patina and camouflage and was key to its early buoyancy. Even today many online products and services are provided without requiring any direct form of payment at the point of use. Consumers don't have to dip into their pockets right there and then. The products and services therefore certainly feel free so, one could ask, why turn them down or criticize the (seemingly philanthropic) companies providing them?

For all these reasons and more, historically the Internet and many of the activities on it escaped the sort of close scrutiny that typically have been applied to other areas of commerce. But of course, on closer inspection, the idea of free is, to a large degree, an illusion. As we shall see, revenues and value are simply collected in different ways. "*If you are not paying for the product then you are the product*"[7] is how it has often, if incompletely, been characterized. Sadly, this point is often not very well understood by adults, so it's not surprising that children, particularly younger children, sometimes struggle with the meaning of "free" on the Internet.[8] It also explains why, in a commercial context, the use of the word "*free typically is surrounded by rules and qualifications*."[9]

In the past, it was quite easy to recognize when you were (voluntarily) creating a commercial relationship with someone. You would give them money and get something you wanted in return. The terms of the exchange would either be obvious, implied or stated at the time of the exchange. Typically, a service would be rendered or a tangible product handed over. But who gives money to Facebook,

7 There are several services provided online which are genuinely free in the sense that the provider neither charges for them nor collects any data about the user. Many public agencies work in this way. But even here, such services are provided within a wider framework that is dominated by commerce, and therefore, to a degree, makes that kind of provision possible.

8 http://www.theiinonline.org/wp-content/uploads/2011/07/The-i-in-online-Child-Privacy-Survey-July-20113.pdf

9 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.browse&elemID=73 http://www.lawpublish.com/ftc-free.html, https://www.cap.org.uk/News-reports/News/Copy-Advice-Archive/2012/Use-of-the-word-free.aspx#.Vnop9hWLSUk

Google or Twitter? Not the typical Internet user. Yet two of these companies are among the most valuable in the world and their revenues derive almost entirely from online interactions with the public.

Services which are provided free at the point of use tend to yield value and revenues to online businesses in one of two ways:

1. They can, in effect, be a "come-on", a lure to draw you in – but then one quickly finds that to do anything interesting or useful it is necessary to buy something, like an add-on or plug-in. This approach has introduced a new word to the online vocabulary: "freemium", and, as we shall see, it applies principally to the constantly expanding world of apps.[10] To some degree, the basis of many freemium offers is deceptive.

2. Online services can also be monetized by collecting data about browsing habits and location. In the case of children, this might be obtained without the child being aware of that dimension or being capable of giving informed consent to the collection and use of such data. In the latter respect children are in exactly the same position as a great many adults, but children are entitled to a greater degree of consideration and protection.[11]

HOW DID WE GET HERE?

The Internet as we now know it was not the result of a carefully worked out plan. On the contrary, it is a supreme example of the doctrine of the unforeseen, unintended and unwanted consequences. The debate about the nature of the Internet, its past and its future still rages.

Although the Internet's origins lie very much within the taxpayer-funded public sector, since the mid-to-late 1980s[12] the principal driving force behind the development of cyberspace has been business. Capitalist enterprise typified and propelled the creative anarchy of small startups which succeed by creating a market for new products and services or by disrupting old business models. Several of today's Internet giants did not exist 20 years ago. They began life in a garage or a dorm as the glimmer of a whacky or visionary idea. It was only later that the well-established corporate world woke up to both the threat and the potential of the Internet. Some companies were able to adapt and make up lost ground; others didn't, and either went out of business or continued in reduced circumstances.

In the early days of the Internet, the perception of it as a highly technical construction or environment was more than a little intimidating for many of the arts graduates who tend to predominate in the higher positions of many key public institutions. Moreover, with the onset of the global recession in 2008, and as the resources available to public bodies began to shrink, it became ever harder to commission independent experts

10 See below page 23

11 See for example the UNCRC

12 http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet#Commercialization

or advisers who might have provided alternative perspectives as a counterbalance to the relentless push that was coming from Silicon Valley.

The Internet was also poorly understood by many leading commentators within the mass media and the wider policy-making communities – people who in other circumstances could normally be relied upon to be critical observers. The Internet became inseparably identified with the *zeitgeist*. If critical or questioning voices were raised they tended to be drowned out by absurd comparisons with reactions to the development of the printing press in the 14th century, or the emergence of telephones and video recorders. Any doubts expressed about the new technologies were thus derided for being overly conservative, backward looking, or as coming from someone who just "didn't get it". Few public servants or politicians wanted to risk being branded or lampooned in this way.

The popularity of the Internet and online services was advanced as both proof and justification for the idea that Silicon Valley was providing people with things they desired, so wouldn't it be best if everyone else just steered clear and let them get on with continuing to be successful? Yet the fact that a product or service is popular is not conclusive proof that everything about it is socially desirable, or that it should be free of external constraints and left to find its own level.

The Internet's global, cross-jurisdictional nature added to the complexity of the public policy challenge. In addition, many governments saw the arrival of the Internet as an important source of new forms of economic growth. Legislators were therefore loath to step in for fear that premature action might kill the "golden goose". This view fitted neatly with the approach taken by many Internet businesses: they did not want state intervention or regulation either. The fewer controls or legal limits, the more they would be free to experiment with different business models. Therefore, self-regulation became the dominant narrative in many countries. It remains a potent model that is also attractive to governments, not least because it removes from them much of the immediate economic and practical burden of working out what to do and then doing it. Governments of smaller countries often felt that it was anyway difficult to attract the high-level attention of senior executives of the world's technological powerhouses. Self-regulation therefore provided an attractive alternative. But in relation to the EU itself, clearly that does not apply: the EU is plenty big enough to command the attention of any business.

Within the EU there was, however, a further concern. The development of high-tech industries and their associated infrastructure is, as the Juncker Commission has reminded us and underlined, a strategic priority in the larger battle to advance or strengthen Europe's position vis-à-vis the economic power blocs of China and the USA. There was consequently, even within the EU, a perception at some levels of the bureaucracy that they ought not to make things too difficult for the high-tech industries. Among the many things the EU wanted the Internet industry to do, tackling issues connected with children's use of technology was a long way down the list. Despite public protestations to the contrary, this sense of the relative unimportance of the issue was picked up by technology players and they reacted accordingly.

An additional political complication for governments and governmental agencies stemmed from the view that any apparent interference from them with the way companies operated on the Internet would raise the spectre of politically motivated

control. The revelations of Edward Snowden certainly seemed to provide at least a partial justification for this view. It is, however, for all practical purposes completely irrelevant to discussions about online child protection. Children have vulnerabilities and a legal right to protection, guaranteed by international conventions and treaties, in ways that simply do not apply to adult citizens[13], and save for the recent emergence of concerns about the radicalization agenda it is the position of adults which seems to have captured the interest of the National Security Agency - NSA; Government Communications Head Quorters - GCHQ and other intelligence and security services.

This general cloud of suspicion, anxiety and lack of clarity about the legitimate role of governments in relation to the Internet made it much harder to promote any kind of rational debate about the proper boundaries or limits that should be observed by companies working in the Internet space. A lobby developed which sought to move anything and everything connected with the Internet to a special, privileged place where governments became fearful to tread.

Online businesses somehow succeeded in presenting themselves as being on the side of the angels, champions of virtues and values which are not normally shown on balance sheets. Internet companies were, in effect, feeding off – and at times encouraging – an anti-politics sentiment. The internet could and would put politicians and existing political institutions in their place. The industry successfully spun the myth that state- sponsored regulation or intervention of any kind was the enemy of freedom and progress. The Internet as a whole was being packaged and promoted as the voice of the little guy speaking truth to power. Nothing else was as important as this. The notion became hegemonic. The implications of the fact that the Internet was such a key part of children's lives got lost in the grand drama and glamour of geopolitics, espionage and counter-espionage. Children were seen as the responsibility of parents and schools. They were not the concern of those remaking the world through cyberspace.

Within the EU, the tendency has been to shunt more and more responsibility onto companies to self-regulate and self-police in relation to online child protection, under the umbrella or the banner of corporate social responsibility.[14] This approach involves taking a lot on trust, particularly as there are, as yet, no civil society institutions capable of even getting close to being able to monitor or keep up with all of the relevant activities of the industries or indeed the EU institutions which interact with them. This cannot be in the public interest. It is therefore very much in children's and the broader consumer interest for EU institutions to ensure that civil society is helped to fulfil this type of scrutiny role.

The situation is definitely changing, although the rate of change sometimes seems painfully slow. In May 2012, the European Commission published its "Strategy for a Better Internet for Children". Its perspectives and ambitions are shared by and very much inform the thinking behind this paper. If eNACSO has any criticisms they relate to the pace, energy and determination with which the objectives of the strategy have been pursued.

The high-tech companies that dominate the Internet are among the wealthiest and best politically connected businesses in the world. Some of them spend more in a

13 http://childrensrights.ie/childrens-rights-ireland/un-convention-rights-child

14 https://ec.europa.eu/digital-agenda/en/news/better-internet-kids-ceo-coalition-1-year

single year purely on lobbying EU institutions than many children's groups do on their entire operations across several years.[15] [16]

Nevertheless, eNACSO detects that key parts of the media and public policy community now seem more confident about addressing technology challenges and the companies behind them. As we shall see, this has not yet been fully translated into actions which meet the needs of the moment but, for example, the rising number of anti-trust actions, particularly in Europe, reminds us that modern businesses have, as in earlier times, exactly the same tendency to gravitate towards monopoly. The rising number of privacy suits also seems to be significant in terms of reframing people's attitudes towards technology companies. Many commentators are now quicker to point out that, for all their libertarian rhetoric, Internet companies are, after all, just that – businesses which have a legal duty to their shareholders.

15 http://www.techinsider.io/european-lobbying-spend-by-american-tech-companies-2015-8

16 http://money.cnn.com/2015/09/29/technology/google-europe-lobbying/index.html

THE GROWTH OF E-COMMERCE

According to a July 2015 report, e-commerce is set to grow globally by 25% in 2015.[17] The Web will account for 7.3% of global retail sales, growing to 12.4% by 2019. Global e-commerce sales will exceed US$3.5 trillion within the next five years.[18] By 2018 mobile e-commerce (m-commerce) will account for nearly half of all e-commerce.[19] Across the EU and Europe as a whole there has been a strong and continuing trend that is driving an ever greater proportion of retail activity towards the Internet.[20] In figures published in May 2013, the EU said: *"E-commerce is booming… European e-commerce is growing steadily every year, outpacing growth in traditional retail and services"*. Indeed, European online revenue of goods and services grew by 19% to reach €311.6 billion in 2012. In the 28 EU Member States (including Croatia, which joined the EU on 1 July 2013), the number grew to €276.5 billion, or 88.7% of total European e-sales.[21] This represented growth of 18.1%.

The EU report further noted that there were large differences in development between the mature markets in the North and the North West of Europe and those in South, Central and Eastern Europe. It went on to add: *"European e-commerce industry is clearly dominated by three leading countries: the UK (€96 billion), Germany (€50 billion) and France (€45 billion). The total of €191 billion of these three countries together represents 61% of the total European B2C e-commerce sector, and 69% of the EU28"*.

Nonetheless, the trend for all EU Member States is clear, and it is being repeated elsewhere in the world.[22] Ecommerce Europe estimated the number of European e-commerce websites to have grown to 550,000 at the end of 2012, a rate of increase of 15% to 20% per year, and it is set to grow even more rapidly as the

17 https://www.internetretailer.com/2015/07/29/global-e-commerce-set-grow-25-2015.

18 Ibid

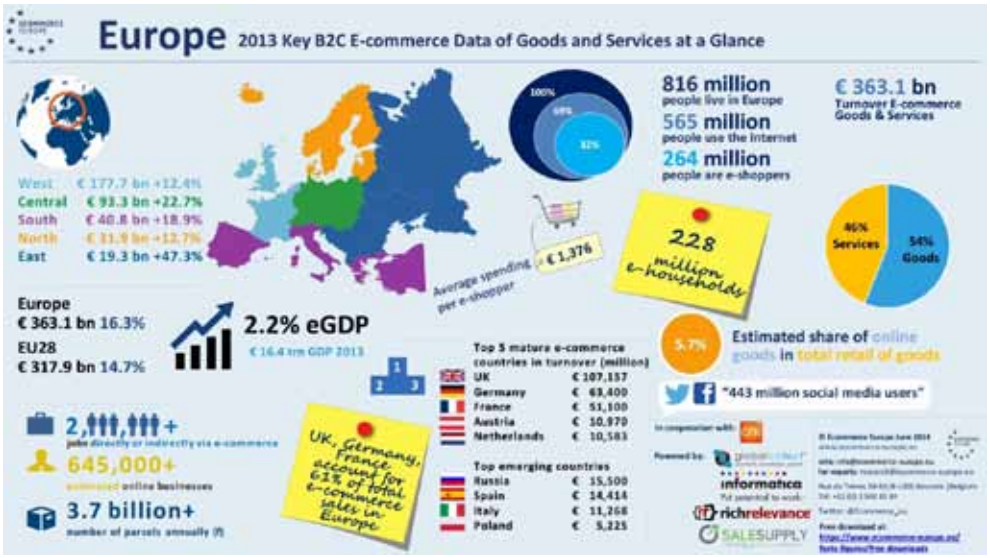
19 https://www.internetretailer.com/2014/03/10/mobile-commerce-will-be-nearly-half-e-commerce-2018

20 The same is true in relation to B2B activity but since children are extremely unlikely to be involved in it that aspect is ignored in the remainder of this report.

21 http://www.ecommerce-europe.eu/press/2013/05/press-release-european-e-commerce-to-reach-312-billion-in-2012-19-growth

22 http://www.forbes.com/sites/chuckjones/2013/10/02/ecommerce-is-growing-nicely-while-mcommerce-is-on-a-tear/

developing markets in the south and east of Europe catch up with the more established environments.[23]



23 Ecommerce Europe 2013:7

E-COMMERCE AND CHILDREN WHY IS THIS IMPORTANT?

As the preceding section demonstrates, e-commerce is on a continuing upward curve and is going to become an increasingly important part of everyday life. Cyberspace is often where the best bargains can be obtained, and shopping online can be fun. Online shopping also presents a potentially "greener" means of purchasing, because ordering over the Internet helps cut down on journeys to retailing outlets. Beyond that, there are some consumables which, for practical purposes, now can only be bought online. For all these reasons and more, trying to prevent the great majority of children from engaging with e-commerce most definitely is not the answer. It is extremely important that young people learn about, master and understand the world of online commerce.

Yet such understanding requires a grasp of the business principles that underpin the different types of e-business. There is a multiplicity of models or types of commercial activity operating on the Internet, but in our analysis we detected five which have a particular impact on children and are therefore most relevant to this paper:

1. The sale of items on the Internet for use in the real world, such as clothes or electronic goods. The transaction between consumer and seller takes place online and the goods are delivered to a physical world address.
2. The sale of online content such as games or music. The transaction between consumer and seller takes places completely online.
3. The sale of advertising space on sites visited by children (e.g. Lego advertising on the Nickelodeon website). Here, no monetary transaction necessarily takes place between the owner of the site that is visited by children and the individual child. Instead, the website owner makes money from advertisers, by granting them access to potential consumers in order to influence them to make a purchase now or in the future.
4. The sale to third parties of consumer data collected on websites. Again, no monetary transaction takes place so nothing is immediately obvious to the "consumer". In

general, individuals ought not to be identifiable from profiles collected in this way, although whether or not that is always the case is frequently contested.

From the child's point of view, the first three of these are probably easily identifiable as commercial transactions, but the other two take place in the background. Consequently, even where the child was aware this was happening, these activities nevertheless appear to be "free", though in reality they are not.

Moreover, the shift towards a greater share of e-commerce being conducted via mobile devices in principle raises no new issues or concerns, however it should be noted that whenever a mobile device is involved, two new factors immediately come into play for children:

1. If the mobile device in question is a smartphone, the smaller screen size can mean it is even harder to convey important safety or consumer advice or information about the terms and conditions of use; and

2. Precisely because the device is mobile, typically carried in a child's pocket or school bag, the potential for parental supervision or support can also be significantly diminished.

CHILDREN'S ONLINE PURCHASES

It is clear that enormous numbers of young people are actively involved in purchasing offline products and online content. A study published in July 2014 gave an insight into American young people's online purchasing activities. This showed that 76% of teenage girls and 86% of teenage boys shop online. There seems to be a growing preference among teenagers for shopping online.[24] Amazon was the top online retailer. EBay was also very popular. Buying streaming movies from Netflix was another major item.

It has proved difficult to obtain reliable and up-to-date EU-wide data about children's and young people's levels of income and their expenditure on different goods and services, both online and off. However, the UK has produced a substantial amount of data over the past few years, and this points to trends that are already in place in other EU countries or soon will be.

"What do you call a consumer who wants to buy everything you have, doesn't care what it costs and is less than five feet tall? A marketer's dream? Nope. You call them kids."

AdRelevance Intelligence Report, 2000

In 2006, children and young people in the UK up to the age of 19 spent £12 billion from their own pocket money or earnings derived from part-time jobs. When one adds to the equation the amounts spent by parents on their children – which children and

24 http://www.retailtechnology.co.uk/news/5634/teenage-girls-prefer-to-shop-online/

young people have some influence over, in varying degrees – the total value of the market increased to almost £100 billion in that year.[25]

A study published in 2009 suggested UK youngsters would spend over £6,000 between the ages of 7 and 15, and that in total they were "worth £4.89 billion to the UK economy, twice the value of the UK toy industry".[26]

Aviva published research showing that in 2012 children and young people in the UK between the ages of 5 and18 received £43 million per week in pocket money from their parents – equating to over £2 billion a year.[27]

That's quite a spread of numbers from studies which used different time frames and different methodologies, but they all send out the same message. Children and young people, taken as a whole, have considerable funds at their disposal. E-commerce and m-commerce is not exclusively about capturing and retaining future customers or developing brand loyalty. It is also about selling things to children and young people today, getting them to part with cash they have now.

In light of both the numbers of children who are actively engaging with the Internet – it has already been noted that two out of every 10 Internet users in the EU are below the age of 18 – and in view of their growing online purchasing, children should not, as they are now, be subsumed within a wider category of "vulnerable consumers". They should be recognized as economic actors in their own right. Vendors who wish to accept payments from children should accept that they have additional obligations towards them.

HOW DO CHILDREN PAY?

As we have seen, children and young people regularly enter into commercial transactions both offline and online.

In the physical world, however, if there is a relevant age restriction which applies to the purchase in question, on seeing the would-be purchaser it is up to the vendor to ask for proof of age and, if such is not forthcoming, to decline the sale. By contrast, in the online world, where there is an age specific component, while suppliers might ask a would-be customer to tick a box to confirm they meet a particular age requirement, with a few notable exceptions, typically they make little effort to determine whether or not this is a truthful statement.

Online retailers often say they can only do so much, and the rest is down to parents.

There is no doubt that parents have a responsibility but retailers also have one. If a child walks into a bar and asks for a glass of cognac, that may indicate a failure of parenting but it does not absolve the owner of the bar of their obligations.

While some purchases require a credit card, and these are normally only available to those aged 18 and over, not all of them do. This means that many children and young

25 "Consumer Kids", Ed Mayo & Agnes Nairn, Constable & Robinson Ltd, London 2009, pages 5 and 18.

26 http://news.o2.co.uk/?press-release=young-people-contribute-4-89-billion-to-uk-economy

27 http://www.aviva.co.uk/media-centre/story/17191/parents-boost-childrens-piggy-banks-to-the-tune-of/

people are still able to purchase goods and services directly, typically using a debit card – a means of payment which is lawfully theirs and, for all practical purposes, does not require any active parental engagement, consent or cooperation.

HOW IS IT DONE?

In some countries, banks, with parental consent[28], will routinely issue debit cards to children as young as 11. While these will not have any credit associated with them, they will nonetheless be fully usable online. Parents might pay their children's pocket money into the account and further amounts can be added either when gifts of money are received or from part-time earnings.

Following an intervention by the UK government in 2004, a number of online gambling websites decided not to accept debit cards as a means of placing bets. Such cards were lawfully available to under-18s and widely used by them. However, this policy meant adults who might only have or choose to use debit cards were also unable to use their services. The practice was later abandoned when, following the implementation of the Gambling Act 2005, all online gambling sites were required by law to verify the age of every would-be punter quite independently of the method of payment being used. Once this age verification had taken place the method of payment became of secondary importance. Debit cards were once more acceptable.

In several European countries, payment cards which use online payment systems of Visa, MasterCard, Maestro and other major brands can be bought for cash and used online by anyone, in some instances anonymously. Some of these cards might specify that the person buying the card must be over 18, but there are doubts about whether

28 However, there was one notorious case where a large bank sent debit cards to children directly, without engaging first with their parents http://www.thefreelibrary.com/BANK+BLASTED+OVER+DEBIT+CARDS+FOR+KIDS%3B+Lloyds+sends+Visa+plastic+to...-a0183341217

or to what extent this might be enforced by vendors. However, many of these cards specify that they can be used by persons of any age or by those aged 13 or above.

There is a proliferation of gift cards which can either be store-specific or website-specific (e.g. allowing the holder to purchase items on, for example, eBay). Again, these cards often say they can be used by anyone, or by persons aged 13 or above.

"Holiday Cash" cards are also part of this broad sweep of new ways of paying for items online and off.

Mobile phones can also be used to pay for items via premium rate services which, inside EU Member States are regulated,[29] but outside of the EU they may not be.[30]

Lastly, the emergence of Bitcoin[31] and other digital currencies may well pose fresh challenges in this context. The market is not yet sufficiently developed to discern any firm trends but it is certainly an area to watch.

Thus, it is clear that when it comes to purchasing products online to be used or consumed offline, or when purchasing and consuming online services, children and young people have the means to be involved. In many ways, they are just as free to interact with obviously commercial products and services as any adult. In the great majority of cases, where the product or service is not age-sensitive, or governed by age-related laws, this may matter little or not at all. But it should also be noted, as we shall see, that very few of the businesses that sell age-sensitive items in fact have any effective mechanisms in place to determine the age of the potential buyer.

It is completely unacceptable for companies trading over the Internet to assume that a parent or someone else will take care of the way that children interact with them. Companies are not obliged to sell age-sensitive products online but if they choose to do so they must also accept they have a responsibility to ensure they are selling lawfully and properly. Leaving aside the narrow legal question, children as consumers are also less likely to have the same levels of financial awareness as adults. This renders them much more vulnerable to deception and unfair trading.

Any long-term vision of how the Internet environment is to be made a better place for children and young people must involve the development of efficient age-verification mechanisms which do not compromise children's safety or create new privacy risks.[32]

29 By virtue of the *EU Consumer Rights Directive* which regulates the use of premium phone numbers.

30 A payment method currently very popular in African countries and available to anyone, including children. To learn more see: http://edition.cnn.com/2014/02/20/business/no-cash-no-cards-just-smartphone/ and http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:22551641~pagePK:146736~piPK:146830~theSitePK:258644,00.html

31 http://www.bbc.co.uk/news/technology-27694550

32 See European Strategy for a Better Internet for Children, para 2.3.1

THE WORLD OF APPS

Apps are small downloadable computer programmes that began mainly as games but now extend across a vast range of subject areas and purposes.

Designed originally for the booming smartphone market, apps now extend to tablets and also mainstream computing on the major platforms. The tablet market is, perhaps, particularly pertinent to this report as, apparently, babies as young as 4 months are now keenly interacting with them. According to a 2014 study, 38% of babies under 2 years old in the USA use tablets or smartphones, up from 10% in 2011.[33]

Children are major users of apps, and the engagement of children with apps, as well as the practice of marketing apps as "free", has been the subject of at least two major regulatory investigations, one in the USA and one in the UK. Three matters were examined: the real cost of "free" apps; the collection and use of apps users' personal data; and the deceptive nature of app marketing.

REVENUES FROM "FREE" APPS

A report published on Forbes.com in December 2013 showed the following table:

Mobile App Store Revenue Share Worldwide, by Business Model and Platform, Jan 2013 & Nov 2013
% of total

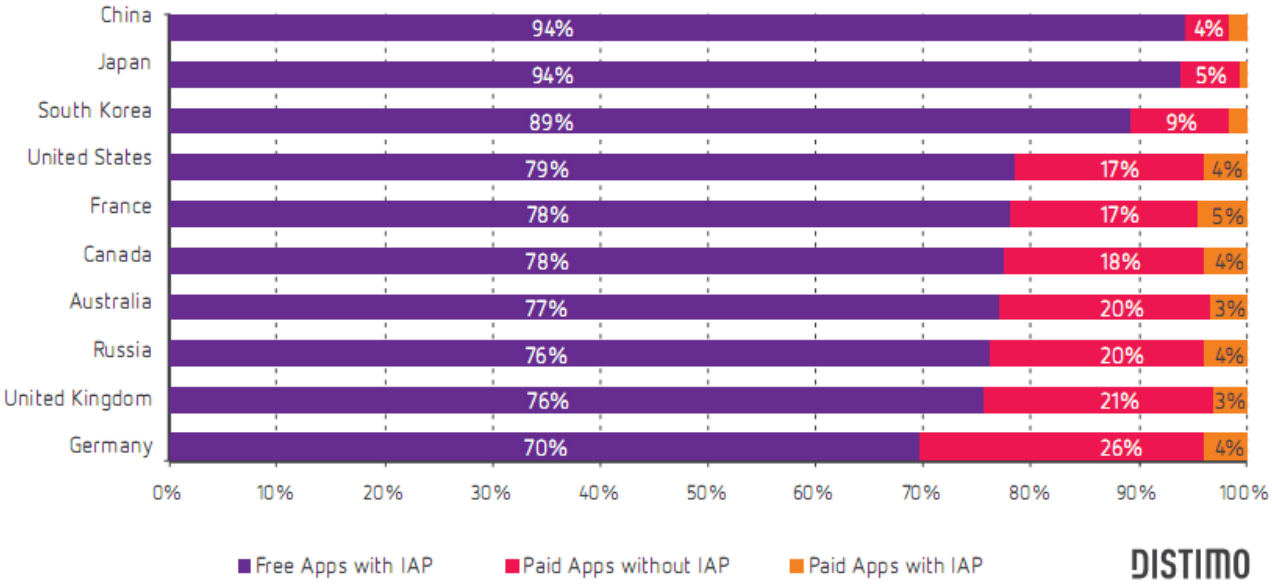
	Jan 2013		Nov 2013	
	Google Play	Apple App Store	Google Play	Apple App Store
Free apps with in-app purchases	89%	77%	98%	92%
Paid apps	6%	11%	1%	4%
Paid apps with in-app purchases	5%	12%	1%	4%

Note: excludes ad revenues
Source: Distimo, "2013 Year in Review," Dec 17, 2013

167322 www.eMarketer.com

33 http://www.nydailynews.com/news/national/toddlers-risk-tech-experts-study-shows-soars-article-1.1747694

The revenues shown are those that go to the app store operators (i.e. Apple and Google), not to the app developers. In an earlier report it was disclosed that, for example, on the Apple app store, of the top 250 apps measured by revenue, only 27 were paid for at the point of download.



The above table is based on data about Apple apps. It is derived from a report entitled "How the Most Successful Apps Monetize Globally", published in December 2013.

CHILDREN'S APPS IN THE USA – FTC CONCERN

In February 2012, the Federal Trade Commission (FTC) published a report based on research carried out in 2011. "Mobile Apps for Kids: Current Privacy Disclosures are Disappointing"[34] was a groundbreaking study taking a large-scale look at what was happening in the apps arena.

The FTC looked at two platforms: Apple and Android. They first opened for business in 2008 and smartphone users could then choose from 552 Apple Apps and 50 Android ones. Things have moved on since then. At the time that the FTC did its research for the report, the number of apps available for each platform stood at 500,000 and 380,000 respectively. They had been downloaded 28 billion times. The numbers today are even larger and continuing to grow exponentially.[35]

FTC staff focused on looking only at apps that would appeal solely to children. When searching the app stores using the word "kids", the FTC investigators identified 8,000 Apple and 3,600 Android apps. They then took the first 480 from each list, giving a total of 960. From these, 200 Apple apps and 200 Android apps were randomly

34 http://www.ftc.gov/os/2012/02/120216mobile_apps_kids.pdf

35 http://www.gartner.com/newsroom/id/2592315

selected. A number of their characteristics were examined and documented. Hundreds of developers had been engaged in their production.

The report contains a wealth of information about the different kinds of apps that are directed at kids. The FTC found as follows:

"The survey findings regarding data collection and sharing were of greatest concern to FTC staff. Indeed, across the wide range of "kids" apps examined in the survey, staff found very little information about the data collection or sharing practices of these apps. Apple's and Google's mobile operating systems and app stores provide limited notice to users regarding app capabilities, and leave the bulk of disclosure to individual app developers. In most instances, staff was unable to determine from the information on the app store page or the developer's landing page whether an app collected any data, let alone the type of data collected, the purpose for such collection, and who collected or obtained access to such data."

And from the conclusion:

"The mobile apps marketplace is a constantly evolving new media that offers parents many new options for entertaining and educating their children. Staff's survey shows, however, that parents generally cannot determine, before downloading an app, whether the app poses risks related to the collection, use, and sharing of their children's personal information. Although the two major U.S. mobile app stores provide some information and controls governing apps, all members of the mobile app ecosystem – the app stores, the developers, and the third parties providing services within the apps – must do more to ensure that parents have access to clear, concise and timely information about the apps they download for their children. Parents should be able to learn, before downloading an app for their children, what data will be collected, how the data will be used, and who will obtain access to the data. Armed with such information, parents can make knowledgeable decisions about the apps they choose for their children, and embrace these technologies with more confidence. Staff is committed to working with all stakeholders on these issues, and also plans to continue its vigorous enforcement of the COPPA statute and Rule. Staff hopes that this report will spur greater transparency and meaningful disclosure about the data collection practices in apps for children."

The FTC revisited the issue ten months later. Published on 10th December 2012, "Mobile Apps for Kids: Disclosures Still Not Making the Grade"[36] tells most of the story through its title.

In terms of the number of apps available, Google had caught up with Apple. In September 2012 there were over 700,000 Apple apps, a 40% increase since December 2011. For Android there were also 700,000 but this represented an 80% increase from the beginning of 2012. In choosing their sample of apps to look at, the FTC staff appear to have used an identical methodology to the previous report. This was their verdict:

"The results of the survey are disappointing. Industry appears to have made little or no progress in improving its disclosures since the first kids' app survey was conducted, and the new survey confirms that undisclosed sharing is occurring on a frequent basis. Staff did find a handful of app developers that were providing users with simple and short disclosures. However, such instances were far from the norm, and most

36 http://www.ftc.gov/os/2012/12/121210mobilekidsappreport.pdf

apps failed to provide basic information about what data would be collected from kids, how it would be used, and with whom it would be shared. It is clear that more needs to be done in order to provide parents with greater transparency in the mobile app marketplace."

Inter alia, the question of how apps were rolled out illustrates how it is almost impossible to disentangle privacy concerns from the wider e-commerce agenda. There was a clear lack of transparency in terms of what data were being collected and how it was being used by those who collected it. There was also a lack of transparency in relation to the cost of engaging with "free" apps.

A REGULATORY RESPONSE

The FTC took issue with a failure by Apple to provide notice to consumers of the possibility of purchases being made as a result of downloading free apps. In January 2014, the FTC reached a settlement with Apple. Under a consent decree entered into between Apple and the FTC, Apple agreed to pay back US$32.5 million to parents whose children had downloaded apps. The FTC said Apple failed to inform consumers that they could be approving in-app purchases by entering a password on their device. After entering the password, users then had a 15-minute window where unlimited purchases could be made without further action being taken by users.

The FTC remains interested in and concerned about children's use of apps, and it has issued a specific guidance note to parents about them.[37] A European counterpart seems long overdue.

CHILDREN'S APPS IN THE UK – OFT CONCERNS

In April 2013 the UK'S Office of Fair Trading (OFT) announced an investigation into children's Web- and app-based games.[38] They noted, in line with the figures we have already seen, that 80 of the 100 top-grossing Android apps were free to install. Subsequent purchases from add-ins might range from a few pence to £70 or more. Leading up to the announcement of this enquiry there had been a spate of media reports of families that had been shocked to discover that their children had spent sometimes substantial sums of their parents' money on buying further downloads, which were charged to a parental credit card without the parents or the child realizing it.

For example, George Holmer of Nottinghamshire was appalled to find his 11-year-old son had forked out £3,500 to buy "gold" in a game called *Arcane Empires*, a "free" app. Then there was the bizarre case of Doug Crossan from Bristol. He discovered that his 13-year-old son had spent £3,700 on 300 purchases made in games such as *Hungry Shark* and *Gun Builder* (both "free" games) and *Plants v Zombies* (69 pence

37 http://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps#kids

38 Press release 12 April 2013, now archived

to download). Mr Crossan is a police officer. He reported his son to the police, in effect for fraud.

The OFT reported its findings in the late summer of 2013, in a document entitled "Children's Online Games Report and Consultation". In the light of their investigation the OFT concluded that:

"The concerns we uncovered during our investigation mainly fall into these categories:

- *A lack of transparent, accurate and clear up-front information relating, for example, to costs, and other information material to a consumer's decision about whether to play, download or sign up to a game;*
- *Misleading commercial practices, including failing to identify the practice's commercial intent;*
- *Exploiting children's inexperience, vulnerability and credulity, including by aggressive commercial practices;*
- *Including direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them;*
- *Payments taken from account holders without their knowledge, express authorisation or informed consent."*

A REGULATORY RESPONSE – YES AND NO

Although the OFT had noted in its report that the commercial practices it described were "likely to breach consumer protection law" (specifically the Consumer Protection from Unfair Trading Regulations 2008 which implement the Unfair Commercial Practices Directive 2005/29), it did not take enforcement action. Instead, it issued a set of principles to provide guidelines for industry, with the threat of legal action if these guidelines were not complied with by April 2014. The reasons for deciding to proceed in this way were stated to be:

- To provide guidance which addressed all the issues in a coherent manner; and
- To assist the industry which it recognized as new and innovative and which would welcome guidance on its legal obligations.

It is noted that the UK Information Commissioner has also issued Guidance to app developers in compliance with the Data Protection Act.[39] Among the other advice provided, the Guidance makes clear that developers should pay particular attention to what kind of personal data may be collected if the app is aimed at children. The Guidance notes that the potential harm that may be caused by inappropriate collection of data will be greater if the child is not old enough to fully understand the significance of providing their personal data.

39 December 2014 version1.1

AN IMPORTANT INTERNATIONAL INITIATIVE

In June 2007, OECD governments adopted a "Recommendation on Cross-border Cooperation in the Enforcement of Laws Protecting Privacy". The Recommendation called for member countries to foster the establishment of an informal network of Privacy Enforcement Authorities [para. 21]. It further specified a number of tasks for the network:

- Discuss the practical aspects of privacy law enforcement co-operation;
- Share best practices in addressing cross-border challenges;
- Work to develop shared enforcement priorities; and
- Support joint enforcement initiatives and awareness campaigns.

This led, in 2010, to the formation of the Global Privacy Enforcement Network GPEN.[40]

In May 2015, 29 data protection authorities from around the world collaborated in a "sweep" of websites and apps aimed at or popular among children. They looked at the data privacy practices of these websites and apps.

At the end, the GPEN report highlights the following areas of concern:

- Inadequate or non-existent privacy policies, or lengthy and complex privacy policies;
- Over-collection of information, e.g. collecting an exact date of birth instead of simply the year/month of birth to verify a user's age;
- 78% of websites and apps swept were found not to use simple language, or to present warnings that could be easily read and understood by children;
- User information was, in some cases, disclosed for vague or unspecified purposes and 51% of websites and apps stated that they may disclose user information to third parties;
- Virtual worlds that facilitate contact with children. e.g. a free text chat function, are sometimes unmonitored, posing a risk of children disclosing their personal information to strangers.
- 58% of websites and apps examined contained advertisements that redirect users to another website.

40 https://www.privacyenforcement.net/

ONLINE ADVERTISING

Advertising is essential to a modern economy. Moreover, in the context of the Internet, advertising has fuelled many of the most widely used and most valuable "free at the point of use" resources available. This trend is likely to continue. Digital advertising spend has already outstripped TV spend in the UK, and by 2017 mobile advertising will have followed suit. An estimated £45bn will be spent on digital ads and just short of £4bn on mobile ads. If advertising revenues were to vanish from the Internet equation the Internet we know would undoubtedly be a poorer place.

John Wanamaker, an early pioneer of advertising and marketing, once famously said: *"Half the money I spend on advertising is wasted. The trouble is I don't know which half."*

The same remained true in the early days of advertising on the Internet. Banner ads would appear on Web pages without anyone really knowing whether the people viewing them would be likely to have any interest in what was being offered. Thirteen-year-olds do not generally show much interest in equity release or pension schemes. Yet it also became apparent that children were being very deliberately targeted with ads and that their online behaviour was of great interest to commercial companies. A major US research-based article in the Wall Street Journal in 2010 describes what was then common practice.[41]

The Journal's investigation focused on the use of cookies and other tracking technologies. The article looked at 50 US sites that were popular with American "teens and children". Media giant Viacom owned eight of the 50 sites. The sites in question were all associated with Nickelodeon TV, a channel aimed squarely at younger children. They also looked at 50 of the most popular US sites which were principally aimed at adults.

The children's sites had placed 4,123 tracking devices on to the computers which had accessed them. This was 30% more than were found on the adults' sites. A specific example cited in the Journal article concerned a 10-year-old child who was consistently presented with ads for "pets … 'virtual worlds' and 'online goodies'

41 http://online.wsj.com/article/SB10001424052748703904304575497903523187146.html

such as little animated graphics to decorate a website". As we shall see, it is encouraging that the advertising industry did eventually address this problem, even if it took a little while for them to get around to it.

In September 2014 the United Nations recommended that all advertising an all media should be banned for under-12s, but it anticipated the possibility of such a ban being extended to under-16-year-olds.[42]

ONLINE BEHAVIOURAL ADVERTISING

The answer to Wanamaker's stated problem – how to make ads more relevant to the people who will be viewing them – came with the development of Online Behavioural Advertising (OBA). It is now the dominant genre in the world of advertising on the Internet.

The whole idea of OBA is that it tailors, targets or synchronizes ads to the known interests and tastes of an individual. The advertising agencies' knowledge of those tastes and interests is derived from data gathered about an individual's browsing habits. The principal categories of behavioural data that are collected can cover age, hobbies, shopping habits, ethnic group, likelihood to post comments and general location (such as city), although in principle location data can be a great deal more focused, achieving accuracies of up to 30 metres. For this reason, when discussing the position of children, questions about location data acquire extra significance.

OBA data are gathered through several different types of tracking technologies that report on what individuals do when they go online. As outlined above, these tracking devices go under the generic category of "cookies" and are described in the following terms by the UK's Advertising Standards Authority:

"When you visit a site, a cookie may be placed on your computer's browser by an OBA business (sometimes called an 'ad network'). If you or anyone else uses that browser to visit websites the OBA business has a relationship with, the cookie collects information about those visits. For example, it can collect information about pages visited, ads clicked and products purchased or shown an interest in. It does not collect information that identifies an individual.

Using this information, the ad network can allocate the viewing behaviour from a particular web browser to different 'interest segments' and the ad network will then serve different ads to different interest segments. For example, if a browser frequently navigated the book review section of a news website and searched other websites for books, that interest might be placed within a 'book lover' segment and served advertisements for books and other goods or services relevant to a literary interest.

Alternatively, a specific product or service may be displayed on your browser because you have looked into buying that product. For example, you may be looking for a present for a friend (a coffee maker for instance) and search a department store website and click on a few different coffee makers in the appliances section. After

42 http://www.ohchr.org/EN/Issues/CulturalRights/Pages/impactofadvertisingandmarketing.aspx

a while you give up your search and decide to visit an online newspaper site to read an article. Once there, you may find that you are then presented with ads for different coffee makers. This type of advertising is sometimes called 're-targeting'."

The advertising industry drew up a classification system[43] which assigned certain types of information to predefined categories. Someone who visited sites featuring racing cars could expect to receive ads about Ferraris. Someone who visited sites connected with holidays in Norway might get ads from Scandinavian Airlines, and so on.

In October 2012, the World Federation of Advertisers (WFA), along with industry partners, launched the European Interactive Digital Advertising Alliance (EDAA), in charge of administering the self-regulatory programme for Online Behavioural Advertising (OBA) across Europe. Under the programme, online ads across Europe must display a distinctive icon that connects Internet users to www.youronlinechoices.eu, where they can find information about OBA and to restrict its use should they so wish. Companies that join the programme must undergo a "self-certification" process within six months, and an additional Trust Seal is available for all companies and mandatory for Third Parties.

"In order to demonstrate compliance and be granted the corresponding Trust Seal, signatory companies acting as Third Parties must undergo an independent certification process (audit) with an EDAA-approved Independent Certification Provider."[44]

This audit takes place annually and a number of tiered sanctions can be actioned, through national Self-Regulatory Organizations, in the event of non-compliance, e.g. naming and shaming, ad alerts, removal of the seal, withdrawal of the icon and referral to the regulator. The audit is carried out by a number of organizations that are approved by the EDAA.

The EDAA programme regulations prohibit the specific targeting of children under 13 with OBA[45] and its self-regulatory rules are clearly comparatively new and have not yet been fully implemented in every EU Member State. The ultimate effectiveness of the prevision thus remains to be seen. While this initiative is undoubtedly to be applauded, it operates against a background of wider concerns about the efficacy of self-regulatory codes when it comes to children.[46] The WHO urges governments to take the lead on advertising food and non-alcoholic beverages to children (on and offline[47]). Thus there is perhaps still room for doubt about whether online behavioural advertising should be managed by industry in this way.

43 https://www.cap.org.uk/Advertising-Codes.aspx

44 http://www.edaa.eu/certification-process/trust-seal/

45 http://www.ohchr.org/EN/Issues/CulturalRights/Pages/impactofadvertisingandmarketing.aspx

46 See for example "Through the looking glass", produced by the Children's Food Campaign.

47 http://whqlibdoc.who.int/publications/2010/9789241500210_eng.pdf

LOCATION DATA

Software that tracks user location poses a different sort of risk to children.

The use of location data is regulated by the E-Privacy Directive in relation to those who provide electronic communications. They are under an obligation to ensure the security of such data and are restricted in the use they may make of it without consent. Such location data can now be accessed by other service providers with user consent.

However, there needs to be much greater clarity about how location data derived from children's and young people's usage of the Internet and associated technologies will be used and by whom. There is considerable anxiety, for example, about the prospect of advertising material being delivered to children that contains "special offers" which are available around the next corner or on the next block, thus raising concerns about inappropriate pressures at a point where children may be away from parental guidance and subject to other pressures, such as those from peers.

Concerns about the potential misuse of location data by unauthorized users are understandable, but, equally, it is recognized that the ability to locate children by the tracking technology on mobile phones can contribute to safeguarding and prove extremely valuable in police investigations.

IMMERSIVE ADVERTISING

"Marketing as marketing disappears within the viral networks of social media platforms. Boundaries are broken down between marketers and kids (as kids markets to each other); between content and advertising (as advertising now infuses, rather than interrupts, content); and between kids' lives and entertainment (as their lives now become the content of that entertainment). It is truly the perfection of [marketers] power".

Joel Bakan, Childhood Under Siege

There have been a number of reports that document poor advertising practices that appear to take advantage of the fact that the previously established rules, designed for TV, radio and print, simply do not work well enough in the online space. The report "Through the Looking Glass" by the Children's Food Campaign, documents several examples of the ways in which high fat, high sugar and fatty foods are promoted to children[48] on the Internet in a way that bypasses the stricter TV advertising regulations. Concerns have being expressed about the way in which sports sponsorship by betting companies, and examples of "free" betting on gambling, like games on platforms such as Facebook, might be introducing children to a culture of gambling which will condition their acceptance of it. The emergence of children as undisclosed "brand ambassadors" was widely regarded as

48 Malcom Clark, Charlie Powell, *"Through The Looking Glass"*, Children's Food Campaign, April 2013, available at: http://www.sustainweb.org/publications/?id=273

being scandalous[49] in the UK, and brought a quick response from the advertising industry.[50]

In an interview, Jonathan Kent, the founder of the UK campaign "Leave our kids alone", said: *"Stage by stage advertising has become more aggressive and more insidious and more in your face, and these days it's gone way beyond advertising, it's an entire marketing ecosystem. So companies recruit brand ambassadors from the playground, they create little economies even."*[51] Pressure from the Prime Minister's office led the UK Advertising Association to produce best practice guidelines preventing children aged under 16 from being employed to act as brand ambassadors or in peer-to-peer marketing campaigns.

"I don't know whether it is advertising or not because when I go to the stadium I also see background ads, so it's all part of the game as such."

"Advertising is just part of the football world. To have the same in games just makes it more and more authentic."

Two young boys during an eNACSO focus group in Austria

An obvious contrast between traditional and digital marketing is the move from one-way communication to a more immersive and multifaceted exchange. Today's technology allows advertisers to deliver the same commercial message to reach children via multiple technologies: online, mobile phones, tablets, as well as more traditional media such as TV and billboards.

One aspect of the current incarnation of online advertising that continues to cause concern is the blurring of the line between promotion and content and between advertising and entertaining. It is becoming increasingly difficult to identify what is designed to inform and amuse and what is designed to persuade and cajole with commercial intent. This applies to both adults and children, but the distinction is more difficult for children and the impacts may be more serious.

Let's take for instance "advergames", that combine games with brand integration and, according to the definition given by the Federal Trade Commission (FTC), are *"games designed to promote a particular product ... [that] tend […] to use animated depictions […] or proprietary characters associated with particular brands".*[52]

Professor Agnes Nairn and colleague Haiming Hang titled a recent study "Advergames: It's Not Child's Play" to make the point. According to their study[53], there are two forms of advergames:

1. Electronic games that are used to advertise a product, brand or organization, accessible on social media sites, companies' own websites and as downloadable content or apps on mobile devices.

49 http://www.bbc.co.uk/news/uk-14706687

50 http://www.adassoc.org.uk/publications/brand-ambassadors-peer-to-peer-marketing/

51 ABC interview, "You're never too young to be targeted", available at: http://www.abc.net.au/radionational/programs/futuretense/you27re-never-too-young-to-be-targeted

52 Federal Trade Commission, A Review of Food Marketing to Children and Adolescents: Follow-Up Report 70 (December 2012), http://www.ftc.gov/os/2012/12/121221foodmarketingreport.pdf.

53 Agnes Nairn, Haiming Hang: "Advergames: It's Not Child's Play", Family and Parenting Institution (December 2012, Updated May 2014)

2. Commercial messages embedded within the content of retail accessible video games, online electronic games or apps.

Advergames are very popular among marketers promoting food (including fast food and snack food) and both alcoholic and soft drinks. The FTC's 2012 report on food industry marketing expenditures found that *"advergames ... were often a key focus on child- or teen-oriented websites and that companies spent an estimated $676 million to produce advergames in 2009."*[54] Advergames are also promoted on retail food packaging to prompt a purchase or a purchase request to a parent, and are increasingly found in app formats for tablets.

WHAT IS THE HARM?

The main concern with advergames is that the blurring of the distinction between a game and an advert prevents children from engaging their critical faculties. Advergames, especially those targeting children, often do not properly indicate the commercial nature of their content. As a result, the separation between entertainment and commercial content that is advocated by most advertising best practices codes is often blurred. Article 18 of the International Chamber of Commerce Advertising and Marketing Communication Practice Consolidated Code 2011 clearly states: "Marketing communications directed to children should be clearly distinguishable to them as such." The Code recommends that, while the age limits used in national definitions be applied to determine whether a person should be treated as a child in general terms, in relation to all sections of the code related to personal privacy, including behavioural advertising, those under 12 are regarded as children. Yet research consistently shows that children find it very hard to identify these marketing communications.

"Given what we know about implicit persuasion in adults, it is highly likely that the engaging nature of contemporary interactive marketing which is hard to consciously identify, associated with rewarding stimuli and frequently repeated, will automatically elicit implicit persuasion and discourage the deployment of cognitive resource."

From 'Consumer Kids', Agnes Nairn and Ed Mayo

It is well established that children can identify TV commercials by the age of 5 using perceptual cues such as the length of the commercial compared with a programme, or the music or volume of the broadcast. However, it is not until around ages 8-12 that children are able to use conceptual abilities to understand the persuasive intent underlying adverts. And even if by age 12 children are capable of skepticism towards TV advertising, they do not necessarily employ this.[55] A 2013 study compared the

54 Supra note 52

55 Brian L. Wilcox et al., Report of the Am. Psychological APA Task Force on Advertising and Children (Feb. 20. 2004), http://www.apa.org/pi/families/resources/advertising-children.pdf.

ability of children versus adults to identify advertisements on mock Web pages.[56] The mock Web pages contained a total of 27 ads. Every adult in the study identified all ads shown. In stark contrast, 6-year-olds identified just one-quarter of the ads, 8-year-olds about half of the ads, and 10-year-olds identified about three-quarters of the ads shown. The authors of the study concluded: *"the developmental sequence derived from the television advertising research cannot be applied to children's awareness of advertising in other media, because we can no longer assume that the ability to recognize an advertisement always precedes the ability to understand the purpose of advertising."*[57] Indeed a number of recent studies show that for children of all ages the ability to recognize the persuasive intent of advergames, in-game advertising, sponsorship or product placement is significantly below their ability to understand the purpose of TV adverts. With marketing delivered via mobile phones on small screens seemingly even harder to identify, the marketing guidelines in relation to clearly identifiable communications appear to be quite obviously breached.

A study[58] with 15-year-olds showed that when it comes to advergames even these older teenagers were unable to recognize the commercial intent. As one boy said, "It's not an advert. It says 'play'." As behavioral researchers have noted, the implicit-persuasion model embedded in digital marketing may explain why also adolescents, even with their greater cognitive capacities and skepticism, may not be any better able to resist some advertising appeals than younger children and, indeed, may be even more vulnerable to some types of digital marketing. If brands are "embedded" in an entertainment context, as with in-game advertising or other immersive environments, they can still be influential without being consciously recognized or recalled. Moreover, the integration of advertising and content means that young people's attention *"may be largely engaged with the interactive experience",* as scholar Louis Moses explains. As a consequence, their ability to be consciously aware of the marketing techniques *"may be processed only peripherally, and thereby less deeply"*.[59]

An explorative study of Swedish15-year-olds demonstrated that teenagers are exposed to 10% of all potential advertisement while surfing the Web, but they are mainly unaware of this exposure. The eye movements of these teenagers were measured during a 15-minute experimental session, which also demonstrated that food advertising has a greater impact than advertising for other products, and that boys were exposed to this type of commercial message from 30% to 60% more than girls.[60]

Therefore, what it is happening is that not only do companies track, profile and target children and young people, *"but they also use aggressive commercials which bypass the cognitive defences against persuasion which adults are presumed to*

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56 Mark Blades et al., "Children's Recognition of Advertisements on Television and Web Pages", 62 Appetite 190 (2013); see also An and Stern, 2011 and Reijmersdal et al, 2012 on Advergames.

57 For an excellent summary of case law related to stealth marketing see Center For Digital Democracy, et al., "Complaint and Request for Investigation of PepsiCo's and Frito-Lay's Deceptive Practices In Marketing Doritos to Adolescents" (Oct. 19, 2011), http://digitalads.org/sites/default/files/publications/digitalads_ftc_complaint_2011.pdf.

58 Agnes Nairn, Haiming Hang study "Advergames: It's Not Child's Play". December 2012

59 Kathryn C. Montgomery, Jeff Chester, Sonya Grier, Lori Dorfman "The New Threat of Digital marketing", Pediatric Clinics of North America, Volume 59, Issue 3, June 2012, pages 659-675. Special Issue "Children, Adolescents, and the Media".

60 Helena Sandberg, Kerstin Gildof, Nils Holmberg "Children's Exposure to and Perceptions of Online Advertising", International Journal of Communication 5 (2011), pp. 21-50

have when they understand that a given message consists of advertising content and can identify the source of the message."[61]

AND THERE IS MORE...

The majority of marketing practices online have been purposely designed to tap into the developmental needs and behavioural practices of young people. In his book "Childhood Under Siege", Joel Bakan examines the work of Martin Lindstrom, a leading kid's marketer, to understand how this process works: *"For Lindstrom, marketing to kids is all about discovering and then engaging the unique emotions of youth. Emotions drive everything for children […] and marketers to be successful, must engage the most fundamental emotions at the deepest levels. Love, which connotes nurturing, affection, and romance is one of these fundamental emotions. […] Fear, as in violence, terror, horror, cruelty, and war is another."* He continues saying that *"Successful marketing to children and teenagers requires more than just tapping these emotions, however. It is equally important […] to use the right kinds of media to do so"* and *"Having discovered that manipulating children's deep emotions is a formula for success, kid marketers push that formula as far as they can, doing whatever it takes, without apparent constraint or concern, to work the emotions of youth into profit. It is this dynamic […] that drives them to ramp up the media violence, cultivate addiction, cynically exploit social network friendships, sexualize girls and promote hyper-consumerism."*

"Of course you have to be on the social networks otherwise you don't get what is going on with your friends, but I really hate it when you get ads the next day because you have been chatting about something with your friends…or have been searching for something in another window while chatting with your friends."

A young boy during an eNACSO focus group in Denmark

Social networks are among marketers' favourite platforms since they resonate strongly with identity exploration, social interaction and autonomy, all fundamental developmental adolescent characteristics. *"They provide an accessible, user friendly template for creating and expressing one's public and private persona in cyberspace"*[62], therefore marketers, profiting from this special relationship between young people and social media, have developed what is now called "social media marketing". The social networking platforms offer "brand-building opportunities" that are not available let alone possible through traditional advertising.

Marketers have developed other strategies to forge emotional bonds between kids and avatars, virtual pets of various kinds and similar characters. These bonds, according to

61 Supra note 30

62 Kathryn Montgomery, Jeff Chester, "Digital Food Marketing to Children and Adolescents", October 2011, p.13. Available at: http://digitalads.org/sites/default/files/publications/digitalads_digital_marketing_report_final_web_20111017.pdf and from the same authors see also "Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age", Journal of Adolescent Health 45 (2009) S18-29

Joel Bakan, create "stickiness", a term defining the degree to which users keep coming back to a site, which is then monetized with sales of subscriptions and virtual goods to, for instance, feed a pet or buy a new dress for super-fashioned avatars such as on the Star Doll website.

"Initially this type of site, the majority of which are designed specifically to target kids, allow users to play for free in their "basic mode" giving them time to bond with their avatar," explains Bakan in his book, *"but if they want more fun or to go further in the game levels they would have to buy subscriptions or virtual accessories."* This is a variation of the same "freemium" strategy we have seen with apps.

Most of the rationale behind these practices is not new. However, as the examples given above have shown, new technologies enable businesses to identify even more effective practices that allow them to reach their aims. Industries argue that data are collected to improve the quality of services they provide to their users; the more they know about them the better they can satisfy their expectations and improve the quality of their services. This is certainly true, and it is something that they repeatedly state in their terms of references and privacy policies, where they also describe in ambiguous and lengthy terms how they collect and intend to use the data.

Internet advertising, whether OBA, immersive techniques such as advergames or social media marketing that uses emotional manipulation appears to present a number of concerns given that children do not seem to be able to clearly distinguish online advertising as stipulated by the advertising industry's own codes.

These factors contribute to our conclusion that some of these techniques are clearly in contravention of the EU Unfair Practices Directive 2005/29 in terms of aggressive marketing, pressure selling and misleading communications.

As with the evidence around e-commerce and the marketing of apps to children, it seems highly undesirable that we have reached a state of affairs where new techniques are introduced first – with no onus on industry to demonstrate that there will be no adverse effects on children – and regulation is introduced post hoc. This situation should change, with companies being placed under a positive obligation to consider the potential impact of any and all of their marketing and advertising activities on vulnerable consumers as a whole, in particular children.

DATA COLLECTION, ADVERTISING AND MARKETING

As noted earlier, the digital age has radically changed the nature of the advertising and marketing industry. Online Behavioural Advertising (OBA) is the new norm.

Advertising and marketing companies have developed an array of sophisticated data collection applications which drive the OBA engine.

Vast amounts of personal data are now regularly mined and stored in databases – and in an instant are used to update online targeting profiles or identities: *"Data has become one of the most valuable commodities […] There is a fundamental shift in media buying from buying placements to buying audiences."*[63] This trend gave birth to the now often heard assertion that "data is the new oil".[64] In other words, personal data have become the principal driving force of some of the modern world's most dynamic businesses.

Historically, concerns about children's exposure to commercial activity revolved around potentially exploitative or unfairly manipulative types of advertisements and marketing strategies, particularly ones which encouraged children to develop unhealthy habits or consume unhealthy foodstuffs or drinks. These concerns arise in their own right and quite independently of any considerations about how children might come to be confronted by such ads or marketing strategies in the first place.

However, specifically in relation to the increasing amount of commercial activity taking place over the Internet, data collection and the uses to which such data are put have become completely intertwined. They are two sides of the same coin.

Thus, while it is probably the case that in many people's eyes the privacy agenda has principally been concerned with examining the activities of the state and state agencies, a rising number of privacy related court cases are leading to an increased public awareness of the huge amount of information about people being amassed by private sector actors such as Google, Facebook

63 Supra note 62. See also Jeff Chester "Targeting the Subconscious in the Big Data Era", available at http://www.law.yale.edu/documents/pdf/ISP/Jeff_Chester.pdf

64 http://www.forbes.com/sites/perryrotella/2012/04/02/is-data-the-new-oil/

and others whose businesses are wholly or largely built on revenues derived from advertising.

Children are meant to be exempt.

Under the European online advertising industry's self-regulatory rules (EDAA), children's personal data cannot be intentionally collected or used to target children. However, just as on the Internet *"no one knows you're a dog"*[65], currently, in the context of Web browsing nobody can reliably know if you are a child, although given modern profiling techniques it seems highly likely that companies could infer that from the information they accumulate. It is therefore surprising that there is not a greater obligation on data-mining companies to try to ensure children are completely removed from any and all targeting that may arise from the analyses they carry out.

Children and parents don't think about the commercial implication of giving out information online: they are much too preoccupied with stranger-danger [...] A glance at websites used by children shows that most sport a privacy policy and many take particular care with children [...] However, scratch the surface and we see that many of these policies are not worth the cyber-paper they are written on [...] and anything children divulge is up for grabs.

Agnes Nairn and Ed Mayo, Consumer Kids

While there is considerable doubt about the extent to which adults understand how OBA works[66], or know how to prevent themselves from being subjected to the profiling it entails or know how to withdraw from it, there is even greater uncertainty in that regard in relation to the capacity of children to do likewise. Moreover, with the growth of the *Internet of Things*, the situation is set to become even more complicated. This will bring into question, in a great many online settings, the very idea of an individual being able, in any meaningful way, to consent to at least some parts of their personal data being collected, and this will apply to both adults and children alike.[67]

Thus, at the moment and for the foreseeable future, in the midst of all these data collection processes, children form an important part of the larger picture.

THE ARTICLE 29 WORKING PARTY - CURIOUSLY ABSENT

The data protection authorities in Europe have given surprisingly little attention to the protection of children in the area of data protection in an online commercial setting.[68]

65 https://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you%27re_a_dog

66 http://www.theguardian.com/media/2015/jul/01/less-than-half-of-uk-adults-are-aware-ads-fund-free-content-online

67 http://www.privacysurgeon.org/blog/wp-content/uploads/2013/09/Privacy-in-the-Digital-Economy-final.pdf

68 Although see the investigation into apps referred to on page 23

The Article 29 Working Party[69] (the group of privacy regulators from different EU Member States) last addressed the question of children and data protection in any substantial way in an opinion[70] issued in 2009, *"Opinion 2/2009 on the protection of children's personal data (General Guidelines and the special case of schools)"*. However, as is evident from the title, the Working Party did not focus on the broader commercial context within which children use the Internet or are exposed to a range of data collection practices.[71]

Moreover it seems that in the recent discussions on the soon-to-be-established new data protection regime, the Article 29 Working Party expressed no opinion on what should constitute the minimum age at which a child should be able to decide for themselves whether or not they can provide personal information to commercial third parties, i.e. without the company concerned needing to obtain parental consent for the collection and processing of their child's data.[72] On the other hand it appears as if few, if any, national data protection authorities expressed an opinion either, leading many to wonder exactly where the final, adopted proposal came from.

Looked at overall, this absence of a major focus on the position of children by the data privacy authorities seems a remarkable lacuna. It is readily acknowledged that there are no obvious or easy answers to the privacy challenges posed by children's engagement with e-commerce, but the position is hardly likely to be improved by ignoring the problem or putting it in a box marked "too difficult". It will not solve itself, particularly as, hitherto, there has been no substantial regulatory or legal pressure on any commercial actors to find solutions. On the contrary, key parts of the status quo self-evidently suit most online companies.

The Article 29 Working Party aside, more generally there has also been a marked absence of any discussion about the importance of how companies that legitimately obtain and hold information about children nevertheless manage the personal data thus obtained.

A NEW DATA PROTECTION REGIME BECKONS

The protection of all personal data is currently guaranteed in the EU by the 1995 Data Protection Directive.[73]

It should be noted that the 1995 Directive makes no specific provision for, or reference to, the personal data of children or young people. There is simply a general requirement that all processing of personal data must be fair; consequently, where the data relate to a child, that would be a relevant consideration and would create

69 http://ec.europa.eu/justice/data-protection/article-29/index_en.htm

70 http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp160_en.pdf

71 Although there is a reference to an earlier (2003) paper on direct marketing

72 http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm see in particular the letter of 17th June, 2015 concerning the Trilogue.

73 Directive 95/46/EC

an expectation that the data controller[74] would make appropriate arrangements to reflect that fact.

We have been unable to find any major study on how well the current regime has worked in relation to the privacy dimension of collecting and processing personal data relating to children in Europe in the context of e-commerce.[75] Neither have we been able to locate any impact study which shows the likely effects of any potential changes to the rules affecting age and data privacy.

In the absence of a specific provision within the 95 Directive, concerning children's data, national laws apply in terms of stipulating, for example, the age at which a child is considered capable of deciding for themselves whether or not to hand over personal information to commercial third parties, e.g. websites such as Facebook or email services such as Gmail. In Italy this age is 18, in Spain it is 14, and in the UK there is no fixed age, though 12 is generally considered the threshold.

IN 2012, the European Commission opened up a review of the data privacy regime.

The commission published a draft of a new Genera Data Protection Regulation - GDPR. At the time of writing, that text seems set to clear all the final hurdles – usually formalities – early in 2016, to become law in 2018.

A POTENTIAL CONFLICT?

In respect of interactions with information society services, e.g. commercial websites,[76] the final text of the GDPR cuts across national jurisdictions. It remains to be seen if this leads to any legal conflicts.

In the first draft of the GDPR, at Article 8 it was proposed that at age 13 a young person would be considered fully competent to decide for themselves whether or not to hand over personal information to a commercial third party (e.g. Facebook), and fully competent to decide what to post to the site.

The Commission advanced no argument or evidence to support setting 13 as the proposed standard[77] other than a reference to the fact that it was already in widespread use, because under US federal law all US companies were obliged to follow it.

However, the final text reads as follows:

"…in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 16 years, or if provided for by Member State law a lower age which shall not be below 13 years, shall only be

74 The entity collecting and processing personal information

75 There have been several, however, which look in a general way at what young people think about privacy.

76 As a matter of fact, the definition is derived from the eCommerce Directive which say an information society service is one which is "normally provided for remuneration, at a distance, by electronic means". But who "remunerates" Facebook in this context? Not the individual Facebook user, who is normally the concern of data protection rules.

77 Which is more than a little ironic when set against the provisions of Article 33 of the proposed new GPR, which makes certain kinds of impact assessments mandatory.

lawful if and to the extent that such consent is given or authorised by the holder of parental responsibility over the child."

This proposal emerged very late in the Trialogue and appears to anticipate the creation of four different age standards: 16, 15, 14 and 13. Nobody appears to have advanced any arguments or produced any evidence to justify or support this multiplicity of standards, nor was an impact assessment carried out. Moreover, in the absence of any research on the EU-wide operation of the earlier status quo, it is hard to see how such an assessment could have been carried out. Aside from indicating a hugely disappointing lack of real interest in understanding the nature of the issue they were meant to be addressing, it also sits oddly with the declared intention to create a digital single market.

The working assumption must be that many Member States will decide not to bring forward national legislation which would allow a departure from the default age of 16; while the parties to the Trialogue seem indifferent towards the need for evidence to support any given age limit, national legislatures may take, or be required to take, a different view. Thus, in the absence of any compelling reason[78] to opt for 15, 14 or 13, age 16 will stand, for want of a better alternative. Congestion of the legislative timetable or other political factors may also make it difficult or impossible to progress an initiative in this area.

In the absence of any child-focused evidence to support the new Rule of 16 – or 15, 14, or 13, come to that – the GDPR could be in conflict with Treaty obligations under the UN Convention on the Rights of the Child.[79]

Article 13 of the Convention gives children *"the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."* The Convention makes no mention of the possibility of these rights being abridged or modified by a requirement to obtain parental consent. On the contrary, the governing driver of the Convention as a whole is the child's evolving capacities, not their parents' idea about how well or how far those capacities have evolved. This does not necessarily mean that no fixed age limit could ever be put forward, but if there is to be one it needs to be explained and justified in child protection or child welfare terms. Clearly that has not yet happened.

Given that most Member States will probably stick with the default age of 16, it seems likely that the major US companies will lobby for age 13 to be adopted in as many countries as possible, because that fits with their existing arrangements. The outcome of that conflict of views will be most illuminating.

78 Which could be, for example, a decision to opt for a pre-existing national law, but that only works where the pre-existing law stipulates 16,15, 14, and 13. If the pre-existing law is below 13 (as in the case of the UK), or is above 16 (as in the case of Italy), that option will seemingly not be available.

79 http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

THE PROBLEM WITH THE RULE OF 13

In the USA, the adoption of age 13 was never meant to establish a general privacy standard in the wider way in which privacy is understood today. Besides the commercial dimension there is also the issue of children's disclosures of information about themselves to the wider world and the age at which they might be judged competent to decide such matters entirely for themselves. This is of particular concern in respect of older children.

Despite the title of the legislation which brought the Rule of 13 into effect, the principal intended purpose of the Children's Online Privacy Protection Act (COPPA) was extremely narrow and limited. It was meant to protect children below the age of 13 from being exposed to commercial advertisements without their parents' consent. This was a time when the data collection practices of companies – i.e. the practices used to determine who would receive their ads – were very unsophisticated compared with today. Moreover, the Act was passed in 1998 and brought into effect in 2000, a little while before Web 2.0 and large-scale use of social media truly emerged. Thus it would have been impossible for the people drafting or proposing the 1998 legislation to have known what was coming down the track. No one else did. Yet once it was put in place, and while there have been very welcome later amendments, its fundamental tenets have proved remarkably resilient. A massive array of vested interests has now grown up around the 1998 laws.

Studies carried out by EU Kids Online network[80] show that in some EU Member States around 70% of all children who are below the age of 13 and are online have accounts on Facebook or other social networks, despite the fact that Facebook has repeatedly made clear that their site is not suitable for children below the age of 13. Similar proportions of underage users have been found within the USA and many other countries outside the EU. Thus the Rule of 13 plainly does little to protect children from environments that are not meant for them, yet that is frequently how it is portrayed.

ONE AGE TO RULE THEM ALL?

It seems unlikely that fixing a single age for "privacy maturity" in relation to everything that happens between childhood and adulthood is going to be the right answer to the online privacy challenge. Between the ages of 12 and 18 young people do a lot of growing up, and different privacy standards or parental consent standards should be applied to persons of different ages or in relation to different types of activity undertaken at different ages within that span. That may not be very convenient for or welcomed by many online services, because it would entail creating more complex and more expensive systems, but that ought not to be the first consideration here. The EU ought to commission specific research into young people's interaction with online privacy and frame a response and standards according to the findings.

80 Monica Barbovschi, Brian O'Neill, Anca Velicu & Giovanna Mascheroni: *Net Children Go Mobile – Policy Recommendations. Report 5.1*, 2014

PARENTAL VERIFICATION BUT NO AGE VERIFICATION?

The GDPR states at Article 8.1 that:

"…*reasonable efforts (shall be made) 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.*"[81]

This provision makes clear that companies are meant to verify who a child's parents are if the companies are knowingly seeking data from someone below the age of 16 (or one of the permitted alternatives).

Elsewhere, Article 38, 1 (a) (e) anticipates that industry trade associations will draw up codes of practice which will address the "protection of children" and how to collect the consent of the holder of parental responsibility, "taking into account available technology."

However, the key point is, as with the operative provisions in the USA, the EU appears not to want to oblige companies to age verify people who sign up to their site, for example to ensure that children are not able to join or use services that are not intended for them.

In the context of signing up for services which are expressly not meant to be used by children below a stated age, if an online enterprise can simply set an age limit at or above that point, and is not put under an obligation to check the ages of its members, no one should be surprised if that age limit quickly becomes irrelevant or has only "decorative" value. Children will continue to misrepresent their age with the greatest of ease. Inter alia this brings into disrepute the whole idea of rule-making.

Our view is that any company that states an age rule should have the wherewithal to enforce it, otherwise the rule runs the risk of becoming a deceptive practice.

Earlier we called for independent research into the operation of the current rules on data collection in terms of their impact on children, and this was against the background of our arguing that we had doubts about the robustness of the advertising industry's capacity to self-police.

In a sense, therefore, unless and until such research has been completed we acknowledge that we are handicapped in terms of advocating for any particular solution.

Such research should also encompass an examination of the role that age verification could play in achieving better overall outcomes for children. Age verification might be able to play a dual role: it could help secure greater compliance with existing legal requirements in respect of the online purchase of certain types of goods and service (it has been hugely successful in the UK in terms of curbing under-age engagement with online gambling); and it could also help more widely in the context of data collection practices.

81 Except "in the context of preventative or counselling services offered directly to a child", para 29 of the Preamble

AGE RESTRICTED PRODUCTS AND CHILDREN

One of the objectives of this Policy Paper is to highlight how some online marketing practices violate the rights of children, as set out, for example, in the UN Convention on the Rights of the Child. These include their right to privacy, their right to be informed and their right to be protected from material harmful to their well-being.

Throughout this Paper we have described how a great deal – and perhaps in the case of young people, the majority – of what they do online, appears to be free because no up-front charge is required. We have also demonstrated that in fact the content comes at a price but there is little transparency about how the value is collected.

This final section focuses on the online marketing practices for age-limited goods. These practices typically do not target children or young people directly, but due to the structure of the business models they allow children to access and eventually to purchase content or products which would not be accessible to them in the physical world.

We have chosen two examples of these sorts of marketing activities: the selling of pornography and alcohol online. The selling of these products to minors is regulated by law in all EU countries, and in both cases it is not allowed below a certain age (albeit not necessarily the same age in every country). What we intend to highlight here is the fact that the above-mentioned laws are systematically not enforced online. The result is that children and young people have access to a great deal of pornography online and can buy products which are not intended for them, such as alcohol.

PORNOGRAPHY

Every publisher of pornography who has ever spoken publicly on the subject has repeatedly made clear that they never intend their products to be viewed or bought by children. Yet none of the world's major pornography websites has any kind of barriers which would restrict children's access. Their business model operates by

presenting a large number of pictures, these days overwhelmingly videos, which are completely free to view. The sites generally make their money by persuading enough viewers to buy longer versions of the same video clips, or clips which are available in high-definition video. Some sites seem also to have links with prostitution, as they pick up a user's geo-location information and offer commercial sexual services in the presumed vicinity of the viewer.

The established practice of selling pornography online therefore in fact exposes large numbers of children and young people to it even though they are not the intended or target audience.

SYMMETRY PLEASE

In the context of the current discussion about the impact that different kinds of sexual imagery might have on children, the word "pornography" can become an obstacle to communication and understanding. For many people it conjures up images of the centrefolds of adult magazines circa 1980 or of burlesque movies with risqué themes. It is true that images and videos of this kind are easy to find on the Internet but the type of imagery which is being addressed here is of an altogether different type.

Prior to the Internet there was undoubtedly material available which was every bit as violent or graphic as is found online today, but the practical constraints of accessing it in effect controlled its distribution and availability to a substantial degree. Six- and seven-year-olds would be unlikely to come across much explicit material depicting bizarre, often violent, evidently non-consensual sexual practices which even many adults would find hard to watch or process emotionally. Yet today this type of material is accessible 24/7 at zero cost, with no controls to determine if the person watching actually wants to do so – for example, they may have landed on it by accident, and are not able to determine if the viewer is old enough by reference to the applicable law in the country in which they reside.

Sites providing this type of material are among some of the most visited on the Internet.[82] They are known colloquially as "tube sites" and they make their money not through advertising but, as mentioned above, through persuading the viewer to buy longer or "better" versions of the material available to view for free.[83]

Although there is room for legitimate debate around the edges of any definition that might be used to describe such content, the type of material that is at issue in this paper might more commonly be referred to as "hard core". Moreover, while it is often assumed that hard-core pornography is always legal because it only involves adults, it is far from certain that all of the materials in this category would in fact be deemed legal for unrestricted distribution in several EU Member States. For example, in some countries there is a class of pornographic material which, although it is deemed to be legal, is not allowed to be included in any movie intended for showing in a cinema which is open to the public. It can only be sold on or from the premises of licensed sex

82 http://www.alexa.com/topsites

83 http://www.atvod.co.uk/uploads/files/For_Adults_Only_FINAL.pdf report

shops where, typically, an age check is carried out at the door to ensure only persons over the age of 18 can enter.

In every EU Member State it is axiomatic that what is legal in the real world is legal online and, symmetrically, what is illegal in the real world is also illegal online.

As already noted, every EU Member State has laws or regulations which prohibit or restrict the sale or provision of pornography to persons under the age of 18. Many of these laws or regulations are long established. At one level it therefore seems strange that, when discussing pornography on the Internet, before proposing a solution which seeks to mirror real-world rules, proponents of such solutions are asked to produce evidence of harm or the risk of harm which can be caused to children by exposing them to pornography.

If there was a particular reason why the long-established real world rules ought not to be applicable on the Internet, for example because they would demonstrably not create any risk of harm to children, the onus should lie on those making such a claim to prove it. Alternatively it must surely be sufficient to argue for parity between the offline and the online worlds.

The mechanics of how age verification solutions could be delivered is extremely important but it is a second-order question. First the importance of achieving parity between the real and the virtual worlds in this area needs to be broadly accepted as being non-contentious. At the moment it is not.

POSSIBLE SOLUTIONS

Age verification is the obvious answer but its use in relation to pornography sites in the EU appears to be limited to Germany.[84] Within the UK, the case of R v Perrin established that, while it might be going too far to suggest that English law requires age verification on pornography sites, its absence increases the likelihood of a successful prosecution.[85]

However in February, 2016 the UK Government issued a consultative paper in which they made clear their intention to put the law on a stronger, clearer footing. Commercial publishers of pornography will be required to use age verification or risk becoming inaccessible in the UK. In addition a new obligation will be created by which the payments industry, the advertising industry and other businesses that supply ancillary services to pornography web sites will be expected to ensure that the pornography sites they engage with have age verification in place.[86]

If this were to be allied to an EU-wide scheme for online age verification, then breach of the rule in any EU jurisdiction could also attract EU-wide sanctions. Companies care about having access to the EU market in a way that perhaps they do not in relation to any single national market. This would mean an EU-wide law is more likely to be effective.

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84 In England and Wales by virtue of a decision in R v Perrin (2002) etc. age verification should also be used in relation to pornography sites but there have been no known prosecutions. The police simply say that because the worst offending sites are based overseas the cost and difficulty of bringing a successful prosecution are too problematic to justify the risk.

85 www.gov.uk/government/consultations/child-safety-online-age-verification-for-pornography

86 Which to a non-lawyer will seem very much like a requirement to have it.

ALCOHOL

The World Health Organization stated in a report published in 2012, and also reiterated in more recent publications, that the European Union is the region with the highest alcohol consumption in the world, more than double the world average.[87] A major risk category is young drinkers among whom there has been an increase in early initiation and binge drinking[88] compared to an overall declining trend in alcohol consumption in most European countries.[89]

Even if alcohol is a major contributor to preventable diseases and deaths, and is responsible for a range of social, health and economic ills, which tend to be most pronounced among young people,[90] it is often associated with celebrations, festivities and successful events.

In general, alcohol misuse in the short term can increase susceptibility to depression, suicide, violence, risky sexual behaviours and reckless driving.[91] Childhood and adolescence are critical times for brain development, which undergoes enormous structural and developmental changes and is more vulnerable to alcohol-induced damage.[92] There is also evidence that alcohol use, and in particular heavy use, can impair educational achievement, which can have consequences over a young person's entire life, and early initiation is associated with higher consumption as adults.[93]

Therefore, the consequences of alcohol misuse among children and young people can be profound in both the short and long term, suggesting that scrutinizing and regulating the new and ubiquitous online alcohol marketing strategies should be a priority for policymakers.[94]

As we have seen above, the nature of advertising in the digital age has radically changed and in this contemporary media and communication environment, it appears that alcohol marketing is *"enormously well-funded, ingenious and pervasive […] trying to recruit new generations of drinkers and speaking for pro-drinking attitudes, and heavy alcohol consumption."*[95]

The attractions of digital media marketing are well known by alcohol brands that, like other major marketers, are promoting their products across a variety of platforms ranging from social networks to mobile and smartphones to immersive games and virtual communities,[96] using increasingly sophisticated marketing techniques and

87 WHO, *"Alcohol in the European Union- Consumption, harm and policy approaches"*, 2012, page1; also reiterated in the most recent *"The European health report 2015 – Targets and beyond – reaching new frontiers in evidence_highlights"*, page 2.

88 J. Mulder, J. De Greef, *"Eyes on Ages – A research on alcohol age limit policies in European Member States. Legislation, enforcement and research"*, developed for the Dutch Institute for Alcohol Policies (STAP), July 2013, page 10

89 WHO, "The European health report 2015", page 2

90 The WHO reports: "Alcohol is a cause of non-communicable diseases, including cancers, cardiovascular diseases and liver diseases. Alcohol also harms people other than the drinker, whether through violence on the street or domestic violence in the family…", supra note 73, page 5.

91 Corinne Dobson, "*Alcohol Marketing and Young People: Time for a New Policy Agenda",* commissioned and published by the Australian Medical Association (AMA), 2012, page 2.

92 Supra note 87

93 See for example: http://www.medscape.com/viewarticle/581464

94 As also suggested by the WHO in "Alcohol in the European Union" supra note 87

95 Österberg E. (2004) *"What are the most effective and cost-effective interventions in alcohol control?"* Copenhagen, WHO Regional Office for Europe (Health Evidence Network report; http://www.euro.who.int/document/E82969.pdf, accessed December 2013), page 11.

96 Jeff Chester, Kathryn Montgomery, Lori Dorfman, *"Alcohol Marketing in the Digital Age"*, 2010 Center for Digital

profiting by the growing capability of young people to access content online at any time.

The alcohol industry argues that it does not deliberately target underage drinkers. However, since marketing is now integrated in daily communication and social interactions, which also include sponsorships and other forms of promotions, most young people are exposed to alcohol marketing regularly. According to many studies, this prolonged exposure increases the likelihood that adolescents will start to use alcohol, or drink more if they are already using it.[97]

Research and regulations have largely been concerned with more established marketing media, such as television, print and radio. These remain important avenues but they have not dramatically expanded and increased the sophistication and dispersed nature of marketing in the way that the Internet has.[98]

In May 2010, all 193 Member States of the World Health Organization endorsed a Global Strategy to Reduce the Harmful Use of Alcohol. The marketing of alcohol to children is addressed as follows: *"The exposure of children and young people to appealing marketing is of particular concern […]. Both the content of alcohol marketing and the amount of exposure of young people to that marketing are crucial issues. A precautionary approach to protecting young people against these marketing techniques should be considered."*[99]

However, in the years since then, this area has proved to be very controversial to regulate, given the conflicting interests at stake and the endless evidence battle,[100] and the situation gets even more complicated when it comes to advertising online. Age verification, for example, is one of the principal methods used for protecting underage youth from online alcohol sales and advertising. However, despite attempts on brand websites and Facebook pages, the mechanisms used for age verification seem to be largely inadequate or, at best, increasingly irrelevant. For example, on social network sites, drinks companies claim they are able to restrict alcohol ads from reaching underage youth, but imprecise and faulty mechanisms allow young people to very easily provide false information regarding their birth date.[101]

A study by the Marin Institute found that the nature of social media means that it is particularly difficult to restrict the dispersion of some forms of marketing, especially viral campaigns that are designed to spread themselves broadly, often by being transmitted by community members rather than the company that initiated the campaign. *"Facebook users of all ages,"* the Marin Institute report notes, *"could become*

Democracy & Berkeley Media Studies Group, page 5.

97 See for example: Dring, C, Hope, A, (2001), *"The Impact of Alcohol Advertising on Teenagers in Ireland"* Health Promotion Unit, Department of Health & Children, McClure, A.C., Chin, S.D., Gibson,J. and J.D. Sargent, (2006) *"Ownership of Alcohol-Branded Merchandise and Initiation of Teen Drinking"*, American Journal of Preventive Medicine, 30 (4), 277-283, Snyder, L.B., S.M. Milici F. F, Sun H, and Strizhakova Y, (2006) *"Effects of alcohol advertising exposure on drinking among youth"* Archives of Pediatrics & Adolescent Medicine, 160(1), 18-24.

98 The WHO launched a report giving an overview of the regulations on alcohol marketing which confirms that the attention has been put on more traditional media and not on Internet and social media. See pages 3 and 4 of the "European Status Report on Alcohol and Health 2014 - Marketing and Alcohol" available at: http://www.euro.who.int/__data/assets/pdf_file/0019/244900/Marketing-of-alcoholic-beverages.pdf?ua=1

99 WHO, global Strategy to Reduce the Harmful Use of Alcohol, 2010

100 EuroCare, Alcohol Marketing and Social Media, EuroCare reflections 2014, page 4

101 Supra note 100

fans, view photos of individuals consuming alcohol, post and read comments, and receive updates."[102]

A commentary from the Center on Alcohol Marketing and Youth hosted by the Johns Hopkins Bloomberg School of Public Health asserts that alcohol is far too attractive and also far too easy for young people to obtain on the Internet: *"The fact that there are literally thousands of online outlets selling alcohol, and that purchase attempts by underage persons are successful almost half of the time, tells us how insufficient the protections are for our youth."*[103]

Most European countries, including Italy, Poland and Spain have implemented the AVMSD for all media when it comes to content restrictions. *The advertising for all kinds of alcoholic beverages must comply with the following requirements*:

- Not to be directed to minors and underage persons or to be broadcast in programs for them;
- Not to use minors and underage as performers or, in particular, present minors and underage using these beverages;
- The contents of the commercials must not be related to sport and physical achievements or driving vehicles;
- Not to maintain that the alcoholic beverages possess therapeutic qualities, have stimulating or sedative effects or that they solve personal problems;
- Not to encourage the excessive consumption of alcoholic beverages or present abstention or moderation in a negative light;
- Not to suggest that the high alcoholic content contributes to the good quality of the alcoholic beverages;
- Not to create the impression that the using of alcohol contributes to social or sexual success.

This is backed up by a survey of Welsh teenagers aged 14 to 17 which found that many find it "easy" to get alcohol delivered to their homes. The alcohol awareness charity Alcohol Concern found 15% of this group had bought alcohol online and that two-thirds of these said they used online shopping to buy alcohol, as it was the easiest way to "bypass ID checks". All teenagers had to do was agree to the website terms and conditions and use a debit card and email address – and then simply wait for the alcohol to be delivered. The survey was carried out in tandem with a police sting operation in which 15-year-olds used supermarket websites to get beer, wine and vodka delivered to their door. In 44% of the test purchases, alcohol was delivered to the underage buyers.[104]

In 2009 the Trading Standards Officers in the London Borough of Greenwich established that age restricted videos, age restricted games, knives and alcoholic drinks were being supplied to underage persons by companies which were all

102 P. Anderson, A. de Bruijn, K. Angus, R. Gordon, and G. Hastings, "Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies," Alcohol and Alcoholism 44, n. 3 (January 2009): 229-43.

103 See: http://www.camy.org/press/Press_Releases/Commentary_5_7_12

104 Alcohol Concern, "On your Doorstep, underage access to alcohol via Delivery Services", report, June 2013

household names on the British high street. Clearly this was not just an issue for shady fly-by-nights.

A similar test has been carried out in the USA by two researchers at the Center for Health Promotion and Disease Prevention and published in the American Medical Association Journal. During the study, 100 orders by underage buyers were placed with online vendors. Of these, 45% were successfully received and 28% were rejected as a result of age verification. Most vendors (59%) that used any sort of age verification used weak age verification methods at the point of order, and out of 45 successful orders, 23 (51%) used none. Age verification at point of delivery was also inconsistently applied and, when attempted, failed about half of the time. Overall the study concluded that current age verification procedures used by the vendors do not adequately prevent online sales to minors.[105]

Thus, as things stand, young people receive positive images of alcohol through the marketing of brands and products, and the alcohol industry is a child's primary educator on alcohol both online and offline. Alcohol marketing can shape youth culture by creating and sustaining expectations and norms about how to achieve social, sporting or sexual success – also favoring a very sexualized representation of women – how to celebrate, how to relax and how to belong to a peer group. All of these positive marketing associations push children, despite not being the primary targets, to try a variety of avenues to buy alcohol.

ONLINE MARKETING SLIPS THROUGH THE REGULATORY NET – THE STATE OF PLAY

Alcohol marketing regulations and enforcement appear to be relatively effective when it comes to offline retail and to traditional media such as TV, but it is clear that there is still a way to go if they are to keep up with new online technologies.

The Television Without Frontiers Directive (TWF), originally issued in 1989, attempted at that time to harmonize alcohol advertising regulations. The current EU Audio Visual Media Services Directive (AVMSD) 2010/13/EU sets out criteria in relation to television advertising alcohol (see box below).

At the European level there are also Council Recommendations of 5 June 2001 on the drinking of alcohol by young people, in particular children and adolescents (2001/458/EC). The recommendations stated among other things that alcoholic beverages should not be designed or promoted to appeal to children and adolescents. The recommendations listed several characteristics that are found to be specifically appealing to young people, for example the use of styles associated with youth culture. The Council Recommendations however, are not legally binding. The Council also invited the European Commission to put forward a comprehensive strategy, which took a long time to deliver and was only finalized in 2006. The "EU Alcohol Strategy" is a piece of soft law that sums up five priority themes relevant in all Member States. It includes messages such as: protect young people, children

105 Rebecca S. Williams, Kurt M. Ribisl, "Internet Sales to Minors", Arch Pediatr Adolesc Med. 2012; 166(9): 818-813

and the unborn child; and inform, educate and raise awareness on the impact of alcohol consumption.[106]

The strategy officially came to an end in December 2012 but its impact and added value to support Member States in reducing the related alcohol harms were evaluated twice, in 2009 and 2013. The report[107] concluded that the strategy was still relevant and had brought added value, which suggests that a new and updated strategy would be necessary. Although the Commission's intentions are to follow up, no new proposal has been introduced yet for an updated strategy, but a new EU action plan on youth drinking was proposed as part of the Health Programme 2014–2020.

The "Action Plan on Youth Drinking and on Heavy Episodic Drinking (Binge Drinking)", which was also endorsed by the Committee on National Alcohol Policy and Action (CNAPA), among its policy areas includes reducing exposure of youth to alcohol marketing and advertising. The influence of marketing exposure on adolescents is reiterated in the action plan by mentioning the studies of the Science Group report of the European Alcohol and Health Forum which states: *"Marketing and advertising for alcoholic beverages must not target and should not expose children and young people, and should not encourage heavy episodic (binge) drinking. Advertising must be in compliance with the Audio-Visual Media Services Directive and with national regulation in Member States. Effective enforcement and self-regulatory measures also play an important role in this context."*[108]

The AVMD is currently being reviewed and the Commission launched a public consultation with the specific aim of improving the EU rules for broadcast and on-demand audio-visual media services in the digital age, and how best to protect children and other viewers, support European creative works, stimulate our rich cultural diversity, promote access to information and regulate advertising in the audio-visual online world.[109]

This review is indeed a great opportunity for the Commission to close some of the existing loopholes relating to alcohol marketing online that allow the issues described in the previous paragraph to exist, such as:

- Rules governing advertising on social media platforms, online games and contests organized by the alcohol industry.
- The growing issue of the alcohol industry sponsoring events with a clear appeal to young audiences, such as music festivals, football matches, etc.
- Clear rules on age verification on the Internet.

Beyond these examples of soft laws, a number of countries have self-regulatory organizations that oversee the marketing activities of the alcohol industry. Although individual self-regulatory codes differ to meet national or regional market needs, they are often based on the Advertising and Marketing Communication Practice: Consolidated International Chamber of Commerce (ICC) Code and its basic principles.

106 To learn more please visit: http://www.eurocare.org/resources/policy_issues/eu_alcohol_strategy
The evaluation was conducted by CNAPA and the report is available here: http://ec.europa.eu/health/alcohol/policy/index_en.htm

107 The evaluation was conducted by CNAPA and the report is available here: http://ec.europa.eu/health/alcohol/policy/index_en.htm

108 "The Action Plan on Youth Drinking and on Heavy Episodic Drinking (Binge Drinking)", page 12.

109 To see the official consultation please check: https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st

As with the Council Recommendations, these are not legally binding and, as we have seen above in relation to clearly identifiable marketing communications, they are very poorly policed.

> In Germany no binding restrictions exist for TV or Internet alcohol advertising except for a general rule regarding the protection of minors. There is a voluntary code of conduct for alcoholic beverages in place from 1976, and most of the restrictions on advertising, sponsorship or brand identification are left to voluntary basis codes.

Another type of self- regulation can be found in the form of voluntary codes of practice drawn up by coalitions of industry participants, e.g. The Brewers of Europe, European Forum of Responsible Drinking (EASA/EFRD), Mature Enjoyment of Alcohol in Society (MEAS- Ireland).

Many of these codes, including those drawn up by specific companies, e.g. Diageo and SABMiller, have specific rules for digital media and the biggest advertisers,[110] and the World Federation of Advertisers recently presented a *"Responsible Marketing Pact"* to "scale-up" self-regulation in the digital world. It stated three main aims:

1. Prevent minors from seeing alcohol marketing on social media. That includes common standards for Facebook sponsored stories and user-generated content, and controls on sharing and forwarding content.
2. Limit exposure of minors to alcohol ads. Such ads would be limited to media where at least 70% of the audience is over the legal purchase age of 18 (or 16 in some European countries).
3. Ensure that the content of alcohol ads appeals primarily to adults.

As with advertising in general, however, this proliferation of pacts and initiatives does not in and of itself necessarily lead to better protection for children. In the case of food and non-alcoholic drinks marketing, a recent, independent, and methodologically robust systematic review of statutory provision and industry-led voluntary codes found that there was a sharp division of evidence on the effectiveness of industry-led codes, such that industry-funded reports found remarkably high levels of compliance that were not replicated in scientific peer-reviewed studies of compliance to the same codes.[111] The self-regulation of alcohol marketing for digital media has been described by many researchers and NGOs working in the field as "entirely inadequate"[112] and inherently it favours the industry. For example, the WFA stipulation that alcohol advertising be limited to sites with an audience of over 70% adults does not take into account the sheer numbers of website visitors. For some very popular sites 30% of an audience could amount to tens of millions of young people, potentially hundreds of millions. Limits of this kind should take into account raw numbers rather than simply crude percentages.

The issue of user-generated content also raises a number of issues which are only partially addressed by the current regulatory codes. Social media communications are

110 These include: AB InBev, Bacardi, Brown-Forman, Carlsberg, Diageo, Heineken, Pernod Ricard and SAB Miller

111 Galbraith-Emami, S. and Lobstein, T. (2013). *"The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review"* Obesity reviews 14(12), 960-974

112 See Hastings et al, 2010 and the British Medical Association report, 2009:25

dynamic and rapid while existing regulations are reactive, relying on public complaints and subsequent adjudications.

THE UK CO-REGULATION SYSTEM

Alcohol advertising in the UK is subject to controls that seek to prevent advertisers targeting and appealing to young people. The controls cover broadcast, print and online advertising and are a mix of co-regulation (with OFCOM) and self-regulation, administered by the Advertising Standards Authority (ASA) and the Portman Group. ASA is responsible for all advertising standards and consumer complaints, both broadcast and non-broadcast. As a result, all alcohol advertisement must adhere to the self-regulatory UK Code on Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP code) and the co-regulatory UK Code of Broadcast Advertising (BCAP code) that is overseen by OFCOM. From 2011 the CAP code applies in full to marketing messages online, including the rules relating to misleading advertising, social responsibility and the protection of children.

It is hard to see how a system that can barely keep up with conventional advertising[113] can hope to deal with the current digital environment where marketing campaigns may be highly impactful but consist of temporary messages lasting hours and days rather than weeks and months.

FRANCE: THE LOI EVIN

The articles relating to alcohol advertising in French law can be summarized as follows:

- No advertising should be targeted at young people;
- No advertising is allowed on television or in cinemas;
- No sponsorship of cultural or sports events is permitted;
- Advertising is permitted only in the press for adults, on billboards, on radio channels (under specific conditions), at special events or places such as wine fairs and wine museums;
- When advertising is permitted, its content is controlled: messages or images should refer only to the qualities of the product such as degree, origin, composition, means of production, and patterns of consumption. A health message such as: "alcohol abuse is dangerous for health "must be included on each advertisement.

In 2009 the law was amended to allow for alcohol advertising on online platforms, however this law is seen by many working in the field of alcohol policy as one of the most robust pieces of legislation that should be adopted as a minimum standard throughout Europe.

113 Baggott, 2006:33

Moreover, it seems to be possible for new terms and types of advertising to be defined and protected at short notice. An example is "Heritage Advertising" where alcohol advertising that relies on the national or regional heritage of a product has special status. This has led, for example, to amendments in the Advertaising Standards Authority for Ireland (ASAI)code in Ireland. It now states that the code does not apply to *"…heritage advertising, where the advertising is not part of the advertisers' current promotional strategy and is published in an appropriate context."*[114] What defines an "appropriate context" remains unclear since advertising referring to a specific heritage of a country (Belgium and beers for example) can be found in many brand websites and social media as well.

THE UNIQUE CASE OF FINLAND

In Finland a new law concerning advertising of alcohol on the Internet, specifically on social media and online games, entered into force in January 2015. The Finnish Alcohol Act specifically states that:

- Alcohol advertising in digital games and gaming apps in consoles, tablets and mobile phones is banned;
- Product placement in video games is banned;
- All kinds of competitions and prizes in social media and "real life" alike are banned (e.g. if you "like us" you can win the tickets for a match/concert).

Brand advertising through conventional Web pages continues to be allowed, within the existing rules on targeting, but:

- "Share" buttons are not allowed;
- Consumers' comments on the product are not allowed if they are considered part of the marketing.

Communication by private citizens is not considered commercial communication, if no money is involved, so the restrictions do not apply to individual FB pages, blog texts, social media postings, private emails, etc.

114 ASAI code 2012 at: http://www.asai.ie/asai-code/scope-and-application/

BUSINESS, CHILDREN, THE INTERNET AND RIGHTS

As noted earlier, the Treaty of Lisbon requires the EU to promote the protection of the rights of the child.[115] The rights of the child also form part of the fundamental rights that the EU is committed to respect under Article 24 of the Charter of Fundamental Rights of the European Union. In addition, all EU countries have ratified the United Nations Convention on the Rights of the Child.[116]

In this Policy Paper we have explored the ways in which Internet business models throw up a range of issues relating to violations of children's rights and, along with these, the responsibility of businesses in Europe to respect them. We have seen that the vital real-world separation of adult commercial activities from children's commercial activities has simply not been reproduced online in the dizzy rush to embrace the creative and monetizing opportunities of digital space.

How then can the EU harness and reinforce existing provisions to ensure that the commercial actors on the Internet respect the fundamental rights of our youngest citizens?

Specific consumer protection laws[117] in the online world have yet to catch up with advances in digital marketing, but existing broad prohibitions on unfair and deceptive acts and practices, if properly enforced, can certainly be utilized to protect children and teens from unfair and deceptive digital marketing. We have seen how individual marketing communications via apps have been found to be misleading and aggressive as well as deceptive and containing direct incitements to purchase. Yet we have seen no prosecutions. Surely this is an area for pan-European action?

We have also seen that children's privacy is not accorded special protection when such data are gathered for commercial purposes. This is despite the fact that common EU rules have been established

115 Article 3, "protection of the rights of the child"

116 The articles on which this paper built its foundation are quoted at the beginning of the document.

117 In relation to consumer policy there has not been an equivalent focus on the protection of children in the approach taken by the Union. In the published summary on consumer protection by the Commission there is limited reference to the role of children as consumers. For more details please see: "The European Union Explained: Consumers – Putting the consumer first", updated November 2014

to ensure that personal data enjoy a high standard of protection everywhere in the EU, and we all have the right to complain and obtain redress if our data are misused anywhere within the EU.[118]

Perhaps one of the most striking features of privacy law and practice in the EU as it affects children and young people is that it has never been the subject of a major or comprehensive study by the leading agency with responsibility for considering policy in this area, the Article 29 Working Party.[119]

In relation to age verification there is a tacit acknowledgement that the current state of affairs is not satisfactory and is not tenable in the long run. A number of industry initiatives have made some progress. However, much remains to be done. No one is under any obligation to verify that a child is making a truthful statement about their age and no liability can arise in relation to such matters. The only time an obligation or a potential liability comes into play is when the site acquires actual knowledge that a person on their site is below the specified age. In such circumstances, where is the incentive to change anything? This is a classic example of how the external stimulus of regulatory action appears to be the only method that is likely to achieve any sort of worthwhile change.[120]

It is very obviously the case that parts of the European institutions, in particular the Commission, have been strongly engaged with children's interests as demonstrated by the commitments previously mentioned. Moreover, the Safer Internet Programme and the Daphne Programme were perhaps two of the best known examples which in the past have been well resourced and supported. However it seems that more progress is needed, at a corporate level and across the Commission and EU Institutions as a whole, to ensure that the importance of children's rights are strongly embedded.

SELF-REGULATED ADVERTISING STANDARDS

Beyond the regulation of trading practices and privacy, we have seen that the EU has framework legislation in place which sets out minimum standards on advertising to children for its Member States through the Audiovisual Media Services (AVMS) Directive. This is undergoing a thorough revision to tackle audio-visual services in the digital age, while harmful Internet content accessible by children is regulated by the Recommendation on the Protection of Minors and Human Dignity and the Right of Reply.[121]

Every Member State has then its own internal set of regulations. For example, Greek legislation prohibits advertising for toys on television between 07:00 and 22:00, and in Sweden television advertising addressed to children under the age of 12 is prohibited. In the UK in 2007, the statutory television regulator Ofcom introduced rules prohibiting the advertising during children's programming of products high in fat, salt or sugar.

118 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML

119 http://ec.europa.eu/justice/data-protection/article-29/index_en.htm

120 A fact tacitly acknowledged by the Commission in its support for a number of initiatives designed to explore age verification techniques.

121 See EASA website to read more on this regulation: www.easa-alliance.org

In Denmark, Belgium and Italy advertising to children on TV is also restricted and well regulated.

In most countries advertising is also governed by self-regulatory codes of conduct. Advertising self-regulation is built on different levels. On a global level, the International Chamber of Commerce has drafted a global code on marketing communications – the ICC Consolidated Code on Advertising and Marketing – which all self-regulatory codes in the world should follow. This includes special provisions for children, including the requirement to be responsible and sensitive to children's needs and levels of understanding. The rules take into consideration the inexperience and credulity of children as well as the social and cultural values of society. The Code advocates the basic principle that marketing communication should be legal, decent, honest and truthful, and further delves into matters of data protection and privacy related specifically to children's personal information. These issues are covered in the general provisions of the Code as well as in Chapter D which focuses on Digital Interactive Media.

EASA, the European Advertising Standards Alliance, the umbrella organization of the European Self-Regulatory Organisations (SROs), published a best-practice guidance with regard to digital marketing communications. The majority of SROs have incorporated these rules into their national codes, and some have introduced additional rules of their own regarding advertising to children.

However, the existence of these self-regulatory codes does not guarantee compliance, and the evidence shown in this Policy Paper implies that the codes do not yet appear to have been successfully applied to the digital environment nor do they appear to be overseen in a uniform manner across the EU. Recent evidence on compliance with codes governing food and non-alcoholic drink marketing to children is not encouraging and, indeed, has led the WHO to conclude that governments and not industry should be the leading stakeholders when it comes to protecting children's wellbeing.[122]

If the self-regulation of advertising was properly policed then the misleading advertising that led to in-app purchases that cost EU parents thousands of euros would never have been allowed. If the self-regulation of advertising was properly policed then advergames and other immersive digital techniques would be clearly signposted in a manner that all children recognize. If the self-regulation of advertising was proactive in protecting children then it would put the onus on industry to show that new techniques are in children's interests before they can be used. As it is, advertisers seem to be able to introduce new techniques as and when they wish, with the onus placed upon academic researchers and children's interest groups to prove that a technique is harmful once it has already been rolled out and used on children. In the pharmaceutical industry no drug can be released for sale to the general public until it is proved that it is safe for consumption. The same precautionary principle should be in place when it comes to commercial digital tactics and children.

There would thus seem to be a case for a body independent of the advertising industry to audit the behaviour of the industry when it comes to advertising to children online and respecting their rights, specifically their best interest, as stated in the UNCRC and all the relevant European treaties and strategies mentioned so far.

122 Supra note 87

CONCLUSIONS

In a landmark study, "The Impact of the Commercial World on Children's Wellbeing", Professor David Buckingham found that:

"New media and marketing techniques raise some ethical concerns about potential deception and threats to privacy: the public is not currently well-informed about this area, and existing regulation is insufficient…"

Our report entirely bears out and supports Professor Buckingham's view.

One in five of all Internet users in the EU is a child.

Long-established rules and practices designed to protect children from unfair commercial practices in the physical world, e.g. in relation to deceptive or aggressive advertising, or barring access to legally proscribed areas or age-sensitive materials, have not been adequately translated into the virtual space.

Improving media literacy among children, their parents and teachers must continue to be a high priority, but online businesses need to show a much greater willingness to deploy technical tools to help them discharge their ethical and legal responsibilities in respect of advertising, marketing and selling to children.

While welcoming the broad approach of the European Commission's "Strategy for a Better Internet for Children", there is concern that fragmented responsibility for the deliverables, and lack of resources to ensure a consistent approach to children's rights, is seriously undermining its implementation. Here are three recent illustrations:

1. The General Data Protection Regulation made unexpected, fundamental and radical changes to young people's independent right of access to online services. It did so without having completed an impact assessment and without any consultation with appropriately qualified sources of expertise.

2. The Telecoms Single Market Directive has important implications for online child protection, yet these appear to have been overlooked or marginalized in a discussion about Internet neutrality.

3. In the discussions on global Internet governance which took place around the adoption of the NetMundial statement, the EU failed to secure any reference to the position of children as Internet users, seemingly because they did not raise the issue.

The Commission has long had powerful tools that allow it to act in relation to challenges arising from the abuse of monopoly power. However, as online businesses have evolved, a rapid convergence is underway in respect of data privacy and consumer protection concerns. There is therefore an urgent need to develop a new EU-wide institution with the ability to engage with enterprises in a more granular way in the interests of consumers in general and children in particular. The USA's Federal Trade Commission provides a potential model. It has substantial powers in respect of online child protection.

The EU should look upon the goal of improving online safety for children and young people in rather the same way as it does the promotion of technological innovation. The Commission should allocate financial resources which allow it to become a joint investor with and partner of technology companies and other agencies, with a view to encouraging the development of solutions to the remaining challenges in the field of online child protection.

RECOMMENDATIONS

POLICY AND LAW REFORMS

1. Sustainable mechanisms must be developed to increase EU institutions' engagement with children's rights and civil society organizations' capacity to engage constructively in the evolution of the Digital Single Market in relation to online consumer protection issues in general and online child protection in particular

2. A Communication or Staff Working Document on children and the Digital Single Market should be developed, in which the role of children as economic actors and their specific rights are explicitly recognized.

3. The Unfair Commercial Practices Directive should be amended. Children should no longer be considered as simply a subset of vulnerable consumers.

4. The principle of caveat emptor should be broadened to encompass the notion of caveat vendor in respect of children. This implies that companies should be under an obligation to know who their customers are, particularly if the enterprise is active in a market or is providing a product or service known to be popular with children.

Companies selling goods and services to children should be obliged to present all relevant information about the product or service and their data collection and usage policies in accessible language. In addition, after-sales service, refunds and compensation policies should recognize that children cannot be treated identically to adult consumers, or held to the same standards.

IMPACT ASSESSMENTS

5. High-level mechanisms must be established to ensure that all EU legislative and other measures affecting children and

technology developed within EU institutions draw on timely research and an impact assessment.

6. All future policymaking concerning e-commerce, both generally but also specifically in relation to tracking technologies, online advertising and data collection practices, should include an impact assessment in respect of children.

7. Before launching any new marketing or advertising initiative, companies and advertising agencies should satisfy themselves that they have considered all the relevant child safety and child welfare aspects, including data collection and usage.

A NEW AGENCY

8. There is an urgent need to develop a new EU-wide agency with the ability to engage with enterprises in a more granular way in the interests of consumers in general and children in particular. The USA's Federal Trade Commission provides a potential model. It has substantial powers in respect of online child protection.

PRIVACY STANDARDS

9. Data Privacy Commissioners should revisit the issue of companies' obligations to children in the context of e-commerce.

10. Data Privacy Commissioners should be placed under a specific obligation to inspect data security standards and privacy practice within companies and other organizations in relation to websites and apps popular with children or which collect data from children.

11. Individuals with access to potentially sensitive data about children should be subject to pre-recruitment checks and be appropriately managed once employed.

EDUCATION AND AWARENESS

12. Continued and massively increased investment in education and awareness campaigns is essential to promote greater media literacy on the part of children and young people, their parents and teachers and professionals who work with children.

AGE VERIFICATION

13. In order to minimize the possibility of children being able to make unlawful purchases online, the EU should give priority to the establishment of age verification systems which can work over the Internet, in respect of any and all goods and services which have legally specified age limits within any Member State. Optimally, any age verification system should operate independently of the payment mechanism being used.

14. Consideration should be given to establishing a regime under which, in order to sell age restricted products or services online, a licence would be required. A licence would only be issued if the vendor shows they have put in place a robust age verification system which works at the point of sale and, in appropriate cases, also at the point of delivery.

15. Companies supplying online payment facilities or other support services to online businesses selling products or services which are the subject of legally defined age limits should be required to ensure that the business concerned is compliant with relevant legislation.

POLICING ADVERTISING STANDARDS

16. In relation to advertising, a non-industry EU-wide body is needed to ensure that self-regulatory codes on advertising reflect satisfactory standards and that they are being properly enforced and upheld in a timely manner within each Member State.

INVESTING IN ONLINE CHILD SAFETY

17. The Commission should become more actively engaged as an investor in technology companies seeking solutions in the field of online child protection.

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