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What Does The 'Best Interests of the Child' Mean for Protecting Children's Digital Rights? A narrative literature review in the context of the ICO's Age Appropriate Design Code

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Abstract

The ICO's Age Appropriate Design Code puts the best interests of the child at the front and centre of its requirements. However, the best interests of the child is an uncertain and contested principle. This article reviews the current literature in the field of children's digital rights to examine whether there is consensus on what the best interests of the child means, in order to inform the application of this important principle. The article also explores issues relevant to the best interests of the child which have not currently received attention in the digital rights literature, but which have arisen in different fields. It is argued that should digital service providers justify their design decisions on the basis that they promote the best interests of the majority of children yet harm those of a minority, or that economic interests outweigh the best interests of the child the ICO will not be able to avoid having to come to conclusions as to where an appropriate substantive balance lies. This article concludes that how companies and the ICO should determine the best interests of the child needs to be operationalised in clear, consistent ways.

Introduction

This article on the best interests of the child in the context of children's digital rights is prompted by the Age Appropriate Design Code ('the Code').[1] This Code, in force from 1 September 2021 and designed by the Information Commissioners Office (ICO), places the best interests of the child at the front and centre of its requirements.

The Code 'applies to "information society services likely to be accessed by children" in the UK'[2] and is a set of 15 principles as to how children's personal data should be processed in order for digital service providers to be compliant with their legal obligations under the General Data Protection Regulation (GDPR). Its leading principle (found in section 1 of the Code)[3] is that the "best interests of the child" are the primary consideration when designing and developing online services. This principle derives from Article 3 of the United Nations Convention on the Rights of the Child 1989 (CRC),[4] ratified by the United Kingdom on 16 December 1991. As a consequence of the Code, 'The principle of "the best interests of the child" is therefore both something that [information society services] specifically need to consider when designing your online service, and a theme that runs throughout the provisions of this code.'[5]

Therefore, how to operationalise the rights protections of the CRC to ensure the effective protection of the best interests of the child by industry and its regulation by the ICO is now a core problem which urgently needs to be addressed. However, the best interests of the child (BIC) is characterised by how uncertain the central principles of this concept actually are.

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[1] ICO, 'Age Appropriate Design: A Code of Practice for Online Services' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/> accessed 21 February 2022

[2] ICO, 'Age Appropriate Design: Services Covered by This Code' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/services-covered-by-this-code/> accessed 21 February 2022

[3] ICO, 'Age Appropriate Design: 1. Best interests of the child' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/1-best-interests-of-the-child/> accessed 21 February 2022

[4] United Nations Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990

[5] ICO, 'Age Appropriate Design: 1. Best interests of the child' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/1-best-interests-of-the-child/> accessed 21 February 2022

There is little legal, academic, or practice-based agreement of what the 'best interests of the child' means, either in the abstract or practice.[6]

It is therefore timely to consider what, if any, conclusions can be drawn about how the BIC is conceptualised in the existing academic literature on protecting children's digital rights. Part 1 of this article covers three important questions for determining the meaning of the BIC in the context of children's digital rights. First, what kind of legal rights do children have in the digital space? Second, what is the relationship between the best interests of the child and the other human rights provided for in the CRC? Third, what does it mean to say that the BIC 'shall be a primary consideration'?

The second part looks beyond the literature on the BIC in the digital rights context and draws on debates and controversies in other fields where the BIC is relevant, to identify outstanding issues which are likely to arise when interpreting the BIC principle in the Code. The issues identified are: whether the BIC is a procedural or substantive right; practical problems with the application of the 'primary consideration' guarantee; the risk that the BIC may be co-opted; the child's agency and the role of parents, and; the question of who determines the what is in the BIC.

Part 1

1. Review Methodology

Methodologically, this part comprises a narrative literature review aimed at identifying and categorising current knowledge in the field of the best interests of the child in digital rights. A purposive search was combined with reference harvesting to identify literature. Literature was found first by combining the search terms 'best interests' and 'digital' in academic journal databases HeinOnline, Westlaw, and Google Scholar. The references and bibliographies of these were reference harvested for further literature missed by the purposive search. Reference

[6] Elaine E Sutherland and Lesley-Anne Barnes Macfarlane, 'Introduction' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press 2016), 9-17

harvesting is a supplementary search process recommended as highly effective for identifying relevant social science literature for review which may be missed by database searches.[7]

Narrative literature reviews seek to survey the state of knowledge on a particular topic and to 'reveal problems, weaknesses, contradictions, or controversies'.[8] Narrative reviews may 'cover a wide range of issues within a given topic, but they do not necessarily state or follow rules about the search for evidence.'[9] A narrative literature review methodology was selected as most appropriate because of its 'ability to construct a critical analysis of a complex body of literature'.[10]

The literature review was conducted in June-August 2021 and covers academic literature on children's digital rights. Most, although not all, of the literature uncovered by the review has been published since 2016, which suggest that academic interest in this topic has only recently gained pace.

The aim of the review was to identify current trends in academic writing on this subject and therefore excludes publicly available resources published by NGOs. It has also not included any material generated by governmental organisations. One key purpose of governmental material is standard setting, even in its soft law forms. One aim of the literature review is to identify theoretical or doctrinal norms against which such material can later be evaluated, so their inclusion in this review would defeat the object of the exercise: this literature review would end up describing pre-existing standards, which would then become the benchmarks against which those same standards would be evaluated.

A focus on the academic literature is justified as a discreet line of enquiry because, at its best, academic literature intellectually presses ahead of legal standards, and is constructed without the political compromises which legal instruments are necessarily subject to.[11] However, it must be acknowledged that much of the academic material which was found during

[7] Diana Papaioannou, Anthea Sutton, Christopher Carroll, Andrew Booth, Ruth Wong, 'Literature searching for social science systematic reviews: consideration of a range of search techniques' (2010) 27 Health Information and Libraries Journal 114

[8] Roy F Baumeister & Mark R Leary, 'Writing Narrative Literature Reviews' (1997) 1 Review of General Psychology 311, 312

[9] John A Collins & Bart CJM Fauser, 'Balancing the strengths of systematic and narrative reviews' (2005) 11 Human Reproduction Update 103, 104

[10] George Karpetis, 'Social Work Skills: A Narrative Review of the Literature' (2018) 48 The British Journal of Social Work 596, 598

[11] We recognise that this may be an overly idealised vision of academic literature.

the literature search is descriptive or analytical in nature, and that purely normative work makes up only a small proportion of the literature reviewed.

Part 2 of this article uncovers issues for the ICO's Age Appropriate Design Code arising from the academic literature on the best interests of the child, from both within and without the literature on children's digital rights. This article therefore does not purport to interrogate whether the Code meets children's rights standards found in key legal texts, such as General Comments 14 and 25 of the Committee on the Rights of the Child (on the right of the child to have his or her best interests taken as a primary consideration and on children's rights in relation to the digital environment, respectively).[12] The scope of enquiry permitted by an article length piece also precludes this article from evaluating whether or not those key international legal instruments align with current academic understandings of the best interests of the child in the digital sphere. However, this article seeks to contribute to that potential future research exercise by reviewing current trends in academic writing on this subject.

The scope of the review is limited to material on children's *rights* in the digital sphere. It therefore excludes consideration of legal regimes for protecting children online which are not rights based, including the US Children's Online Privacy Protection Act (COPPA). The literature review was conducted in English and only English language publications were included in the review. These limitations are likely to have resulted in the creation of a Euro-centric output.

2. What kind of legal rights do children have in the digital space: human rights, best interests of the child, or specific legal rights?

2(a) Specific legal rights

The first type of article is descriptive of a particular legal regime, and so describe how the different kinds of legal principles interact with children in the digital sphere. Oswald et al survey the impact of a range of legal principles in UK law on children's participation in reality television programmes, including statutory rights (from the Data Protection Act 1998),

[12] Committee on the Rights of the Child, 'General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)' (29 May 2013, CRC/C/GC/14); Committee on the Rights of the Child, 'General Comment No.25 (2021) on children's rights in relation to the digital environment' (2 March 2021, CRC/C/GC/25).

regulation (by Ofcom), and in common law rights (the tort of misuse of private information).[13] Bessant also surveys a range of torts in English law which might apply to 'sharenting'[14] and places these in a context that 'Where private information is shared without a child's consent or knowledge, this may infringe their human rights'.[15]

This human rights context arises from the impact of the Human Rights Act 1998 (HRA) on UK law. Section 6 HRA requires courts to act in accordance with the European Convention on Human Rights (ECHR). This means that the right to respect for private life (article 8 ECHR) represents a transformational influence on the development of English torts of duty of confidence and misuse of private information.[16]

Both Bessant and Oswald et al are concerned with the legal regulation of the public sharing of private information about children: particularly the broadcast of information and images of a child through television, print, and social media. The conclusions raised by these articles clearly have direct relevance to children's digital privacy when it comes to digital services which permit children (or their parents) to publish private information about themselves. Less evident is the relevance of the existing case law to privacy issues where data is held, as it were, behind closed doors. The collection of private information of digital users for practices such as tracking for behavioural advertising[17] and dataveillance[18] are pervasive practices online. They are also hidden, in that the data being collected is not publicly broadcast and/or only shared or sold privately between data users.

Digital data collection practices where the data is not intended for public consumption raises different issues to those underlying the existing case law on children's privacy under

[13] Marion Oswald, Helen James and Emma Nottingham, 'The Not-so-Secret Life of Five-Year-Olds: Legal and Ethical Issues Relating to Disclosure of Information and the Depiction of Children on Broadcast and Social Media' (2016) 8 Journal of Media Law 198

[14] 'Sharenting' is 'the "habitual use of social media to share news, images, etc of one's children."' Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 CL 7, 7

[15] ibid 8

[16] Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 Modern Law Review 726

[17] Ingrid Lambrecht, Valarie Verdoodt and Jasper Bellon, 'Platforms and Commercial Communications Aimed at Children: A Playground under Legislative Reform?' (2018) 32 International Review of Law, Computers & Technology 58, 70; Valarie Verdoodt, 'The Role of Children's Rights in Regulating Digital Advertising' (2019) 27 International Journal of Children's Rights 455.

[18] Deborah Lupton and Ben Williamson, 'The Datafied Child: The Dataveillance of Children and the Implications for Their Rights' (2017) 19 New Media and Society 780.

Article 8 ECHR. The existing case law typically arises from claims brought against television or print media where they publish information and/or images about children for public consumption.[19] The public nature of these invasions of privacy are relevant to the reasoning deployed for finding a privacy breach in such cases, as described by Bessant:

> In *Weller*, Lord Dyson explicitly considers the need for the child claimants to be protected from embarrassment, bullying and "potentially more serious threats to their safety" which might be caused by publication of their images. Even in cases brought by adult claimants, the courts have been willing to provide injunctive relief to prevent publication of information which might cause these claimants' children embarrassment or distress or result in bullying.[20]

Bullying, embarrassment, and distress are not the kind of harms to children caused by forms of digital privacy invasions which are less public than the publication of private details about the individual. It is significant, then, that the Code has specific guidance addressing the permitted use of data for marketing and behavioural advertising,[21] geolocation tracking,[22] and profiling.[23]

It can be said with confidence that the Code must be applied in a way which is compatible with a Convention Right: the ICO is a public authority to which s6 HRA applies. In this context it is potentially significant that the courts have recognised a broader public policy rationale for Article 8 ECHR protection of children's rights. In *Re F (adult: court's jurisdiction)* Sedley LJ said that, 'The family life for which Article 8 requires respect is not a propriety right vested in either parents or child: it is as much an interest of society'.[24] However,

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[19] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 CL 7, 14.

[20] ibid 13.

[21] ICO, 'Age Appropriate Design: 5. Detrimental use of data' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/5-detrimental-use-of-data/> accessed 24 February 2022.

[22] ICO, 'Age Appropriate Design: 10. Geolocation' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/10-geolocation/> accessed 24 February 2022.

[23] ICO, 'Age Appropriate Design: 12. Profiling' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/12-profiling/> accessed 24 February 2022.

[24] *Re F (Adult Patient)* [2000] EWCA Civ 3029, [2001] Fam 38.

the applicability of this finding about the nature of Article 8 ECHR's protection of *family* life to protections of children's right to *private* life is unclear. The precise interaction between the Code, English law privacy torts, and the HRA is something which will require further research (and, likely, litigation).

2(b) CRC rights

The literature engages with the BIC most often as a specific human right, or as an overarching principle amongst other substantive human rights. One of the most common approaches to the question of legal rights for children in the digital space is for scholars to identify the human rights in the CRC which are particularly relevant. In total the surveyed literature identifies 24 different substantive human rights in the CRC (including Article 3 CRC on the best interests of the child) as being potentially impacted by children's access to the digital space.[25] The right to privacy (Article 16 CRC) is by far the most cited CRC right in the literature. However, the range of CRC rights cited reflects the range of activities which children engage in digitally (such as personal and political expression (Article 13 CRC), association (Article 15 CRC), education (Article 28 CRC), and leisure (Article 31 CRC)), as well as the range of risks to which they are potentially exposed (such as mental violence (Article 19 CRC), economic and sexual exploitation (Articles 32&34 CRC), drugs (Article 33 CRC) and trafficking (Article 35 CRC)). Explicit protections for minority and indigenous children,[26] and for disabled children[27] also remind us that specific groups of children have particular needs, vulnerabilities, and CRC rights which must be considered in the digital space.

Alper and Goggin nominate a range of CRC rights as being relevant to children (and particularly to disabled children) in the digital space, and include the best interests of the child as a general principle for decision-making.[28] Verdoodt recites a range of specific CRC rights relevant to regulating digital advertising,[29] and discusses the BIC as one of the overarching

[25] Articles 2-3, 6, 8, 12-17e, 19, 23, 28-37, 38 CRC.

[26] Sonia Livingstone, John Carr and Jasmina Byrne, 'One in Three: Internet Governance and Children's Rights' (Global Commission on Internet Governance, Paper Series No 22, November 2015), 10 [NB this is the exception that proves the rule on exclusion from the literature review of NGO papers. It has been included because it is heavily cited by the other work included in this review.]

[27] Meryl Alper and Gerard Goggin, 'Digital Technology and Rights in the Lives of Children with Disabilities' (2017) 19 New Media and Society 726, 733

[28] ibid 733-735

[29] Verdoodt *supra* n17, 460-74

principles.[30] Lambrecht et al consider personalisation in marketing as potentially not being 'in line with children's fundamental rights' in general[31] and tracking 'for behavioural advertising purposes' as not in the best interests of the child.[32] Phippen treats Article 3 CRC as a specific right engaged by the use of technology to track the physical location of a child or to pacify a child, alongside other CRC rights.[33] Lievens et al do the same in more general terms, covering all digital technologies.[34] Livingstone and Bulger bundle Article 3 CRC together with other participation rights (namely, Articles 12, 13, and 15 CRC).[35]

However, the analysis of the BIC in this way is consistently limited. Attempts in the literature to spell out what the BIC means, beyond its core textual tenets in the CRC, are rare. The difficulty that many researchers have found when trying to integrate Article 3 CRC into their analysis is demonstrated by Livingstone and O'Neill's one sentence account of the best interests of the child which precedes a detailed account of how almost all the specific rights of the CRC 'offers a sound guide to policy action.'[36] However, discussion of Article 3 CRC is limited to a description of its core tenets and an acknowledgement of the difficulties that it presents:

> A cornerstone of the UNCRC is the statement that 'in all actions concerning children, whether undertake 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 3) although the question of determining what are the child's 'best interests' remains a vexed one.[37]

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[30] ibid 464

[31] Lambrecht, Verdoodt and Bellon, *supra* n17, 68

[32] ibid 70

[33] Andy Phippen, 'Online Technology and Very Young Children: Stakeholder Responsibilities and Children's Rights' (2017) 5 International Journal of Birth and Parent Education 23, 25

[34] Evba Lievens and others, 'Children's Rights and Digital Technologies' in U Kilkelly and T Leifaard (eds), *International Human Rights of Children* (Springer 2019), 492

[35] Sonia Livingstone and Monica Bulger, 'A Global Research Agenda for Children's Rights in the Digital Age' (2014) 8 Journal of Children and Media 317, 320

[36] Sonia Livingstone and Brian O'Neill, 'Children's Rights Online: Challenges, Dilemmas and Emerging Directions' in Simone van der Hof, Bibi van den Berg and Bart Schermer (eds), *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer 2014), 22

[37] ibid

That the best interests of the child is an indeterminate principle is widely recognised beyond the digital rights literature. Eekelaar and Tobin ask rhetorically:

> Why, then, does the principle of the *best interests of the child* cause such difficulty? There is of course the perennial concern regarding the apparent indeterminacy of this principle. How are a child's best interests to be determined and by whom?[38]

Without anything approaching an agreed, stable content, the literature on the best interests of the child in digital rights suffers from the same problems encountered by other child's rights literature. If what the best interests of the child actually means is unknown, unclear, or inherently contested and contestable, attempting to deploy the best interests of the child to support a specific form of rights protection becomes akin to nailing jelly to a wall; whereby the only solid thing that can be said is that the best interests of the child ought to be a primary consideration and everything else just slips away leaving only that fixed central point of reference. Without specific, meaningful content, the best interests of the child becomes what Fortin describes as 'social ideas, rather than individual rights.'[39]

2(c) Belts and braces

The indeterminacy of the content of the best interests of the child helps explain the second form in which the best interests of the child appears in the academic literature. When the best interests of the child is treated as a social idea rather than an individual right, it is necessary to identify specific rights which are engaged in the digital space. When the best interests of the child becomes too slippery to substantively grab hold of to support specific protections, another specific legal right or human must be found to further support children's rights protections: a 'belt and braces' approach. Many of the academic articles reviewed take this 'belt and braces' approach to the issue of what kind of legal principles are engaged when children enter the digital realm.

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[38] John Eekelaar and John Tobin, 'Art.3 The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019), 76

[39] Fortin is here describing economic, social and cultural rights in the context of children's rights, but the descriptor is also fitting for the best interests of the child; Jane Fortin, *Children's Rights and the Developing Law* (3rd Edition, Cambridge University Press 2009), 18.

Given the overriding importance of the General Data Protection Regulation (GDPR)[40] for data protection in the European context, there is much academic attention on this instrument. Descriptions of the GDPR often place the specific GDPR legal rights in the general context of the human rights of the CRC and/or specifically the best interests of the child.[41] Lievens and Verdoodt's[42] review the specific protections for children in the GDPR and conclude that:

> when decisions are taken regarding the different aspects of processing personal data of children a multi-dimensional children's rights perspective must be adopted, with attention for the full range of rights that are explicitly attributed to children by the UNCRC.[43]

However, they provide no indication as to how this might be achieved, especially as in the GDPR 'there are few (clear) provisions that really zoom in on the best interests of children'.[44]

Lievens' and van der Hof's article[45] is the most detailed direct analysis of the human rights compliance of the GDPR. They also develop an explicitly normative position on the best interests of the child, arguing for a 'rights-based perspective' on the protection of children's personal data and that data 'controllers and processors have the obligation to take into account the best interests and rights of the child'.[46] However, the content of the BIC is again undefined.

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[40] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[41] Laura Scaife, 'The GDPR and Consent – a Matter of Child's Play?' (2016) 5 Compliance & Risk 6, 8; Milda Macenaite, 'From Universal towards Child-Specific Protection of the Right to Privacy Online: Dilemmas in the EU General Data Protection Regulation' (2017) 19 New Media and Society 765, 767

[42] Eva Lievens and Valarie Verdoodt, 'Looking for Needles in a Haystack: Key Issues Affecting Children's Rights in the General Data Protection Regulation' (2018) 34 Computer Law & Security Review 269.

[43] ibid 278

[44] ibid

[45] Eva Lievens and Simone van der Hof, 'The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children's Personal Data under the GDPR' (2018) 23 CL 33.

[46] ibid 33

Whereas the first category of articles using a belt and braces approach to the type of legal rights children possess in the digital sphere was mainly concerned with description, the second category of articles present a normative position. This category of normative position seeks to argue that a specific human right ought to be considered when regulating children's digital use. For example, van der Hof et al argue that Article 32 CRC (a right to be protected from economic exploitation) is engaged in various ways by commercial digital spaces.[47] Van der Hof et al connect this to the BIC, but only through a recitation of its basic tenets rather than through detailed analysis:

> Article 3 of the UNCRC requires the best interests of the child to be a primary consideration in all actions, hence including those of private actors […] Therefore, considerable weight must be placed on the best interests of children when making automated decisions about children[48]

Kravchuck's analysis starts with the BIC and argues that 'it is necessary to read child privacy not only as a right, but also as one of the best interests of the child.'[49] Livingstone also makes a substantially similar points, arguing that 'it is becoming clear that privacy (Article 16 CRC) is vital to children's "best interests"'.[50] In these cases, the BIC is used as a vehicle for consideration of a specific human right (e.g. Kravchuck) or as a means of highlighting the importance of children's human rights in the context of promoting the importance of a specific human right in the digital arena (van der Hof et al).

The third, rarest, category of articles adopting a belts and braces approach explicitly seek to outline a general normative position on the BIC in children's digital rights. Van der Hof proposes a rights-based approach to issues of digital consent based on the CRC.[51] Van der

[47] Simone van der Hof and others, 'The Child's Right to Protection against Economic Exploitation in the Digital World' (2020) 28 International Journal of Children's Rights 833

[48] ibid 841

[49] Natasha Kravchuk, 'Privacy as a New Component of "The Best Interests of the Child" in the New Digital Environment' (2021) 29 International Journal of Children's Rights 99, 101. Kravchuck does not exclude other human rights from the content of the BIC child, arguing only that privacy is one important element of it.

[50] Sonia Livingstone, 'Children: A Special Case for Privacy?' (2018) 46 Intermedia 18, 22

[51] Simone van der Hof, 'I Agree, or Do I: A Rights-Based Analysis of the Law on Children's Consent in the Digital World' (2016) 34 Wisconsin International Law Journal 409, 425

Hof compares EU and US regulation of digital consent and argues that consent ought to be understood in light of the CRC's 'fundamental pillars':

> The rights-based approach of the UN CRC provides a fundamental basis when applied rigorously to any measure or action concerning a child. This approach as encapsulated by the four fundamental pillars of the CRC is embedded in the conceptual frameworks of development, participation or emancipation, and protection.[52]

However, the BIC is not considered one of these central pillars, and beyond a discussion of its inherent vagueness, the BIC is unremarked upon.[53]

Buitelaar's analysis of the GDPR focuses on its legal-philosophical foundations, and argues that 'the concept of children's best interest and the concept of informational privacy essentially know the same fundamental value, ie the right to have one's human dignity respected.'[54] Thus when informational privacy is respected, so is the BIC. Buitelaar argues that the GDPR is based on the same foundation: it 'makes a clear link between human dignity and informational privacy.'[55] Thus Buitelaar argues that the specific legal rights in the GDPR uphold the BIC, for example, because the right to be forgotten 'is particularly aimed at children, because it allows them, at a later stage in life, to have data removed that are harmful for their future integration into society'[56]

2(d) Conclusion

In the digital sphere, it is agreed that children possess a wide range of different types of legal rights. These include specific legal rights which originate in national (e.g. common law and statutory rights) and supranational (e.g. GDPR) legal frameworks. These must be interpreted

[52] ibid 430

[53] ibid 429

[54] JC Buitelaar, 'Child's Best Interest and Informational Self-Determination: What the GDPR Can Learn from Children's Rights' (2018) 18 International Data Privacy Law 293, 298

[55] ibid

[56] ibid

in light of international human rights obligations, particularly those specifically aimed at children's protection and participation, and particularly those derived from the CRC.

The BIC is widely recognised as being part of that human rights background which must inform and influence the application of children's rights (both legal rights and human rights). However, the meaning and content of the BIC is under analysed in the context of children's rights and occupies an uncertain legal space between a substantive human right of equal status of other CRC rights (and so can be invoked to protect specific interests), and an overarching legal principle.

In this context, it is evident that we can conclude that the BIC is a definite facet of children's rights in the digital sphere, but that its precise meaning and role is unclear.

3. The best interests of the child and other human rights in the CRC

Once established that the best interests of the child is a definite facet of children's rights in the digital sphere, it is important now to investigate how the BIC is said to interact with other human rights possessed by children.

3(a) Protection and Participation

Kilkelly argues that the BIC in Article 3 CRC is a leftover from a 'paternalistic' age and is out of place in a human rights treaty.[57] Paradigms of the BIC as welfare in the digital space focus on safeguarding children from potential harms. However, the vast majority of the literature on children's digital rights takes the view that the BIC, nor children's human rights, are limited to only protecting children's welfare, despite 'the urgency that the protection agenda attracts'.[58] Instead, children also possess participation rights. Participation rights are best defined as:

> a shorthand for the right embodied in Article 12 to express views freely and have them taken seriously, along with the other key civil rights to freedom of expression, religion, conscience, association and information, and the right to privacy.[59]

[57] Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge University Press 2016), 56

[58] Livingstone and Bulger, *supra* n35, 321

[59] Gerison Lansdown, 'The realisation of children's participation rights: Critical reflections' in Percy-Smith, B., and Thomas, N., *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge 2010), 11-12

These rights essential for participating freely and meaningfully in society outside the family. Participation rights therefore protect children's rights to *do*, rather than rights which just permit children to *be*.

The participation rights in Articles 12-17, 23, & 28-31 CRC have all been considered by the academic literature to have specific relevance to the digital sphere. As just one example, Verdoodt asks us to consider how 'Social media platforms can play an important role in the realisation of this participation right [to association], as they offer clear opportunities for forming or joining groups.'[60] Having participation rights is intimately connected with the fact that children are rights-bearers, rather than just objects of protection. Buitelaar observes that, '[as] rights-bearers, children cannot be regarded as the mere property of their parents. They are not objects but they can exercise agency and deserve dignity.'[61]

The BIC in the digital space cannot, therefore, just be about protecting children's welfare. The BIC must also include the ability to participate in social life. But because of this, 'In children's rights law, there is an intrinsic dilemma between the protective and the empowerment approach.'[62] Children's participation in social life presents risks that they will encounter the kind of harms that they have a right to be protected from, although as Livingstone and O'Neill importantly note, 'risk is distinct from harm: not all those who encounter risk are harmed by it'.[63] Indeed, allowing children to encounter risks is an essential part of children learning how to safely navigate those same risks. From a developmental point of view, encountering and navigating some of the risks associated with the digital space may itself be in children's best interests: 'society does not wish to keep children forever in a "walled garden", recognising that they must explore, make mistakes and learn to cope in order to develop into resilient adults and responsible digital citizens.'[64]

The need to balance participation and protection rights has framed a range of specific debates about children in the digital space, such as over the specific human rights of disabled

[60] Verdoodt, *supra* n29

[61] Buitelaar, *supra* n54, 298.

[62] ibid 293. See also, Macenaite, *supra* n41, 767

[63] Livingstone and O'Neill, *supra* n36, 24-5

[64] ibid 25

children[65] and over the question of when children are able to independently consent to digital privacy policies:

> Since a higher age of consent (if not routinely flouted) would favour protection rights and a lower age would favour participation rights, the stakeholder community has been divided in trying to determine where and how to strike the optimal balance.[66]

It is said more generally that 'there is an important tension between participation and protection, which States should keep in mind when developing guidance documents and policies for the processing of children's personal data.'[67] And 'a balanced assessment of children's interests should be at the center of policymaking and decision-making practices.'[68] Livingstone and Bulger offer the CRC as 'a structure for addressing provision, protection and participation rights in relation to children's online and offline experiences.'[69] However, other than the enumeration of the rights which ought to be considered, and the vaguely worded Article 3 CRC requirement that the BIC ought to be a primary consideration, the CRC does not itself provide instructions on how to conduct a balance when there is a conflict between two or more of the rights that it provides to an individual child.

Beyond acknowledging the existence of the dilemma, none of the academic literature surveyed offer specific guidance or tools for decision-makers as how to actually conduct a balance between conflicting rights. Future research is needed to provide concrete means by which decision-makers (both governmental and corporate) might conduct an effective rights-balancing exercise in the context of the BIC. How decision-makers might balance competing human rights is by no means settled in the academic literature or judicial decisions.[70] The most common prevailing image of rights balancing is of the merchant's scale is only a metaphor,[71]

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[65] Alper and Goggin, *supra* 27, 736

[66] Livingstone, *supra* n50, 20

[67] Verdoodt, *supra* n29, 468

[68] Lievens and others, *supra* n34, 492

[69] Livingstone and Bulger, *supra* n35, 328

[70] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 Law & Ethics of Human Rights 2.

[71] Iddo Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2006) 27 Cardozo Law Review 1393, 1398.

one that is capable of accommodating multiple formal decision-making processes. Exploring the practical application of some of the available theoretical models of rights balancing – such as that suggested by Robert Alexy[72] – might provide a useful means of operationalising the BIC so as to make it a concrete, realisable right as opposed to a mere social idea.

3(b) Balance and the walled garden: online and offline risks

The need not to keep children in a walled garden[73] is a compelling justification for permitting (e.g.) children to express themselves on social media at the risk of encountering cyber-bullying, or allowing them to use the internet to further their education at the risk that they will accidently stumble upon pornography. Approaches to balancing the risks and rewards of online expression and cyber-bullying can be understood as a digital extension to how these risks are already managed offline in schools and playgrounds. These kind of risks are well conceived as a necessary balance between participation and protection rights, even if we are unclear as to how such a balance might be conducted.

However, there are different kinds of harms in the digital space which are not adequately categorised in the literature. Some kinds of risks that children are exposed to in the digital world are conceptually different to many of the analogue risks of childhood (and may be unique to the digital space), such as tracking for behavioural advertising[74] and dataveillance.[75] These are pervasive and hidden practices online. They are activities which are justified as the cost of using the digital space – the data-as-payment model of online products[76] – and so must be accepted as a condition of the use of a digital product. There is not a *risk* that children will be exposed to these activities when they use digital products: it is an almost *certainty* that they will. The nature of the risk is instead what the impact of these practices might be on their privacy, development, or future life. Whereas children who express themselves online risk encountering cyber-bullying, cyber-bullying is not a precondition of the activity. In contrast, the data-as-payment model of online products requires the taking the risk

[72] Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4 Law & Ethics of Human Rights 20

[73] Livingstone and O'Neill, *supra* n36, 25

[74] Lambrecht, Verdoodt and Bellon, *supra* n17, 70; Verdoodt, *supra* n29

[75] Deborah Lupton and Ben Williamson, 'The Datafied Child: The Dataveillance of Children and the Implications for Their Rights' (2017) 19 New Media and Society 780.

[76] Stacy-Ann Elvy, 'Paying for Privacy and the Personal Data Economy' (2017) 117 Columbia Law Review 1369, 1384

of harm to children's wellbeing as essential pre-conditions of the of these products by children to exercise their participation rights.

In the abstract, this difference is between situations (e.g. cyber-bullying) where the harm is known but the risk of it being encountered is uncertain, and situations where the risk of encounter is certain but the harm is unknown. The Code reflects this, requiring a pre-cautionary approach in the latter situation:

> This means you should not process children's personal data in ways that have been formally identified as requiring further research or evidence to establish whether or not they are detrimental to the health and wellbeing of children.[77]

The Code cites 'Strategies used to extend user engagement' as one such example where the lack of evidence of harm requires a pre-cautionary approach and certain practices are explicitly ruled out by the Code (e.g. automatically extending play or 'offering children personalised in-game advantages…for extended play'), whilst also requiring others (e.g. pause buttons).[78] However, the Code does not prohibit all strategies for extending user engagement ('such as rewards, notifications and "likes"') and it instead requires digital service providers to 'carefully consider the impact on children' of their use.[79]

Where there are different kinds of risk/harm situations (of the kinds outlined above), different forms of balancing models might be required to properly consider the impact on children. Where the impacts on children are of different kinds, they may need to be weighed differently. How a precautionary principle interacts with a rights balancing framework is currently unexplored.

3(c) Children's developing capacities

A further dimension of the necessary balance between children's protection and participation rights in the CRC is children's developing or evolving capacities as they age and mature. That

[77] ICO, 'Age Appropriate Design: 5. Detrimental use of data' <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/5-detrimental-use-of-data/> accessed 24 February 2022.

[78] ibid

[79] ibid

this has been a recognised in parts of the digital rights literature is commented on by Savirimuthu:

> Livingstone for example has called for a child's evolving capacities to be integrated into determinations of whether a particular data mining is fair and lawful […].[80] Adopting a similar line of rights focussed reasoning, Barassi[81] emphasises both the value of taking into account a child's evolving capacity and developmental needs following the surge in targeting children and their parents with voice-enabled technologies such as toys and smart devices[82]

Lievens and van der Hof argue the same, finding that 'the age and maturity of the child should be guiding factors. This means that different measures may be considered for younger and older children.'[83] Children's developing capacities is also the subject of Buitelaar's analysis.[84] Buitelaar adopts Ekelaar's 'principle of dynamic self-determinism' which is concerned with how courts make decisions in family law contexts. In these contexts the outcome of legal decisions affecting a child:

> is (partly) determined by the child, [therefore] the outcome is in the child's best interests. It is dynamic because "the optimal course for a child" is subject to revision over time. It is self-determined as the child influences the outcome.[85]

In this sense, dynamic self-determinism cannot provide a 'solution' to the balance between protection and participation rights:[86] dynamic self-determination requires that decisions as to what is in the BIC should not be static. Instead, they must be constantly revised

[80] Livingstone, *supra* n50

[81] Veronica Barassi, 'Digital citizens? Data traces and family life' (2017) 12 Contemporary Social Science 84

[82] Joseph Savirimuthu, 'Datafication as Parathesis: Reconceptualising the Best Interests of the Child Principle in Data Protection Law' (2020) 34 International Review of Law, Computers & Technology 310, 321

[83] Lievens and van der Hof, *supra* n45, 39

[84] Buitelaar, *supra* n54

[85] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law and the Family 42, 48

[86] Buitelaar, *supra* n54, 293

to account for (a) the potential that a child may legitimately change their views on a particular subject, and (b) that the extent to which a child's views should influence the outcome of a decision (from not at all, to being determinative) should change in line with their age and maturity.

However, the changing capacities of the child to make informed decisions for themselves and their developing abilities to actually use their participation rights is clearly something which must be reckoned with in any account of the BIC. Firstly, what is in their best interests is not the same for all children. Individuals aged 0-18 have a wide range of needs and interests: to say, for example, that the best interests of a four-year-old will always align with what is in the best interests of a fourteen-year-old is clearly untenable. Secondly, that digital service providers need to provide mechanisms whereby decisions that children make about their digital life (such as privacy settings) can be changed by the child.[87] Third, that the weight given in the balance between protection versus participation rights should generally shift progressively, so that more and more weight is given to participation rights over protection rights as the child matures.

3(d) Conclusion

It is suggested that the BIC has no substance without consideration of all the individual rights provided for by the CRC, and which apply to a particular situation. Under the CRC, the child has both protection rights and participation rights, and these can conflict. Where the BIC is conflated with the child protection then a paternalist instinct takes over, in ways which the CRC itself seeks to disclaim through the process of granting participation rights to children. When, visa versa, the BIC is claimed to only contain participation rights of the child, the unique vulnerabilities of the child are ignored. It is argued here therefore that the BIC can be defined no more or less clearly than the balance of all the rights possessed by the child.

However, the BIC is more than just the sum of its parts and what is in the 'best interests of the child' in any concrete situation can only be substantively determined by dynamically balancing all the individual rights that a child has in a situation. The BIC is therefore more than – but cannot exist without – the individual rights provided for in the CRC. Dynamic balancing of the CRC rights requires that decisions as to what is in the BIC should not be static.

[87] Lambrecht et al argue that 'children need control tools at the data collection stage, which could develop according to a child's maturity and capacity to take commercial decisions'. (Lambrecht, Verdoodt and Bellon, *supra* n17, 70).

Instead, the balance must be constantly revised based on a child's developing capacities and views.

4. The best interests of the child as a primary consideration

Article 3(1) CRC provides that 'In all actions concerning children […] the best interests of the child shall be a primary consideration.' If the best interests of the child are the balance of all the rights possessed by the child, what does it mean to say that best interests of the child should be a 'primary consideration'? This is one area which has been substantively unexplored by the literature on children's digital rights to date.

This is not to say that the BIC as primary consideration is unacknowledged, only that it is often stated with no further explanation. Savirimuthu states that 'is a cardinal principle set out in Article 3 CRC.'[88] Scaife states that:

> The Convention does not seek to take away parental responsibility, but Article 3 states that in all actions, including those of legislators and public authorities, the best interests of the child shall be a primary consideration.[89]

Buitelaar argues that 'conflicting interests need to be resolved with children's best interest being the primary consideration.'[90] Verdoodt is explicit that it is for the state to 'ensure that the best interests of the child are taken as a primary consideration in decisions and actions undertaken by the private sector.'[91] In none of these formulations are the theoretical or practical implications of a 'primary consideration' explored.

Van der Hof et al go furthest, supporting Verdoodt's assertion that 'Article 3 of the UNCRC requires the best interests of the child to be a primary consideration in all actions, hence including those of private actors'.[92] Van der Hof et al argue that, 'considerable weight must be placed on the best interests of children when making automated decisions about

[88] Savirimuthu, *supra* n82

[89] Scaife, *supra* n41, 8

[90] Buitelaar, *supra* n54

[91] Verdoodt, *supra* n29, 464

[92] van der Hof and others, *supra* n47, 841

children'.[93] They rely on General Comment 14[94] to assert that this means that 'a larger weight must be attached to what serves the child best'.[95]

However, the concept of a primary consideration arguably incorporates something other than just the amount of weight to be given to a factor: primacy of a factor may not only be measured by the weight that it is given in a balancing exercise. In UK law, for example, to treat the BIC as a primary consideration means that no other interest may be treated as 'inherently more significant than the best interests of the children'.[96] It is not clear from this formulation that simply granting 'considerable weight' to the BIC is sufficient. The nature of a primary consideration and its meaning are explored in detail in section 6(b), below.

Whilst it is evident that the academic literature to date agrees with the assertion that the BIC should be a 'primary consideration' in decisions about children's digital rights, this has rarely risen above the level of assertion. Where it does so it is associated only with the weight given to the BIC, which may not fully encompass what it means to treat the BIC as a primary consideration. We suggest that what it means to treat the BIC as a primary consideration in children's digital rights needs further conceptualisation in the literature.

5. Drawing conclusions from the literature

The academic literature identified by this literature review is broad in its engagement with a range of children's rights issues generated by children's digital access. However, the principle of the best interests of the child is generally more elusive, and definitive normative statements beyond its textual foundations in Article 3 CRC are rare. However, the following conclusions about the BIC principle in children's digital rights can be made on the basis of the academic literature in the field.

Firstly, a large range of protection and participation rights are engaged by children's digital activities and are equally protected by the UN's Convention on the Rights of the Child (CRC). Children's protection rights, particularly the protection of a child's right to privacy, are

[93] ibid

[94] United Nations Committee on the Rights of the Child, 'General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1)' (29 May 2013, CRC/C/GC/14)

[95] van der Hof and others, *supra* n47, 841

[96] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [26]

engaged in the digital sphere but a child's freedom of expression and other participation rights are also engaged and are equally important.

Secondly, children's digital activities may cause participation and protection rights to come into conflict. The outcome of a conflict between different facets of a child's human rights must be determined by balancing the different rights of the CRC. Third, the capacity of children to make independent, informed decisions evolve with age and maturity (sometimes called dynamic self-determinism), and that consideration of this is important for deciding where the balance lies between different rights in individual cases. As children's capacities develop, the balance of weight given to protection and participation rights progressively changes. The 'best interests of the child' is the outcome of this balance of the panoply of children's rights in the CRC.

Finally, the literature identifies the BIC as a 'primary consideration'. However, what this means in practice is unexplored in the literature. This is a distinct gap in the existing literature. The implications of this conceptual gap, in the context of the Code, is explored in depth in sections 6(b) and 6(c) below.

Part 2

6. Questions from beyond the digital rights literature

The literature review identified three main areas of agreement in the existing academic literature on the best interests of the child in digital rights. These areas of agreement are foundational to understanding that the BIC means as a practical consideration in this area of law. This part of the article identifies problems, issues, and questions about the BIC which have arisen from other areas of law and academic literature. At present, such questions are substantively unexplored by the literature on children's digital rights. We suggest that exploring these should form part of the next phase of conceptual and practical work around the BIC in children's digital rights research.

6(a) A procedural or substantive right?

The UN Committee on the Rights of the Child argue that the BIC has three dimensions, which it possesses simultaneously: a substantive right, an interpretive legal principle, and a procedural right.[97] A conceptual divide has opened up in the immigration law literature between

[97] Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)'

substantivists and proceduralists. Proceduralists argue that the best way of protecting the BIC is to assess the quality of decision-making. When a decision-maker can show that they have made a careful and informed assessment of the BIC, the reviewing authority will be more likely to accept that the BIC have been met. The assessment isn't whether the final decision is in fact in the BIC, but instead whether the BIC has been given enough attention and weight in the decision-making process. Proceduralists argue that treating the BIC as a procedural right results in more consistent decision-making by reviewing authorities. This is particularly the case when the BIC is one factor amongst others within the balance of pre-existing rights (in the immigration context this is the right to family life).[98]

In contrast, substantivists argue that the BIC ought to be considered as a separate, substantive human right on its own accord.[99] This means that the BIC should be assessed as a relevant factor in decision-making and must be balanced directly against competing interests. The outcome of the balance between different rights and interests can (and should) be directly assessed, not just the way in which the decision is come to.

However, as a domestic regulator, it may well not be appropriate for the ICO to adopt solely a procedural lens for its assessment of the best interests considerations made by digital service providers. The procedural versus substantivist debate in the literature occurs in the context of the supervisory role of the European Court of Human Rights (ECtHR). In that role, the Court has adopted a principle of subsidiarity whereby individual states are able to adopt different public policy responses and the Court will review their conformity with the Convention.[100] Subsidiarity makes sense for the ECtHR because it allows states to make different, democratically endorsed, public policy decisions so long as a minimum rights standard is maintained.

In contrast, the ICO's role occurs in a different context. Whereas democratic imprimatur leads the ECtHR to tolerate a wide range of different responses to the same public

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw11KClJiE%2buI1sW0TSbyFK1MxqSP2oMlMyVrOBPKcB3Yl%2fMB> accessed 17 March 2017.

[98] Mathieu Leloup, 'The Principle of the Best Interests of the Child in the Expulsion Case Law of the European Court of Human Rights: Procedural Rationality as a Remedy for Inconsistency' (2019) 37 NQHR 50; Milka Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights' (2020) 20 HRLR 745.

[99] Jonathan Collinson, 'Making the Best Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decisions' (2020) 38 NQHR 169.

[100] Janneke Gerard, *General Principles of the European Convention on Human Rights* (CUP 2019), 5-6

policy challenge, if the ICO permits a wide range of different substantive answers to the same essential questions in digital design, then its decision-making will be inconsistent. It would also potentially afford a competitive advantage to those companies most willing to create a digital product with substantive privacy outcomes which do not support the BIC, but which play the procedural game of appearing to 'consider' the BIC. It might be argued that such an approach by a company would be identified by a procedural review because there would likely be a significant disconnect between the procedural 'consideration' of the BIC and the substantive outcome. However, identifying such a disconnect can only be achieved by taking a view on what substantive outcome (or at least, range of outcomes) is permissible.

Whether the BIC is a conceived of as being a substantive or procedural obligation on digital service providers is one area in which the ICO should bring clarity.

6(b) A 'primary' consideration

The literature review identified that it is well established that the BIC is a 'primary consideration', but what this means in practice is unexplored in the academic literature. The first principle of the Age Appropriate Design Code is that 'The best interests of the child should be a primary consideration when you design and develop online services likely to be accessed by a child.'[101] The risk assessment documentation created by the ICO to support the adoption of the Code also states that digital service providers should 'Ensure that the best interests and safety of children are a primary consideration in the development of new services' and 'Account for the best interests of the child as a primary consideration where any conflict arises'.[102] However, the Code and Risk Assessment documentation both leave the meaning of 'primary consideration' substantively unexplored. Section 1 of the Code says that:

> The placing of the best interests of the child as a 'primary consideration' recognises that the best interests of the child have to be balanced against other interests. For example the best interests of two individual children might be in conflict, or acting solely in the best interests of one child might prejudice the rights of others. It is

[101] ICO, 'Age Appropriate Design: 1. Best interests of the child' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/1-best-interests-of-the-child/> accessed 21 February 2022

[102] ICO, 'Self-assessment risk tool' <https://ico.org.uk/for-organisations/children-s-code-best-interests-framework/self-assessment-risk-tool> accessed 2 September 2021

> unlikely however that the commercial interests of an organisation will outweigh a child's right to privacy.[103]

The Code, however, provides little actual guidance as to how to conduct a balancing assessment, not least one which treats the BIC as not just *a* consideration in the balancing exercise, but the *primary* consideration. Without conceptual certainty, it is impossible to state why it is unlikely that commercial interests will outweigh a child's right to privacy, and how one is to determine when the unlikely has genuinely arisen. Furthermore, if the ICO conceives of the BIC as being a procedural right, when does a digital service provider adequately consider the BIC as a *primary* consideration: when the BIC are considered first or when they are given more weight than other considerations?

The Supreme Court, in the immigration context, have found that to treat the BIC as a primary consideration:

> This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first.[104]

It is not, however, the case that considering the best interests first is the same as treating them as a primary consideration, only that by considering them first means that the BIC are likely given adequate attention. As Lord Kerr in another case identified:

> it seems to me that there is much to be said for considering those interests first, so that the risk that they may be undervalued in a more open-ended inquiry can be avoided.[105]

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[103] ICO, 'Age Appropriate Design: 1. Best interests of the child' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/1-best-interests-of-the-child/> accessed 21 February 2022

[104] *ZH (Tanzania)*, *supra* n96, [26]

[105] *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [144]

These cases seem to suggest that the nature of a *primary* consideration is both substantive and procedural: the BIC must be given substantive weight of no less significance than other considerations, and a procedural rule whereby the BIC must be considered first. Revision of the Code or supplementary material is likely needed to clarify what the ICO envisage it to mean to treat the BIC as a *primary* consideration.

6(c) Co-opting the best interests of the child

The lack of clarity as to how to treat the best interests of the child as a *primary* consideration is unsurprising. The flexibility[106] or dynamism[107] of the BIC principle is supposed to be one of its key strengths. However, as Sutherland observes about the BIC generally, the indeterminacy of its content is both one of the BIC's key strengths as well as its core weakness.[108] Van der Hof observes the same in the digital rights sphere:

> the best interest principle is flexible enough to adjust to novel developments, but at the same time provides little guidance on how to ensure children's best interests in particular situations. Therefore, it is at risk of being easily neglected, overlooked, or outright ignored, particularly in a digital reality that is characterized by other-notably commercial and government-interests that are much more powerful and run counter to the interests of children.[109]

The indeterminacy of the BIC can mean that, without care, the BIC can be co-opted. In the immigration law context, Smyth notes examples where 'more insidiously, the best interests of the child is interpreted as coinciding with the state's interest in … control.'[110] In the digital

[106] Buitelaar, *supra* n54, 296; P Gabriel, 'The Protection of Personal Information Act 4 of 2013 and Children's Right to Privacy in the Context of Social Media' (2019) 82 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 605, 616

[107] Kravchuk, *supra* n49, 101

[108] Elaine E Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press 2016), 36.

[109] van der Hof, *supra* n51, 429

[110] Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled Is the Court's Use of the Principle' (2015) 17 EJML 70.

rights literature, Livingstone et al note that 'Some commentators have regarded institutional or governmental efforts to protect children from sexual or violent offences as offering a cover for politically or theologically motivated censorship or surveillance.'[111] Van der Hof also comments that 'online child protection measures can be perceived as "covert efforts to promote the state's power to survey, censor, or even criminalize private citizens' acts"'.[112]

One way in which the BIC can be co-opted to support a particular outcome is to frame policy debates as being between the best interests of children as a group and the best interests of individual children. In a recent UK Supreme Court judgment on a challenge to the policy of restricting social welfare payments to households comprising more than two children, the Court considered a conflict whereby:

> It might be argued that children's best interests would always be better served by a more generous benefits system. But Parliament was told that reducing spending on welfare benefits would allow the Government to protect other expenditure of benefit to children: on education, childcare and health[113]

This framing of the policy argument is most acute when considering the distribution of finite financial resources but can also appear in other contexts, including the digital. Can, for example, data controllers and processors be reasonably be required to consider the best interests of each and every individual child who accesses their services, or should their obligations be limited to considering the interests of children as a group? What digital product design choices should be made if option A benefits many children, but option B harms the interests of a minority?

That digital design decisions might benefit the majority of children but harm a minority is suggested by Alper and Goggin who consider the specific interests and rights of disabled children (whilst also cautioning against automatically assuming that disabled children are necessarily more vulnerable digital users who are more likely to be harmed by digital products).[114] Livingstone and Bulger make the same argument on a global level, highlighting

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[111] Livingstone, Carr and Byrne, *supra* n26, 14

[112] van der Hof, *supra* n51, 429

[113] *R (SC and Ors) v Secretary of State for Work and Pensions* [2021] UKSC 26, [207]

[114] Alper and Goggin, *supra* n27

the probability of different impacts of digital technologies on children in high-, middle-, and low-income countries.[115]

Whilst a balance between the best interests of many children and an individual child might be a legitimate one, the lack of clarity over how the BIC of the child(ren) should be balanced can make it more vulnerable to being co-opted in support of policy decisions which are not in the best interests of some children.

6(d) Children's agency and the role of parents

The CRC is emphatically not about protecting children as vulnerable objects of care who require protection by parents, guardians, the state, or digital service providers at the expense of other rights. Children are recognised by the CRC to have participation rights and agency. However, that agency is incomplete, being subject to the child's developing capacities. This therefore creates tension as between the level of agency to be granted to children, and tensions in the division of responsibility for children's best interests between parents, the state as loco parentis (e.g. in schools), and children themselves.[116]

The responsibilities on digital service providers in the Code introduces new tensions. Decision-making as to how to balance children's rights will be new for most businesses. In many ways it will also shift the balance of responsibility for that role away from parents at the point of their child's use of digital products, to instead be pre-determined in the architecture and design of tools and services. Whether the rights of parents under Articles 5 and 18(1) CRC[117] will be considered in balancing such rights remains to be seen or tested in law in this context. In the 2016 *Named Persons* case, the Supreme Court emphasised the relevance of obligations of parents in Article 18(1) CRC for interpretation of domestic rights emanating from the Human Rights Act 1998. The Court found this as both a matter of legal interpretation and public policy, stating that, 'As is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989 ("UNCRC"), as aids

[115] Livingstone and Bulger, *supra* n35

[116] Eekelaar and Tobin, *supra* n38, 76

[117] Article 5 UNCRC: 'States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.'

Article 18(1) UNCRC: '…Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

to the interpretation of the ECHR'[118] and that 'There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies.'[119]

At the same time, there are also other recent case law developments indicating a possible trend in public policy away from children's agency.[120] Children's agency is important not just in terms of their potential ability to choose to do *more*, but also their potential to choose to do *less*. In the digital sphere, children should be able to exercise agency to (for example) choose to withhold personal information, to change privacy settings so that they share less than the default, and to decline to use services which fail – in the child's own assessment – to adequately balance privacy and utility. When children's ability to exercise agency is restricted, because decisions are made for them even with good intentions, it can lead children to be coerced into engaging with digital services or activities to which they object. This risk is particularly acute in settings, such as schools, which already exercise a measure of coercive control over children.

In digital, the principle of children's agency rights within the BIC is the foundational interest behind providing children with options to vary privacy settings or to opt-out entirely. Undermining the principle of children's agency is hazardous to the best interests of the child where is restricts children's ability to choose to (and how to) protect their own digital privacy.

6(e) Who determines the best interests of the child?

The question as to who determines the best interests of the child is not just one about the respective roles of children, parents, business, and the state, but also a question of who is engaged in whatever processes of review are demanded by the ICO. It is therefore encouraging that the ICO highlight in section 2 of the Code the importance of consulting with children as part of the Data Protection Impact Assessment (DPIA).[121] The views of the child are an important general principle for respecting children's human rights, and Article 12(1) CRC states that:

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[118] *The Christian Institute and others v The Lord Advocate (Scotland)* [2016] UKSC 51, [72]

[119] ibid, [73]

[120] Kirsty L Moreton, 'A Backwards-step for *Gillick*: Trans Children's Inability to Consent to Treatment for Gender Dysphoria—*Quincy Bell & Mrs A v The Tavistock and Portman NHS Foundation Trust and Ors* [2020] EWHC 3274 (Admin)' [2021] MLR (pre-print) https://doi.org/10.1093/medlaw/fwab020

[121] ICO, 'Age Appropriate Design: 2. Data Protection Impact Assessments' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/2-data-protection-impact-assessments/> accessed 23 Feburary 2022.

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 is not *per se* a "right to be consulted" (although it can sometimes be referred to as such) and the Code provides that directly consulting children afresh on specific design issues may be disproportionate.[122] However, the Code seems to unnecessarily restrict the duty to consult, stating that:

> Depending on the size of your organisation, resources and the risks you have identified, you can seek and document the views of children and parents (or their representatives), and take them into account in your design. We will expect larger organisations to do some form of consultation in most cases. If you consider that it is not possible to do any form of consultation, or it is unnecessary or wholly disproportionate, you should record that decision in your DPIA, and be prepared to justify it to us.[123]

Yet Article 12 CRC does not suggest that there are any circumstances in which it is unnecessary to give due weight to children's views on matters affecting them. Where it is disproportionate to conduct a specific consultation, the ICO should still require digital service providers of all sizes to consider other forms of evidence of children's views. There is already some general literature available to digital service providers which include evidence of what children's view of privacy are in some digital contexts.[124] Permitting digital service providers to justify failing to engage with *any* expression of children's views appears contrary to Article

[122] ICO, 'Age Appropriate Design: 2. Data Protection Impact Assessments' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/2-data-protection-impact-assessments/> accessed 23 Feburary 2022.

[123] ICO, 'Age Appropriate Design: 2. Data Protection Impact Assessments' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/2-data-protection-impact-assessments/> accessed 23 Feburary 2022.

[124] e.g. Mariya Stoilova, Sonia Livingstone and Rishita Nandagiri, 'Children's data and privacy online: Growing up in a digital age' (LSE) <https://www.lse.ac.uk/my-privacy-uk/Assets/Documents/Childrens-data-and-privacy-online-report-for-web.pdf> accessed 2 September 2021

12 as well as potentially give licence to digital service providers to ignore inconvenient general findings about children's views under the guise that it would be disproportionate to conduct a specific consultation exercise.

Who determines what is in the BIC also engages questions of representation. Consultations with children and parents should ensure engagement with diverse audiences. Livingstone and Bulger identify a common assumption of a 'competent' user[125] in digital policy making. Although headline figures suggest very high rates of internet usage by children in the UK (98% using the internet at home) these headlines mask considerably different rates of usage of different kinds of digital products.[126] Familiarity with different digital products are likely to create differently competent digital users: watching Netflix, playing Fortnite, browsing eBay, and using Snapchat, are all considerably different types of online experience.

Certain kinds of consultation tools are also likely to produce self-selecting audiences of competent users, especially where such consultations are conducted through digital tools (such as online surveys) with existing users. Finally, digital competence is also likely to be mediated by factors such as disability[127] and socio-economic status.[128] Consultations which only engage with competent child users should not satisfy the requirements of the Code.

The issue of representation is also one which applies to the ICO. It too has a duty under Article 12 to give due weight to the views of children and thus must do so in decisions related to the enforcement of the Code. Furthermore, there is no single, settled view as to what is in the BIC and such views are often mediated by culture.[129] The ICO must therefore reflect diverse outlooks in its recruitment and consultations.

7. Conclusion

[125] Livingstone and Bulger, *supra* n35, 317

[126] Office for National Statistics, 'Children's online behaviour in England and Wales: year ending March 2020' (9 February 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/childrensonlinebehaviourinenglandandwales/yearendingmarch2020> accessed 23 Feburary 2022.

[127] Alper and Goggin, *supra* n27

[128] Livingstone, Carr and Byrne, *supra* n26

[129] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 International Journal of Law and the Family 1, 5; Maureen Long & Rene Sephton, 'Rethinking the "Best Interests" of the Child: Voices from Aboriginal Child and Family Welfare Practitioners' (2011) 64 Australian Social Work 96

The Age Appropriate Design Code does not create new law, nor does it create new standards. But it might create new ways in which existing data protection laws and standards are assessed and applied, and it demands the introduction of assessment of children's rights in the digital environment in ways that are new. How their application will be operationalised will begin to be seen from September 2021. The impact of changes made across the digital landscape as a result must be objectively assessed at a future date. The costs of the Code may not only be for business but have unintended implications and costs for children and families.

How companies and the ICO should determine the best interests of the child needs to be operationalised in clear, consistent ways, with the confidence of industry. If industry bears the cost of assessment, design accommodations and ongoing compliance by passing on the costs to their product users there is potential for children and for parents to bear the brunt of the hidden costs through further economic exploitation of their personal data.

The Code also risks shifting the balance of weighting given to rights based on an arbitrary number, age, and not based on the evolving capacity of a child or other contextual factors that come into decision making around the BIC. The UNCRC does not weight its principles simply by age, but asserts the full range of rights for all children under the age of eighteen in light of their evolving capacities.

Finally, the BIC under Article 3 UNCRC applies to children as individuals, but also in general and as a group. However, children are not a homogenous group with one set of interests: their best interests are impacted by their age and individual vulnerabilities. This may present tensions between the best interests of the individual and the best interests of children as a collective. Protecting vulnerable and younger child users whilst also promoting the rights of other children presents a considerable challenge to business or service design decision-making processes when operationalising the Children's code. Relevant skills and expertise are also required in the ICO to uphold the BIC principle in the Code as this goes beyond the remit of the ICO to date. Should digital service providers justify their design decisions on the basis that they promote the best interests of the majority of children yet harm those of a minority, or that economic interests outweigh the BIC (such as the ability to access a free service over no service), the ICO will not be able to avoid having to come to conclusions as to where an appropriate substantive balance lies.

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