The best interests of the child in the digital environment

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Executive summary

'The best interests of the child' (Article 3 (1) of the *United Nations Convention on the Rights of the Child*, UNCRC) is increasingly mentioned in relation to the provision of digital products and services, often with positive intent to improve the conditions of children's lives. This report examines the concept in relation to the digital environment, clarifying both what 'best interests' is and what it is not.

The 'best interests of the child' implies 'the full and effective enjoyment of rights… and the holistic development of the child' in both the immediate and longer term.[1] However, in relation to the digital environment, there is evidence that 'best interests' is being misunderstood, or even misused or abused. Specifically, in some contexts it is being used as a substitute for the full range of children's rights, which may not be fully substantiated, or to legitimate a 'one-size-fits-all' approach, notwithstanding children's diverse circumstances or to suggest that any single right trumps all their other rights.

We argue that in most cases it is not necessary to evoke best interests but rather to respect, protect and fulfil the full range of rights in the UNCRC; best interests is not a replacement for other or all of children's rights, nor are children's rights a matter of pick and mix.

In certain situations – such as when several of a child's rights are in tension, or where third party claims jeopardize children's rights – a 'best interests' determination should be sought. Such a determination informs the standard of expected conduct for digital service providers.

Determining the best interests of a child or children is the obligation of States and cannot be left to technology companies, which, nonetheless, are required to act on such determinations. Making such a determination invokes an established procedure as set out in the UNCRC and its *General comments*. If necessary, decisions affecting children should be open to challenge through the best interests process.

Determining the best interests of children should not be confused with the task of balancing children's interests against the desires of parents or the commercial interests of companies. In each of those balancing considerations best interests will be a primary consideration.

Designing digital technologies that comply with the legal and regulatory frameworks to realize children's rights as a business norm would be positively transformational of children's lives, especially where children's rights in full are put ahead of commercial interests. This would create a digital environment in which children can enjoy all their rights.

The report concludes with the obligation of States regarding children's best interests in relation to the digital environment. These, in turn, set the framework within which digital service providers, especially businesses, should carefully review their likely impacts on children's rights to ensure outcomes that benefit children and respect their rights.

[1] *General comment No. 14*, para. 51, UN Committee on the Rights of the Child (2013).

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Box 1. Children care when their best interests are not a primary consideration

"I feel like … our world developed into a place where money is needed, like everyone's greedy for money… I don't think the company would stop until it is a major issue, and it is issued by the government to stop."

"Ads give you money for every time that it's shown, specifically on YouTube… The other day my friend had eight ads that you weren't able to skip, and they were 15 seconds long, so that was the whole video itself in ads."

"Like language, studying languages app. I don't remember the app's name. It asked for money. There is no apps without asking money, any studying languages app… I don't think that's really a good thing."

Essex school children, Year 9 (aged 13-14)[2]

About this report

Millions of children across the globe live in conditions of conflict, deprivation and disadvantage that repeatedly fail to safeguard their rights to a safe and secure childhood in which they are able to flourish. In an increasingly digital world, with pervasive implications for the economic, cultural, social and political aspects of our lives, designing digital technologies in ways that address children's rights is important and urgent.

This report is intended for state actors, including regulators, and businesses operating in relation to the digital environment, as well as civil society organizations concerned with children's rights. It reflects on how 'best interests of the child' is being referred to by the tech industry, regulators and policy makers in relation to the digital environment. We raise concerns about references that confuse the meaning or even undermine the purpose of best interests.

Specifically, we seek to inform deliberation regarding the best interests of children in relation to the digital environment. The more that legislation and regulation is developed with the purpose of protecting children and children's rights nationally and internationally, the more important it is that State authorities and companies that use the language of children's rights are careful to adhere to the UNCRC and its general comments, especially General comment No. 25 on the digital environment. This includes, in particular, the fundamental principle that

[2] Pothong & Livingstone (2023).

children's rights are interdependent and indivisible; all children's rights must be observed.

We are aware that many tech companies are headquartered in the USA, the sole country that has yet to ratify the UNCRC. The USA is, however, a signatory to the Convention, meaning that it is obliged not to act contrary to it. This is especially important insofar as the digital services of US companies impact on the lives of children in many parts of the world.

To research the concept of the 'best interests of the child' in the digital environment, we conducted document analysis[3] and reviewed the academic literature[4] on child rights, the digital environment and the best interests of the child. Our search encompassed multiple disciplines and perspectives internationally, mostly in English, although we did also examine legislation in several other languages. When searching for the 'best interests of the child', we referred to the UNCRC for the approved translation of the term in other languages. To ensure quality, we held an invitation-only roundtable with child rights experts and digital policy experts to discuss the emerging findings and conclusions. Two independent experts (from industry and academia) also reviewed the report.

[3] The resources we searched include, but were not limited to, the following: UNCRC and relevant general comments, and statements; UN documents; existing bills, acts and regulatory frameworks for digital technologies (e.g., Digital Services Act, AI Act, Information Commissioner's Office's (ICO) best interests framework, California Age-Appropriate Design Code Act (CAADCA); EU lobbying database; technology company patents (active and recent filings); US Securities and Exchange Commission (SEC) filings such as annual and quarterly reports (for technology companies that are traded publicly in the USA); technology company human rights reports (e.g., Meta's annual human rights reports); court cases about digital privacy, data protection, safety, online risks and harms, and children in the EU, UK and USA (e.g., the Molly Russell inquest in the UK); newspaper articles from major outlets in English (e.g., *The New York Times*, *The Washington Post*, *The Guardian*, *The Wall Street Journal*); reports and blog posts from technology industry trade associations (e.g., NetChoice, AI for America, Chamber of Progress); technology company terms of service, privacy policies and frameworks (e.g., Meta's best interests of the child framework); technology company children-specific product offerings (e.g., Messenger Kids, parental control tools, education technology products for use in schools and homes); European Court of Human Rights database; reports and guidelines published by international organizations (e.g., UNICEF, World Economic Forum, IEEE); and periodic state party reports submitted by countries (that ratified the UNCRC) on measures taken to implement the provisions of the UNCRC.

[4] For the academic literature review, we searched key peer-reviewed journals that cover children's rights, best interests of the child, and digital media and communication (including articles on data protection, data privacy, digital privacy, personal data, social media, big tech, platforms, mobile media and AI, to name a few). Our initial search resulted in 200+ peer-reviewed articles from many countries with different legal and regulatory frameworks (including, but not limited to, Australia, Brazil, Bulgaria, Chile, China, France, India, Ghana, Japan, Kenya, Mexico, South Africa, Spain, Sweden, Türkiye, the USA and UK). This helped ensure a global focus and to understand differences between countries and jurisdictions as regards their application of 'best interests of the child' in digital provision.

Acting in the best interests of the child in the digital environment

Children's best interests are increasingly referred to explicitly in legislation, policy making and deliberation of children's rights in relation to the digital environment (see Box 2). This is especially important when tensions arise among children's rights to agency (including access to information), protection (from harm and exploitation) and privacy, and when their rights are at risk in a commercial and data-driven digital world.

The 'best interests of the child' is one of the four general principles of the UNCRC (United Nations, 1989), which says:

> 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 3(1))

General comment No. 25 interprets children's rights specifically in relation to the digital environment:

> The digital environment was not originally designed for children, yet it plays a significant role in children's lives. States parties should ensure that, in all actions regarding the provision, regulation, design, management and use of the digital environment, the best interests of every child is a primary consideration.[5]

In General comment No. 5, it is asserted that:

> every State should consider how it can ensure compliance with Article 3(1) and do so in a way which further promotes the visible integration of children in policy-making and sensitivity to their rights.[6]

General comment No. 16 makes clear that states can impose on business in fulfilling their obligations:

> These obligations cover a variety of issues, reflecting the fact that children are both rights-holders and stakeholders in business as consumers, legally engaged employees, future employees and business leaders and members of

[5] *General comment No. 25*, para. 12, UN Committee on the Rights of the Child (2021).

[6] *General comment No. 5*, para. 47, UN Committee on the Rights of the Child (2003). The text adds further that best interests 'requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children' (para. 12).

> communities and environments in which business operates.[7]

Also pertinent, General comment No. 20 summarizes children's right to have their best interests assessed and determined properly, when necessary:

> The right of the child to have his or her best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group.[8]

In sum, the best interests principle is applicable to policy making for all decisions that concern children, including business and legislative ones. This includes policies on digital services, data protection and privacy, information security, AI and audiovisual media as well as digital services such as those that provide or impact on public services, e-commerce, education, justice, health and other areas of public and private life.

Box 2. Legislating for the 'best interests of the child' in the digital environment

References to 'best interests' in relation to the digital environment vary by country, in part due to the role of 'best interests of the child' in the country's legal system. South Africa and Kenya include the 'best interests of the child' in their constitutions. It is also present in the Irish Fundamentals, the African Union child protection policy and in Sweden and Scotland, where the UNCRC has been incorporated into law; in those countries it impacts on all laws and regulations that pertain to children.[9]

In Australia, the Online Safety Act 2021 (Part 1, Article 24) refers to the UNCRC and calls for regulatory guidelines from the eSafety Commissioner that require businesses to take into account 'the importance of protecting and promoting human rights online, including the right to freedom of expression, the right not to be subjected to arbitrary or unlawful interference with privacy, the right to protection from exploitation, violence and abuse, and the rights and best interests of children, including associated statutory obligations.'[10]

[7] *General comment No. 16*, UN Committee on the Rights of the Child (2013).

[8] *General comment No. 20*, UN Committee on the Rights of the Child (2016); see also defenddigitalme (2021).

[9] The concept of 'best interests' has been applied in relation to data protection and the digital environment to varying degrees, and mapping such applications and adjudications would be a valuable future research project. So would exploring the differences between countries following civil law versus common law. Note, further, that international organizations such as the Organization for Economic Co-operation and Development (OECD) and World Economic Forum (WEF) also use 'best interests of the child' in their guidelines for the digital industry and policy making. See OECD (2012, 2021); WEF (2019).

[10] Head terms, Phase 1 Industry codes, Clause 5.1(b), Australian Online Safety Act (Australian Government, 2022); see also eSafety Commissioner (2023).

In Brazil, the 1990 Law (Law No. 8.069) on Children's Rights enshrines 'the best interest of the child,' and subsequently, the General Data Protection Law (LGPD) (Law No. 13,853/2018) establishes 'the best interests' as a condition for processing: 'The processing of personal data belonging to children and adolescents shall be done in their best interest, pursuant to this article and specific legislation' (Article 14). [11]

The European Digital Services Act (DSA) (Regulation (EU) 2022/2065) requires businesses to put children's best interests at the heart of their provision, now emphasizing the design of digital services: 'Providers of very large online platforms and of very large online search engines should take into account the best interests of minors in taking measures such as adapting the design of their service and their online interface, especially when their services are aimed at minors or predominantly used by them' (para. 89).[12]

In Kenya's 2010 constitution, Article 53(2) asserts the 'best interests of children' are 'paramount' in all matters concerning children.[13] This has shaped its Data Protection Act 2019, where Section 33(1) forbids the processing of data without the consent of guardians, and stipulates that such processing should be carried out in a manner that 'protects the best interests of the child'.[14]

South Africa's legal applications are influenced by *The African charter for the rights and welfare of children*, which lays out best interests of children with special concern for the continent's cultural diversity.[15] While children's 'best interests' as a principle is not explicitly mentioned in the data protection laws in South Africa, it informs the constitutional right to privacy applied to children.[16] The South African Human Rights Commission's (SAHRC) *Social Media Charter* (2023) provides a framework to operationalize best interests in online contexts.[17] Instead of equating 'best interests of the child' with 'parental consent', it guides parents, guardians and children on how to ensure the day-to-day wellbeing and safety of children online.

The UK's Age appropriate design code (AADC) requires organizations that 'provide online products and services that process personal data and are likely to be accessed by children in the UK' to meet 15 standards, of which Standard 1, 'Best interests of the child', specifically requires businesses to 'ensure that the best interests of the child are a primary consideration when you process their data. Your commercial interests may not be incompatible with the interests of children, but you need to consider the best interests of the child as a priority where

[11] Brazilian General Data Protection Law (LGPD) (2019).

[12] EU (2022). The DSA also obliges providers of very large online platforms and search engines to conduct risk assessments. However, this stops short of requiring the use of the Child Rights Impact Assessment (CRIA), although the UN Committee on the Rights of the Child recommends this mechanism for organizations to ensure they realize children's rights.

[13] National Council for Law Reporting with the Authority of the Attorney-General (2010). The use of the word 'paramount' here is striking, as in UNCRC Article 3, 'primary' concern must be given to the best interests of the child in all matters concerning children (suggesting that they may need to be balanced with other interests). However, when it comes to adoption, the child's interests are 'paramount' (Article 21).

[14] Office of the Data Protection Commissioner (2019).

[15] African Union (1990).

[16] Singh & Power (2021).

[17] SAHRC (2023).

conflicts arise'.[18]

In the USA, the California Age-Appropriate Design Code Act (CAADCA) (AB 2273)[19] applies to companies that fall under the definition of 'business' in the California Consumer Privacy Act (CCPA). It asserts that 'Businesses that develop and provide online services, products, or features that children are likely to access should consider the best interests of children when designing, developing, and providing that online service, product, or feature.'[20]

Other countries also make special provisions for children in their data protection laws, including in regions as diverse as Chile, China, Ghana, India, Uganda and Zimbabwe.[21] However, even if the 'best interests of the child' is mentioned, children's rights are often upheld via singular measures of parental consent.[22] Considering the diversity of childhood contexts, this may not mean that children's best interests are ensured in practice and could worsen situations by giving parents undue control over children's access to the digital world.[23]

Best interests of the child in action

According to the UNCRC, the best interests of the child are to be 'a primary consideration' for 'public or private social welfare institutions, courts of law, administrative authorities [and] legislative bodies' (Article 3(1)) as well as 'the basic concern' of 'parents [and] legal guardians' (Article 18(1)). The concept 'should be adjusted and defined … according to the specific

[18] ICO (2019). To support businesses in this task, the ICO has developed its best interests framework (2022). Since the UK's code is now being applied or adapted in other countries around the world, this is a potentially influential framework, although ensuring children's best interests through data protection is far from straightforward. For further discussion, see van der Hof et al. (2020).

[19] Currently not an enforced law. Even though the CAADCA passed in the California Assembly, it was blocked due to a legal challenge from NetChoice, a trade association of tech companies. The case is ongoing in US courts; see *NetChoice v. Bonta* (2022) and NetChoice (2024).

[20] The California Age-Appropriate Design Code (2021, revised in 2022).

[21] Relevant laws include the Chilean Personal Data Protection Bill (2017), Zimbabwe's Data Protection Act (DPA), China's Personal Information Protection Law (PIPL), Uganda's Data Protection and Privacy Regulations (DPRP) – all passed in 2021– and Ghana's DPA of 2012 as well as India's Digital Personal Data Protection (DPDP) Law passed in 2023.

[22] The responsibilities of parents raise more questions than can be addressed in the present report. We refer to the recent 'Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child' (OHCHR, 2023): 'The Committee notes that parents' responsibilities, rights and duties to guide their children is not absolute but, rather, delimited by children's status as rights holders. The provision of direction and guidance by parents must be exercised in a manner to respect and ensure children's rights. Article 18 of the Convention, which underlines the primary responsibility of parents, or legal guardians, for the upbringing and development of the child, states that 'the best interests of the child will be their basic concern.' See also Cannataci (2021) and Abrams (2023).

[23] It is also important to consider why, or why not, the best interests of children may find usage in a country's sociolegal history. Here, the countries' commitments for other (often second-generation) rights, such as those for socioeconomic justice, remind us that ultimately there is an umbrella of needs that children (with their intersecting identities) may rely on, and therefore in how 'best interests of the child' is actioned in the digital environment (Ekudayo, 2015; Goonesekere, 1994; Mosikatsana, 1997).

situation of the child or children concerned.'[24] This adaptability 'is essential in the case-by-case approach'[25] for application to different social contexts and legal systems.

Recognizing that 'best interests' has a contested history[26] in decision-making on children's issues, it is important to refer to the UNCRC and its general comments, statements by the Committee on the Rights of the Child, and related jurisprudence for interpretation and practical application of the concept.

The right to consideration of their best interests applies to individual children, specific groups of children affected by a given issue, and children as a single age-defined group.[27] In relation to the digital environment, 'best interests' applies most obviously to the collective best interests of children as an age-defined group. In addition, special attention should be paid to protecting the rights of children with disabilities, LGBTQIA+ children and those of ethnic minorities, among other vulnerable groups.[28] The rights of individual children will also be a consideration in cases of complaint, reporting and redress. This process-driven approach is helpful when considering commercial companies' engagement with children at scale.

As legislation in relation to the digital environment increasingly refers to the best interests of the child, and as a rights-based approach to the digital environment gains support, other stakeholders including digital providers are now referring to the 'best interests of the child'. In relation to the digital environment, as elsewhere, it is important to follow the procedural guidelines for assessing best interests and responsibilities of relevant parties and ensuring all children's rights, as set out clearly in *General comment No. 14*.

What best interests is not

Using the concept of 'best interests of the child' out of context of the UNCRC risks claiming to make children's best interests a primary consideration while failing to do so in practice. Indeed, if 'best interests' is misinterpreted or misused – be it wilfully or unintentionally – there may be negative consequences for child wellbeing and safeguarding children's rights. Here

[24] *General comment no. 14*, para. 32, UN Committee on the Rights of the Child (2013).

[25] van Bueren (2007, p. 36); see also Zermatten (2010).

[26] In the 'pre-UNCRC' era, 'best interests of the child' were conceived and primarily used as a basis for determining what, for various reasons, would be seen as 'best' for a child for whom the intervention of the authorities was deemed necessary. Such decisions were made on a 'one-size-fits-all' basis, taking no account of a child's individual needs, but referring purely to the circumstances, e.g., removal or forced separation due to birth outside of marriage, family poverty, ethnic origin, etc. Being deliberately undefined and lacking agreed criteria for a basis, best interests of the child-grounded decisions were notoriously subjective, reflecting prevailing adult moral attitudes rather than concern for the child's wellbeing. See Cantwell (2016); Eekelaar & Tobin (2019).

[27] *General comment No. 14*, UN Committee on the Rights of the Child (2013).

[28] As highlighted in the UN's *Guiding principles on business and human rights* (2011, para. 12): '… enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.'

are some examples of how the concept may be manipulated.[29]

First is the obvious but sometimes neglected fact that the UNCRC is a treaty on children's rights, and not on their best interests. The specific right therein to have their best interests taken into account implies compliance with all children's rights when decisions affecting them are made. Child rights experts warn that:

> the best interests principle should not be equated with protection from harm, the right to development or education, etc.: it is in a child's best interest to enjoy all their human rights, including their participation rights (not only the right to be heard but, for example, their right to seek, receive and impart information).[30]

Fulfilment of obligations under the UNCRC cannot therefore be reduced to a simple reference to respect for best interests. When mention is made of best interests, it is signaling the relevance of the treaty as a whole (e.g., putting 'best interests' in the Data Protection Act implies a reference to it within the context of the Convention).

Second, determining best interests of children is not a subjective exercise that allows any self-proclaimed authority to declare what those best interests might be, notwithstanding that some critics suggest that 'the application of the concept of the best interest of the child often simply reflects adults' interests.'[31] Justification for best interest-based decisions must draw on robust evidence examined by qualified professionals and must take full account of children's concerns and wishes. These qualifications should include knowledge both of children's developmental needs as well as technological innovation and policy.

Specifically, in the context of the digital environment, it is not sufficient for a company in the context of its own commercial interests to determine which child rights are most pressing, or imagine that their commercial interest warrants limitations on respect for the best interests of the child. Indeed, the UK's AADC explicitly prioritizes the best interests of the child over commercial interests:

> If a conflict arises between commercial interests and the best interests of children, companies should prioritize the privacy, safety, and well-being of children over commercial interests.[32]

Third, 'best interests' does not mean treating all children the same, irrespective of their age and capacity. Indeed, *General comment No. 20* explains that best interests must be applied to children as appropriate to their development and maturity:

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[29] Because the only mentions of 'best interests' in international treaties are specific to children, we have no generic jurisprudence to guide its application in broader human rights contexts. This creates problems when applying it in a specific context such as the digital environment.

[30] Mitchell et al. (2023, p. 3).

[31] [Italian] CRC Working Group (2002).

[32] ICO (2019, §1798.99.29b)). Similar legislation has been introduced in Maryland (HB901), Connecticut (HB6253), Minnesota (HF2257, SF2810) New Jersey (A4919, S3493), Oregon (SB196), New Mexico (SB319) and Nevada (AB320).

> The Committee stresses that, when determining best interests, the child's views should be taken into account, consistent with their evolving capacities and taking into consideration the child's characteristics. States parties need to ensure that appropriate weight is afforded to the views of adolescents.[33]

Hence, according to the UK's AADC:

> As children acquire capacities, they are entitled to an increasing level of responsibility for the regulation of matters affecting them. The evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression, and which are often inaccurately justified by pointing to children's relative immaturity.[34]

Fourth, reference to 'best interests' of children does not legitimate cherry-picking among children's rights in an attempt to demonstrate that best interests are being upheld. The UNCRC must be read as a whole, and a 'best interests' procedure is only needed when it is difficult to respect particular combinations of rights. It cannot provide legitimation for whichever right a company may favour. Although it is vital that technology companies respect children's rights, this should not be achieved by referring to or seeming to determine for themselves children's best interests in relation to their policies and product development (see Box 3).

Finally, unnecessary recourse to 'best interests' arguments and justifications is dangerous. It detracts from the significance of recognized and unambiguous human rights that must be upfront in underlying policy and practice. For example, protection must be approached as a fully-fledged right creating obligations, and not simply a question of best interests.[35] However, 'best interests' is important as a means of resolving tensions among rights, and must remain a primary consideration when others (including businesses) seek to act according to their own interests.

Box 3. Uses of 'best interests of the child' by Meta

Meta's Trust, Transparency & Control (TTC) Labs developed Meta's best interests of the child framework as a standard for their product developers, drawing on their co-design sessions

[33] *General comment No. 20*, UN Committee on the Rights of the Child (2016).

[34] ICO (2019).

[35] Commenting on legislation in the global South, Goonsekere (1994) notes that, in the absence of a clear definition of best interests, courts have preferred to refer to other rights, such as the rights to life, education or basic needs, to ensure children's wellbeing is prioritized.

with children.[36]

"We developed a process to help us apply the UN's Convention on the Rights of the Child directly to the products and experiences we build at Meta."[37]

Their framework 'distils the "best interests of the child" into six key considerations'.[38]

Beyond the crucial point that it is for States, and not companies, to determine children's best interests,[39] we observe that a child rights framework might take a different approach. Meta uses the language of 'young people', 'youth' and 'teens' seemingly interchangeably rather than 'children' (as in UNCRC Article 1, 'a person under 18'). Moreover, despite Meta's claim not to allow children under 13 on their platforms,[40] leaked documents show that their commercial strategy is to target 10- to 12-year-olds ('pre-teens') as a 'valuable but untapped audience'.[41]

Three of the six considerations refer to families, parents and guardians: each is an important actor, but they should not appear to substitute for a company's responsibility to safeguard children's rights. Since the framework is intended for product development, it is notable that it does not reference either the known harms or the likely long-term impacts of use. Nor is there mention of the best interests of the child requiring an authoritative, independent and accountable determination.

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[36] Meta organized an inaugural EU Youth Privacy Forum, which took place on 29 June 2022. At the event, David Miles, Meta EMEA Head of Safety, and Cecilia Alvarez, EMEA Director of Privacy Policy Engagement, both mentioned Meta's best interests of the child framework: 'Cecilia spoke about 2022 being the "year of youth", with several EU legislative and regulative initiatives (for example DSA (Digital Services Act) and DMA (Digital Markets Act)) being adopted later this year, thanks to which data protection authorities have been giving guidance. Cecilia highlighted that understanding users' age is one of the most important aspects that Meta is addressing in developing the right experience for the right age. She shared two guiding principles. The first being the best interest of the child framework: children also have rights, and we need to find a way to empower them. And secondly, Cecilia reflected on the importance of having a parent's perspective on these issues and to take decisions on the best way to handle the challenges. Every parent has a role to play, from policymakers to families' (Meta, 2022a, p. 3).

[37] Montgomery & Koros (2022).

[38] Montgomery & Koros (2022).

[39] States also have a role to ensure that non-state actors comply.

[40] In a 2018 Senate hearing, Mark Zuckerberg stated that they do not allow under 13s on their platforms (Bloomberg Government, 2018). Similarly, in a 2021 Senate testimony, the head of Instagram, Adam Mosseri, also stated that they do not allow users under 13 (United States Senate Committee on Commerce, Science & Transportation, Subcommittee on Consumer Protection Product Safety and Data Security, 2021). However, social media companies continue to be fined for allowing children under 13 on their platforms. For example, TikTok was fined £12.7 million by ICO (2023) on the grounds that 'TikTok breached the UK General Data Protection Regulation (UK GDPR) between May 2018 and July 2020' and 'Providing its services to UK children under the age of 13 [up to 1.4 million users] and processing their personal data without consent or authorization from their parents or carers.' Similarly, in the USA, Meta received a 233-page joint complaint for allowing under-13s on their platforms (*People of the State of California v. Meta Platforms, Inc*., 2023).

[41] Wells & Horwitz (2021): 'Internal Facebook documents reviewed by The Wall Street Journal show the company formed a team to study preteens, set a three-year goal to create more products for them and commissioned strategy papers about the long-term business opportunities presented by these potential users. In one presentation, it contemplated whether there might be a way to engage children during play dates. "Why do we care about tweens?" said one document from 2020. "They are a valuable but untapped audience".'

The way Meta refers to 'best interests of the child' in different documents suggests some confusion about the principle. In their 2022 *Human rights report*,[42] they imply that it means protecting children and giving them tools. The fourth consideration says children's needs are prioritized over Meta's commercial interests, but the examples given include setting teen accounts to private by default, adding a 'take-a-break' tool, and restricting adults from messaging teens – valuable safety measures but not, notably, limits on the monetization of children's data or effective protections for underage children.

Notwithstanding its framework, Meta's practices have been roundly condemned by the US Congress and at state level in the country, with 42 attorneys general taking legal action against Meta on the grounds that its products are designed to be addictive and harmful to teenagers.[43]

Determining the best interests of children

Determining the best interests of children raises some fundamental questions:

- When is 'best interests' determination necessary and appropriate?
- Who is to determine best interests?
- On what basis should best interests be assessed?

When is a best interests determination necessary and appropriate?

'Best interests' determination is a procedure designed to take all children's rights into account and evaluate as far as possible both the present and foreseeable needs of the children concerned. However, in many cases the application of UNCRC rights does not require a 'best interests' determination – ranging, for example, from the right to birth registration to protection from acts of torture or arbitrary detention.

'Best interests' determination is necessary for decision-making where there are competing potential responses for upholding children's rights, or when it appears that children's rights are in tension, or the declared interests of other parties may conflict with those of children. Notably, when considering the enjoyment and implementation of the human rights of children, including in relation to the digital environment, there is frequently a real or perceived tension between children's agency – exemplified by UNCRC Articles 5 and 12, as well as the fundamental freedoms set out in Articles 13-15 – and rights to protection from

[42] Meta (2022b). In a legal filing, Meta (2023) refers to that report recognizing best interests as one of a list of rights: 'In July 2022, we published our first Human Rights Report, which is available on our website at https://humanrights.fb.com. This report identified an initial list of salient human rights risks based on due diligence efforts to date, including the right to freedom of opinion and expression, right to privacy, right to life, liberty and security of person, rights to equality and non-discrimination, best interests of the child, and rights to public participation, to vote, and to be elected.'

[43] Lima-Strong & Nix (2023); *People of the State of California v. Meta Platforms Inc.* (2023).

harm and exploitation, including violation of privacy (Article 16).[44] In the context of the digital environment, the commercial or business interests of digital service providers may not coincide with those of children.

A fundamental premise of human rights law is that all rights are '… indivisible and interdependent and interrelated.'[45] While this means that, generally, all rights are of equal importance and cannot be dissociated, in given circumstances priority will clearly have to be afforded to one or more above others. In terms of the human rights of children, a duly undertaken 'best interests' determination can play a crucial role in identifying which rights are to be given precedence in situations where potentially conflicting rights are in play.[46] This determination will, among other things, assess the risks to children of a range of scenarios where their 'agency' and 'protection' rights are weighed differently.

When safeguarding children from exploitation is at stake, such a determination will invariably lean towards ensuring the human right to protection. To ensure this does not unduly exclude agency, the determination process will involve taking a closer look at the balancing principle.[47] For example, it may be that enhanced mandatory privacy protection is a better route to child safety than parental consent or parental surveillance – given that the latter may adversely affect the child's right to access information. Trading rights is likely to be disadvantageous to the child, given that rights are interlinked. For example, the Committee on the Rights of the Child emphasizes that while protection is needed for effective participation, participation is needed for children to learn to protect themselves. Best interests in the digital environment may require regulators and legislators to indicate balancing actions particular to the digital context, such as privacy- or safety-by-design.[48]

Who is to determine best interests?

Responsibility for ensuring the best interests of the child first and foremost falls on the executive, legislative and judicial branches of government as well as 'public or private social welfare institutions'.[49] The Committee on the Rights of the Child has noted that such

[44] Specifically, children have the right to access information and to express opinions 'through any media' (Article 13); on the other hand, they have the right to privacy (Article 16), and to be protected from sexual exploitation (Article 34) as well as, importantly, 'all other forms of exploitation prejudicial to any aspects of the child's welfare' (Article 36) including economic exploitation (Article 32). Such 'other forms' of exploitation could also include, for example, 'information and material injurious to his or her well-being', protection from which is explicitly provided for in Article 17(e).

[45] OHCHR (1993).

[46] *General comment No. 14*, para. 80, UN Committee on the Rights of the Child (2013).

[47] *General comment No. 14*, paras 80-83, UN Committee on the Rights of the Child (2013).

[48] Kidron et al. (2018).

[49] UN (1989, Article 3(1). The 'overall objective' of *General comment No. 14* 'is to promote a real change in attitudes leading to the full respect of children as rights holders' (para. 12). One implication concerns the 'decisions made by civil society entities and the private sector, including profit and non-profit organizations, which provide services concerning or impacting on children' (para. 12, C). According to Article 3(1), it is the State parties' obligation 'to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child' (para. 14, C).

institutions include 'business enterprises that function as private or public social welfare bodies by providing any form of direct services for children, including care, foster care, health, education and the administration of detention facilities.'[50] Bar rare exceptions, provision of digital services would not be included in this list.

General comment No. 25 makes it clear that national administrative authorities, legislative bodies and courts of law have the fundamental responsibility for setting and enforcing the standards to which all, including the private sector, are to be held. This means that it is not the role of private enterprises to establish their own criteria and processes for determining what might or might not be in the best interests of the children who may be impacted by their activities; rather, they are obliged to ensure that their services meet the guidance or standards set by the state and/or by the Committee.

However, in the same way that manufacturers of products not designed for consumption by children are obliged to take effective measures to prevent children coming to harm from contact with them, it remains the full responsibility of digital service providers to take needed measures for the digital environment. As stated in the UN's *Guiding principles on business and human rights*:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[51]

On what basis should best interests be assessed?

'Best interests' determination takes place in the light of an assessment process that sets out to evaluate and balance 'all the elements necessary to make a decision in a specific situation.'[52] The assessment is to be carried out by the body that will make the final determination, by a qualified multidisciplinary team.[53] The assessment should be based on a pre-established 'non-exhaustive and non-hierarchical list of elements.'[54]

Essential to both the assessment and determination processes is consultation with the children actually or potentially concerned. When the interests of children as a group are at issue, 'Government institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions.'[55] Certainly, children have views on

[50] *General comment No. 16*, Part III.B, UN Committee on the Rights of the Child (2013).

[51] OHCHR (2011, para. 11). According to this, States have a duty to respect, protect and fulfil human rights whereas businesses have a responsibility to protect and respect human rights and provide mechanisms for remedy.

[52] *General comment No. 14*, para. 47, UN Committee on the Rights of the Child (2013).

[53] *General comment No. 14*, para. 94, UN Committee on the Rights of the Child (2013).

[54] *General comment No. 14*, para. 50, UN Committee on the Rights of the Child (2013).

[55] *General comment No. 14*, para. 91, UN Committee on the Rights of the Child (2013).

their best interests and more generally, on their rights in the digital environment (see Box 4).

The Committee has further noted that, although children's opinions and wishes should not be followed if it is duly determined that their best interests would thereby be jeopardized, the reasoning for overriding their wishes should be rigorously documented, clearly explained and, where necessary and appropriate, subject to subsequent review.[56] Whether or not their views are followed, the evolving capacities of the child (as an actor in the defence and promotion of their rights) must be borne in mind, as foreseen by UNCRC Article 5.

An important element of the 'best interests' assessment and determination process should be a Child Rights Impact Assessment (CRIA) to predict the ramifications of any initiative for the enjoyment of these rights. Prior to that process, a CRIA should be carried out – in principle by the company concerned – and should be informed by inputs from children and a range of other expert sources including civil society, public bodies and academia. As explained in *General comment No. 25* (para. 38):[57]

> States parties should require the business sector to undertake child rights due diligence, in particular to carry out child rights impact assessments and disclose them to the public, with special consideration given to the differentiated and, at times, severe impacts of the digital environment on children.

While individual CRIAs may be needed for different kinds of digital providers, over time rights-respecting design norms and design standards are being developed.[58] In relation to the digital environment, best practice norms are increasingly being codified, providing an agreed reference point so that each company need not begin at the beginning. Where uncontested best practice exists and is followed, it will be possible to record that as evidence of realizing children's rights.

Box 4. Children have views on their best interests

"For lots of apps there's a communication feature like Roblox… If you took that away entirely, it would be a lot safer. But it wouldn't be nearly as much fun or entertaining, which I think is a lot of the reason that it's still there." (Essex school, Year 8)

"Sometimes [a game] might be appropriate for my age, but it might not be actually appropriate for me. So, I think that I should have some choice in what's appropriate for me." (London school, Year 3)

[56] General comment No. 14, para. 98, UN Committee on the Rights of the Child (2013).
[57] For more about CRIAs, see *General comment No. 14*, para. 99, UN Committee on the Rights of the Child (2013); *General comment No. 16*, paras 77-81, UN Committee on the Rights of the Child (2013); Mukherjee, et al. (2021); Livingstone & Pothong (in press).
[58] See Livingstone and Pothong (2023) on 'Child Rights by Design.'

"[If my views were heard, the internet] would be more family-friendly, so that more people could access it, and there'd be less harmful things on it. But then there also might be less information … if you search up drugs on YouTube or something … you could get information about it. But then if they said, no, that's inappropriate, then you wouldn't be able to know about it… So, if anyone approached you or something, you wouldn't really know how to react." (Essex school, Year 8)

The status of best interests of the child vis-à-vis the interests of others

According to UNCRC Article 3(1), children's best interests are to be seen as one of the primary considerations in decision-making, albeit not the only one. Once the most appropriate outcome for children has been determined, it has to be weighed against the interests of others – be they individual parents, the family, the State or any other party with an interest in the issue – and attempts should be made to identify a viable compromise between them. The Committee on the Rights of the Child has clarified that this does not mean placing other interests on an equal footing, stating that

> If the rights of other persons are in conflict with the child's best interests' and if harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.[59]

In relation to the digital environment, technology companies are often under competitive pressure to subordinate children's best interests to their own commercial interests.[60] Despite some companies' promise to respect children's rights in the digital environment, many have failed to comply with regulations that directly or indirectly safeguard children online.[61] Children's rights in general, and the necessary flexibility of the 'best interests of the child' concept in particular, can even be said to be weaponized by tech trade associations. These include the Chamber of Progress, whose corporate partners include Amazon, Apple, Google and Snap,[62] and NetChoice, which represents some of the biggest tech companies in the world.[63] In 2023 NetChoice sued the State of California, effectively halting the CAADCA on the

[59] *General comment No. 14*, para. 39, UN Committee on the Rights of the Child (2013); see also van der Hof et al. (2020).

[60] Wells & Horwitz (2021).

[61] United States Senate Committee on the Judiciary (2024). See, for example, EDPB (2022); ICO (2023a).

[62] Chamber of Progress (2022).

[63] NetChoice (2024a) describes itself as an association whose mission is 'to make the Internet safe for free enterprise and free expression'. It has a large member base including Meta, Google, Amazon, TikTok, Snap, X and Pinterest. See also the Virginia House Bill No. 1468 (LIS, 2024), a bill to amend and reenact §59.1-584 of the Code of

grounds that it violates the US Constitution's First Amendment.[64]

In its complaint about CAADCA, NetChoice argues that 'best interests of the child' can be a subjective and vague term that could cause companies to 'guess' their meanings:

> Among its many infirmities, AB 2273 presses companies to serve as roving censors of speech on the Internet. The law imposes on private firms, big and small, the obligation to identify and "mitigate" speech that is "harmful or potentially harmful" to users under 18 years old, and to "prioritize" speech that promotes such users' "well-being" and "best interests." If firms guess the meaning of these inherently subjective terms wrong – or simply reach different conclusions than do government regulators – the State is empowered to impose crushing financial penalties.[65]

It is noteworthy that the CAADCA (AB 2273) is a data protection regime, which seeks to deliver on a child's right to privacy, rendering the above concern somewhat disingenuous, not least because it is already in law in other jurisdictions and has not been found to have any of the malign effects suggested. Moreover, a CRIA-based independent determination of best interests is precisely designed to eliminate the potentially 'subjective' nature of terms such as 'wellbeing' and 'best interests'.

Conclusion

Children are clear that they want access to a digital world that is less addictive, harmful and economically exploitative. They have the right to be heard.[66]

In relation to the digital environment, particularly important protective rights are those to privacy (including regarding data processing); life, survival and development (including prevention of suicide); protection from abuse and all forms of exploitation; and the highest attainable standard of health (including mental health and psychological wellbeing). These rights should, in turn, be realized in ways that are lawful and without arbitrary restrictions on children's civil rights and freedoms, notably regarding maintenance of contacts with significant persons and access to information.

Children's best interests must be a primary consideration in the digital world. Determination of those best interests makes it possible to identify which right(s) are to be given precedence

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Virginia, relating to the Consumer Data Protection Act because the amendment calls for changes 'that would ban the use of TikTok in the state for minors under the age of 18'. Together with Chamber of Progress, a tech industry coalition, NetChoice filed a brief in support of TikTok against banning TikTok for under-18s (Chavez, 2024c; NetChoice & Chamber of Progress, 2023).

[64] In Ohio (*NetChoice v. Yost*) the Act has been halted while their lawsuit proceeds through the legal system – see Chavez (2024a). NetChoice also sued Arkansas on similar grounds – see *NetChoice v. Griffin* (2023).

[65] *NetChoice v. Bonta* (2022).

[66] Atabey, et al. (2023); Pothong & Livingstone (2021); Third & Moody (2021).

when they are not automatically aligned (as when, for example, freedoms and agency may jeopardize safety, or privacy concerns may put health at risk). Protection from a genuine risk of harm is understandably likely to outweigh other considerations.[67]

The criteria and procedures for assessing and determining the best interests of the child are broadly set out by the Committee on the Rights of the Child in its General comments. This determination process is the responsibility of States, and seeks to ensure that decision-making complies with standards set for children under international human rights law. Companies cannot unilaterally invoke the best interests of children to validate actions they propose or undertake or to avoid realizing the full gamut of children's rights.

'Best interests' invokes an authoritative and transparent procedure established by the State which, in putting the child's interests at the centre of concern as a 'primary consideration', allows for accountable decision-making. Such a procedures should come to a clear determination that the companies must comply with. This procedure should include four key elements. It should:

- Consult children and document what they said.
- Review the available evidence (and document it).
- Be explicit about how children's rights have been weighed in the particular instance, consulting relevant professionals as needed.
- Be accountable for the outcomes.[68]

In sum, to act in a child's best interests is an obligation undertaken by 196 States.[69] It reflects the widely held consensus in civil society, legislation and regulation that the adult world has a collective responsibility to protect and promote the wellbeing of children, and that their flourishing is a common good. While there is doubtless more to be discussed and enacted in relation to children's best interests in the digital environment, we conclude by setting out key tasks for both States and digital providers.

Obligations of States

- States should establish an authoritative body to provide a trusted and accountable procedure by which to assess and determine children's best interests in relation to the digital environment. This may be a government ministry, regulator (e.g., for data protection issues, the Data Protection Authority, or in Europe, the competent national authority that will enforce the Digital Services Act), children's commissioner or other

[67] Livingstone (2013).

[68] As suggested by *General comment No. 14*, para. 4, UN Committee on the Rights of the Child (2013). The obligation to make the best interests of the child a primary consideration becomes crucial when States are engaged in weighing competing priorities, such as short-term economic considerations and longer-term development decisions. States should be in a position to explain how the right to have the best interests of the child considered has been respected in decision-making, including how it has been weighed against other considerations.

[69] UN (2021). The UNCRC can now be considered to be part of customary international law.

appropriate body, as determined by the State. Where an authoritative body already exists, digital services should become an area for which they need to expand their remit with the requisite expertise.

- Such bodies should develop a 'best interests' framework according to which children's rights and best interests can be assessed, taking into account all their rights and anticipating possible conflicts among them. The framework should follow the criteria and procedure set out in General comment No. 14 (best interests), General comment No. 25 (digital environment) and related jurisprudence, including consultation with children and relevant independent experts, grounded in the available evidence, and resulting in a clearly documented determination.
- The authoritative body must retain its independence as the guarantor of children's rights, and must have sufficient resources and power to obtain compliance and remedy from companies as needed to ensure children's best interests are a primary consideration in the digital environment.
- Where decisions are likely to be problematic or contentious, such as when corporate interests appear to be in conflict with children's best interests, the competent State-appointed authority responsible for assessing and determining the best interests of the child should review the outlined potential conflicts of interest submitted by companies.
- This framework should reflect and be informed by international best practice.

Responsibilities of digital providers

- Digital providers should anticipate, identify and evaluate when their products and services are likely to be accessed by children, and take appropriate action to respect, protect and remedy all children's rights potentially impacted. If their products and services are likely to infringe any children's rights or to promote one right at the possible cost of another, they should consult and develop proposals to mitigate such a situation.
- Due diligence processes should be consultative, including meaningful consultation with children and relevant independent experts, evidence-based and clearly documented, including clarity on any decision-making process particularly when rights appear to be in conflict.
- Where decisions are likely to be problematic or contentious, such as when corporate interests appear to be in conflict with children's best interests, companies should consider and outline potential conflicts of interest for review by the competent State-appointed authority responsible for assessing and determining the best interests of the child. While multiple mechanisms may be useful, all these tasks can be optimally advanced by conducting a Child Rights Impact Assessment.

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