

General Comment submission
Children's rights in relation to the digital environment

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Dear Members of the Committee on the Rights of the Child,

We very much welcome the Committee's Draft General Comment No25 on children's rights in relation to the digital environment (the Draft) and are grateful for the opportunity to comment. We are a group of leading scholars and NGO experts on youth, digital media, child rights and public health who work to raise awareness and promote regulation of marketing (particularly of harmful goods, services and brands) to which children are exposed. We argue this infringes many of the rights enshrined in the UN Convention on the Rights of the Child (CRC) and other international instruments and should be strictly regulated.

Based on our collective expertise, we call on the Committee to recognise more explicitly the fundamentally transformed nature of marketing in new digital environments, the harms stemming therefrom, and the corresponding need to protect children from targeting and exposure. Without such recognition, children will not be able to fully enjoy the many opportunities for learning, civic

participation, creativity and communication that the digital environment offers for their development and fulfilment of their rights. Facilitating children's participation in this environment should not come at the price of violations of any children's rights.

Before making specific comments, we wish to highlight our support for much of this Draft. In particular, we strongly support the provisions in the following paragraphs of the General Comment: 11, 13, 14, 52, 54, 62, 63, 64, 67, 72, 74, 75, 88, 112, and 119.

We also note concerns regarding provisions that will require mandatory age verification: e.g., paragraphs 56, 70, 120, 122. We call on the Committee to consider provisions that this be applied proportionately, as this will certainly have the effect of increasing the processing of children's personal data - which should not happen to the detriment of the best interests of the child.

The rest of this contribution, following the structure of the Draft, proposes specific additions / modifications (*underlined, in italics*), with brief explanations (in boxes). Numbers refer to original paragraphs in the Draft; **XX** indicates a new proposed paragraph.

Hoping these comments are useful to finalise the General Comment, we remain at your disposal for further information.

Yours faithfully,

Amandine Garde and Mimi Tatlow-Golden

On behalf of those listed above

V. General measures of implementation by States (art. 4)

B. Comprehensive policy and strategy

26. In addition to *government-led* regulation, industry codes and design standards...

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| 'Regulation' alone is ambiguous and may not be sufficient to ensure that States as duty bearers under the CRC do uphold children's rights, as discussed further below. |
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H. Cooperation with civil society

35. States should systematically involve, *and support the active participation of*, civil society, including non-governmental organizations...

Civil society needs to be empowered (financially and otherwise) for meaningful advocacy supporting effective implementation of the CRC as interpreted by this General Comment and other authoritative sources.

I. The business sector

36. ... States have obligations to ensure that the business sector meets its responsibilities for children's rights in relation to the digital environment by taking all necessary measures including the *development, monitoring, enforcement and evaluation of policies, including the adoption of legislation and regulation that upholds the best interests of the child as a primary consideration.*

...

We explicitly refer to all key stages of the policy cycle highlighting that the best interests principle should guide all decisions throughout. This is particularly important as business actors often invoke economic rights (e.g. free (commercial) expression or (intellectual) property) and trade interests under regional or international trade agreements to challenge national laws and regulations adopted to protect public interests (e.g., consumer, health, environmental or child protection). Such challenges rest on [complex proportionality assessments](#) carried out by courts or tribunals that may not be well versed in children's rights. It is important to emphasise the crucial role that the best interests principle plays in such assessments.

38. ... States should take appropriate steps to prevent, *investigate and sanction* child rights violations by businesses in the digital environment *and ensure that such violations are publicly reported and effective remedies available to children whose rights have been violated.*

This intends to strengthen the original wording, adding the need for public reporting of children's rights violations, whilst emphasising that remedies should be effective.

39. In addition to, *and never instead of*, developing *effective* legislation, States should require businesses ... States should also require businesses to maintain high standards of transparency and accountability. *This includes ensuring that innovations, including algorithmic and other digital processing, are independently assessed to ensure they serve children's best interests.*

XX. States should be mindful of, and manage, all real, perceived and potential conflicts of interests that may negatively affect children's rights in relation to the digital environment. In particular, they should ensure that powerful vested interests do not trump children's rights.

We highlight the importance of ensuring that conflicts of interests are adequately managed. In particular, States should never discharge their obligations under the CRC by delegating responsibilities for effective implementation to private commercial actors whose business model may not promote respect for children's rights. The use of 'industry pledges', 'commitments' or 'public private partnerships' are often found to fall short of what the public interest, and children's rights, requires.

J. Commercial advertising and marketing

40. The digital environment includes businesses that rely financially on processing personal, *group and collective* data to target advertising, marketing, and revenue-generating or paid content; this intentionally and unintentionally impacts on the digital experience of children.

41: ~~States should ensure that advertising and marketing are age appropriate~~

We do not think that digital commercial advertising and marketing can be age appropriate, given the data-driven, persuasive, exploitative methods on which they rely. The remaining sentence in this paragraph has been moved to paragraph 42 (in blue).

42: - States should prohibit by law the targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, *including group or collective data; inferred race/ethnicity or income; and targeting by association or affinity profiling*. ~~Neuromarketing of child directed products, applications and services should also be prohibited~~ *Practices designed to impact mental and emotional processing and implicit persuasion should be prohibited, including, but not limited to, the testing and deployment of practices such as neuromarketing, emotional analytics, and biometrics, immersive advertising, and advertising in virtual and augmented reality environments.* States should also ensure that all forms of commercially driven content are clearly distinguished from other content.

We welcome the Draft's strong provisions to protect children's privacy, but note that a focus on personal data risks excluding harmful digital advertising practices targeting children via group, collective, affinity and associative data. In addition, the scope of exploitative marketing practices extends beyond neuromarketing.

XX. States should ensure that children are protected from the impact that commercial advertising and marketing has on their health, their development and many of their rights. To this effect, they should protect children from exposure to such advertising and marketing. A precautionary approach is warranted because, outside of proprietary industry research, there is no independent public data to reliably monitor the extent to which children are exposed to commercial advertising

and marketing online, and the impact these powerful and opaque digital marketing strategies have on children's identities, behaviour and development.

States have an obligation to ensure that children are effectively protected from exposure to all forms of digital commercial advertising and marketing which negatively affects many CRC rights: growing evidence links it to gender and race stereotypes, precocious eroticism, materialistic values, family stress (children exercising decisive influence on household purchases), and unsustainable consumption. UN bodies and Special Rapporteurs have noted the problem and [Special Rapporteur Farida Shaheed](#) called on States to 'prohibit all forms of advertising to children under 12 years of age, regardless of the medium, support or means used, with the possible extension of such prohibition to children under 16 years of age, and ban the practice of child brand ambassadors'.

We note two key points:

Firstly, the focus should be on children's [exposure to commercial advertising and marketing](#). Measures intended to protect children often focus on marketing 'targeted/directed at' or 'appealing to' children, or on 'children's programming/media'; although the largest absolute child audiences are found for mixed content specifically designed for general audiences, this is often not classified as children's content. The best interests of the child require that children are protected from actual exposure to unhealthy food marketing.

Secondly, in the digital environment, States should adopt a precautionary approach, as there is no method which allows them to reliably determine children's exposure to online commercial advertising or marketing. We advocate for a cautious, expansive interpretation of children's potential exposure. Companies in the digital ecosystem operate behind 'walled gardens'; in the absence of transparency regarding online marketing strategies, States should assume that children are exposed and prohibit such marketing to protect children. Such an approach is the only one likely to protect children from actual exposure to harmful marketing without restricting their right to participation, and is therefore in keeping with the letter and spirit of the child's best interests principle. Taking the interesting example of the United Kingdom: it originally announced regulating digital marketing of unhealthy food via a 9pm watershed ([July 2020](#)), but has now launched a further consultation for a total ban of unhealthy food marketing ban online ([November 2020](#)) on two main grounds: 1) lack of transparency; and 2) wide public support for effective online food marketing restrictions.

~~43. Where parental consent is required to process children's personal data, States should require that efforts are made to verify that consent is informed, meaningful and given by the actual parent or caregiver of the child.~~

We recommend deletion. We do not consider it in any way appropriate for businesses to process children’s personal data for the purposes of commercial advertising and marketing. Crucially, it is impossible for parents to give informed, meaningful consent to such processing as it is not possible to know (and hence consent to) the extent and nature of such processing, onward sale of data, and subsequent use.

E. Right to privacy (art. 16)

73... in cases where the data controller does not demonstrate legitimate, overriding grounds for the processing, *bearing in mind the best interests of the child as a primary consideration.*

We accept there may be circumstances in which a data controller may have a legitimate interest to process personal data, but it should be clearly stated that the threshold to determine what constitutes an overriding legitimate interest must be assessed in light of the best interests of the child principle. As the Committee has stated, Article 3(1) CRC is paramount when States weigh competing priorities, rights and interests, such as short-term economic considerations against longer-term child development decisions. This obligation increases the need for courts and other adjudicating bodies, and more generally all organs of the State, [to reflect the hierarchy of societal values](#) and give precedence to children’s privacy rights.

X. Highest attainable standard of health (art. 24)

The notion of ‘basic health’ seems to contradict the very notion of ‘highest attainable standard of health’ enshrined in the CRC and other international human rights instruments.

105 States should encourage the use of *privacy-preserving (privacy-compliant)* digital technologies to promote healthy lifestyles, including physical and social activity

XX The commercial advertising and marketing of several products, services and brands are associated with poor health. Harmful commodities include but are not limited to unhealthy food and beverages, alcohol, drugs, tobacco and other nicotine products. States should *specifically* regulate *harmful commercial* advertising and marketing to prevent children’s exposure to such advertising and marketing. Such regulation relating to the digital environment should *in no circumstance be less effective than* regulation in the offline environment.

This paragraph highlights the need for a more robust call for States to ban particularly harmful forms of marketing to which children are exposed.

Growing evidence shows this marketing negatively affects the child's right to health and other related rights. Calls are multiplying for prohibition of such marketing in all media, including digital media, to which children are exposed. These goods, services and brands include cigarettes and other smoking products, alcoholic beverages, unhealthy food, energy drinks, gambling services, and slimming/weight management/cosmetic products and treatments whose consumption entails specific public health concerns. As highlighted above, the importance of focusing on exposure, and recognising the imperative of a precautionary approach in light of opaque digital marketing strategies, apply with equal force here. [In our consultation response of May 2019](#) we discussed evidence supporting a ban on the commercial advertising and marketing of harmful commodities, and unhealthy food more specifically.

[WHO](#) and [UNICEF](#) have published a wide range of documents (to which many of us have contributed as experts) calling on a child-rights approach to marketing, and particularly food marketing. This requires a [government-led, comprehensive approach](#) focusing on restricting children's exposure to marketing rather classifying media content as targeted at or directed to children. In particular, since the Committee published its pre-Draft consultation in 2019, the [UNICEF-WHO-Lancet Commission](#) emphasised 'severe threats' posed to children by 'harmful commercial marketing', and called for regulation, urging the international community to work towards the adoption of an Optional Protocol to the CRC. Without prejudging the outcome of this process, we urge the Committee to call on States to adopt effective restrictions on the marketing of harmful goods, services and brands to children.

The significant impact of COVID-19 further increases the urgency to regulate the commercial determinants of health effectively, as the tobacco, alcohol, [food](#), gambling and other industries have 'capitalized' on the pandemic to increase profits [to the detriment of public health](#) .

B. The right to culture, leisure and play (art. 31)

119. Leisure time spent in the digital environment may expose children to risks of harm, for example through *commercial advertising and marketing* or highly persuasive or even...

Commercial advertising and marketing negatively impact on the right to culture; leisure and play. We urge the Committee to specifically recognise it in this paragraph.

XII. Special protection measures

A. Protection from economic, sexual and other forms of exploitation (arts. 32, 34, 35 and 36)

XX States should also legislate to prohibit the use by digital media of exploitative, data-driven and persuasive techniques that, consciously or sub-consciously, capture children's attention, for commercial advertising and marketing purposes. These include, but are not limited to, peer-to-peer marketing, influencer marketing, 'rewarded' game content, branded content, playable ads, precise geolocation, cross-device tracking, and use of AI/machine learning.

We consider there is a need for a specific recognition that practices of digital marketing for commercial gain, including but not limited to the extraction and use of children's data, infringe children's right to be free from exploitation.

[The argument has long been made](#) that marketing typically constitutes manipulation, as emotional (not informational) communication bypasses rational decisions and choices, identifying individuals' weaknesses and vulnerabilities. In digital media this is even more so as marketers take advantage of platforms' structural features and affordances, particularly in social media. Digital strategies operate even more beyond conscious awareness than traditional advertising, blurring boundaries between marketing and media content, distracting from marketing intent.

[Digital marketing is extremely engaging](#), and via entertaining, immersive strategies it amplifies its persuasive impact and potential for exploitation of child-consumers. It aims to go beyond messaging to engage in powerful relationship-building, a sociable, peer-based activity that [cultivates parasocial relationships with brands](#). 'Native' marketing is encouraged by social media companies' algorithms: shown within social media content, reflecting its look and feel, it is [particularly effective in generating purchase intent](#) compared to more distinct and easily identifiable 'display' advertising. Social media networks and marketers encourage and facilitate the rapid, exponential spread of marketing through peer transmission; in essence, this amounts to [recruiting children to act as peer marketers](#).

Social media influencers' popularity is extensive (some with millions of followers), and children trust them more than movie celebrities. [Children \(13 to 15 years\) in Norway](#) believe YouTube influencers' promotion of products is genuine and (ironically) free of any influence. [Experimental studies](#) establish that influencer promotion is effective: children eat more snacks after viewing influencer food marketing compared to those who watched videos of the same influencer promoting non-food, [even when the advertising is disclosed](#).

[We have argued](#) that these and other marketing practices in digital media present threats to individual autonomy, as being controlled outside conscious awareness violates autonomy and

capacity for decision-making ([Susser, Roessler & Nissenbaum](#)) It is critical that those seeking uphold children's best interests grasp that digital media (including its marketing practices) 'are fused indissolubly and irreversibly with processes of profitable data extraction, which in turn are based on continuously tracking human subjects with a view to continuously influencing them and nudging them ever more securely into circuits of extraction' ([Couldry & Mejias](#)).

XIII. International and regional cooperation

XX. In particular, States should cooperate to effectively address cross-border digital marketing and comply with the international commitments they have made to this effect.

Digital marketing is inherently cross-border and requires global and regional coordinated responses – underscored by the enormous economic clout of digital platforms, adtech and other multinational corporations promoting goods, services and brands in the digital environment.