Publication of Children's Photographs under the GDPR- Balancing Parental Consent and the Fundamental Rights of the Child

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We live in an era where sharing photographs of children on social media has become commonplace, often perceived as normal and acceptable, with little consideration of potential risks. Parents frequently give consent to third parties to capture and publish photographs of their children, which may subsequently appear on websites, social media platforms, brochures, or other media to serve the interests of those third parties. However, it is important to ask: do these posts truly carry no risk, and in such situations, whose interests should take precedence?

According to GDPR, personal data is considered to be all information relating to an identified or identifiable natural person, including photographs where individuals can be identified directly or indirectly. According to GDPR, in order to photograph children and publish them for a specific purpose, parental consent is required, or in exceptional situations, proof of legitimate interest.

Parents are the only people who do not need explicit permission in order to take photographs of the children and publish them on social media as it is assumed that their authority as the child's legal representative substitutes for the child's consent. However, considering how social media algorithms operate, we can easily see photos or videos of children of people we don't know personally if the parent doesn't have a locked profile on the specific social networks or if the image is shared by someone in our circle of friends. Thus, the child's face and often their name can become recognizable beyond the immediate circle of family and friends. This exposure potentially places the child at risk, including the misuse of their face or personal information for illegal purposes. Unfortunately, with the increasing use of AI technology, the abuses are assumed to only become greater and the fear of abuse even more justified. Therefore, parents should carefully consider the manner and extent of sharing their children's photos and, when appropriate, refrain from sharing such data to protect them from potential misuse.

In light of third-party use of children's photographs with parental consent, two recent decisions by local data protection authorities in Italy and Spain are particularly significant regarding the publication and use of such photographs.

The Italian Data Protection Authority issued a decision imposing a fine on a Kindergarten for publishing photographs of children on its website, despite the Kindergarten having obtained consent from one of the children's parents for the publication of the photos. In its decision, the Italian Data Protection Authority emphasized that by publishing photographs of infants and children shown in situations, moments and activities characterized by particular sensitivity— and which, by their nature, are intended to remain confidential in order to safeguard the dignity of the children—the Kindergarten committed a violation under the GDPR.

The Authority further noted that such publication exposes children to risks arising in particular from potential unlawful use of the data by third parties, including for illegal purposes or the commission of criminal offenses against minors, as well as possible future consequences in the social and relational sphere of the data subjects.

In this specific case, the Kindergarten was fined EUR 10,000.

The Spanish Data Protection Agency imposed an administrative fine of €10,000 to a School for using a photograph of a minor with a disability on a poster. Namely, The Spanish Data Protection Agency received a complaint from the parents of the minor, indicating that the School made and posted posters showing the minor as a victim of aggression, both in the school playground and in the child's classroom. The posters aimed to illustrate aggression as undesirable behavior by showing the minor as a victim of another student's aggression.

In this case, the Spanish Data Protection Agency found that the School processed personal data in the form of the minor's photograph without a valid legal basis under GDPR, having in mind that the School only had a consent from one of the parents of the child for general school publicity, but not for the specific use of the picture of the child. Furthermore, the parents were neither informed that the School shall use the photograph in that manner.

Also, the Spanish Data Protection Agency held that this specific processing of the child's personal data could not be based on a legitimate interest, as the School stated, given that in this particular case the child's fundamental rights and dignity prevail over any alleged School interest.

These cases are a reminder that the right of protecting of personal data is not just a formality that needs to be satisfied, but it is essential for protecting the interests of the individual, especially in the case of protecting the rights of children, who are entirely dependent on parents and institutions in this regard.

To conclude, although parents pay more attention to whether specific third parties have permission to publish their children's photos and use the photos in a specific way, parents should carefully consider, before sharing photographs of their children, the potential risks involved. They should reflect on which rights might be compromised and whether their child's dignity, privacy, or safety could be jeopardized by such publication.

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