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## Security Risks Of Sharing Content Based On Minors By Their Family Members On Social Media In Times Of Technology Interference

### ABSTRACT

Digitization and technology interference influence the living conditions of the young generation and their perception of privacy and private identity. Social media is changing the way internet users obtain and share information and digital narratives about family members. One of the groups most affected by such actions is minors. People are not sufficiently aware of the consequences of their actions in this regard, as these might have a negative impact on the emotional, social and intellectual development of a child or young person as they do not have any control over the information being published online. The problem is even more serious as the minimum age limit for granting consent to the processing of personal data has not been set (neither the current legal system nor the GDPR has laid down such an age limit). The current legislation de facto allows legal guardians to deny minors entrusted to their care the right to privacy, thus giving rise to digital abduction, personal identity theft or cyberbullying of minors who should be enjoying legal protection against any form of harm. The paper analyses the content and type of information social media users share, in particular sensitive data, using qualitative scientific methods. In this regard, the paper researches the possibilities of implementing the existing legal framework with a view to propose legal and social mechanisms to increase the protection of a specific category of data subjects in the context of the „need to know“ principle.

### KEY WORDS

Social media. Groundswell. Communication. Technology interference. Personal data. The right to privacy. GDPR.

# 1. Introduction

Social media development and multidirectional communication flows have prompted internet users to change from passive recipients of digital content to active content contributors. Given the content value of the published information and taking into account the expected circle of recipients, it is extremely important to join the public discussion not only on the need to protect minors on the Internet to ensure their right to private and family life, but also to prevent the possible uncontrolled dissemination of inaccurate, distorted or untrue information following other user's interpretation (secondary interpretation) of events. We are talking about the so-called groundswell and its impact on the communication process on social media platforms in combination with the inappropriate content of messages shared. Their attractiveness and interactivity give rise to an even broader social problem – the growing dependence of people on modern information and communication technologies. Omnipresent portable electronic devices and easy-to-install software applications designed to transmit information are usually the main cause of weakening social contact in the physical world. Psychologists in particular have become increasingly aware of the impact that technology interference has on the mental and emotional development of children and adults. In this regard, media education and media literacy<sup>1</sup> come to the fore as the only way in which society can ensure its cyber security.

Today, almost 84% of all internet users use social media at least once a month. This value represents a share of 49% of the total global population. In the conditions of the Slovak Republic, 62% of internet users or 51% of the domestic population are active on social media.<sup>2</sup> Based on the presented data, it can be concluded that the emerging new communication standard which includes virtual presentation, exchange of views and experiences, sharing and downloading of content and information through social media, has a significant impact on society as a whole. This is especially evident in young adults under 18 and adults under 45 who use electronic media regularly or on a daily basis. Some people have already been born into the digital world or have mastered technologies at some point of their lives. This group also includes the current generation of parents of minor children (the average age of the first-time mother in Europe is currently 29,3 years).<sup>3</sup> It goes without saying that there are certain differences depending on the specific region, especially when taking into account various socio-cultural and environmental factors.<sup>4</sup> These parents (or legal guardians) willingly share with other members of the internet community information not only about themselves, but also about members of their immediate family, including minors. Thus, the term „sharenting” was born. Sharenting is the overuse of social media by parents or legal guardians who share photos or various home videos of minors with the virtual community. Unfortunately, the real consequences of sharing such sensitive content on social media often come too late (ex post).

If, in the light of the above, we were to assess the relationship between the legislation on the protection of personal data represented by the GDPR and the subsequent specific national legislation and the sharenting phenomenon (the purpose of which is to define the limits to which parents or legal guardians are willing to infringe minors' privacy rights), we would dive into uncertain waters. While, on the one hand, the protection of minors has been highlighted under Article 8 of the GDPR (the aim of which is to ensure the required (not adequate) level of protection of such persons, including their right to private and family life), on the other hand,

<sup>1</sup> VRABEC, N., BÔTOŠOVÁ, L.: The Concept of Learning-by-doing in the Context of Media Education and School Quality Assessment. In *Communication Today*, 2020, Vol. 11, No. 1, p. 142.

<sup>2</sup> *Digital in 2020: Global Digital Overview*. [online]. [2021-01-20]. Available at: <<https://wearesocial.com/digital-2020/>>; *Digital in 2020: Slovakia*. [online]. [2021-01-20]. Available at: <<https://datareportal.com/reports/digital-2020-slovakia/>>.

<sup>3</sup> GEDDES, L.: Avoid Over-sharenting. In *New Scientist*, 2019, Vol. 242, No. 3224, p. 25.

<sup>4</sup> KUPEC, V.: Marketing Information and its Impact on Generation Z. In PETRANOVÁ, D., MAGÁL, S. (eds.): *Megatrends and Media: Media Future*. Trnava : University of Ss. Cyril and Methodius in Trnava, 2017, p. 269.

the legal protection was squeezed into a relatively independent legal institute having the form of a consent which may be granted only by a person who reached the age of 16 (the provision of Article 8, par. 1, GDPR). However, the above is valid only provided that the provisions of Recital 18 GDPR do not apply, as the provisions in question exclude personal or household activity. Thus, the only protection is provided by the national legislation on the protection of privacy of natural persons, usually in the form of the Civil Code. It follows from the above that minors under 16 years of age and their rights and interests are protected only on the basis of the consent given by their parent or legal guardian. However, given the imperfections of the Slovak Republic's legislation, in particular the protection of social relations under the Civil Code (Act No. 40/1964 Coll. Civil Code, hereinafter the „Civil Code“)<sup>5</sup>, the seeming independence of the existing legal regulation from the elements on which the offer of information society services addressed directly to the child is based under Art. 8 par. 1 GDPR, which may include various types of services and activities, usually provided for remuneration, at a distance, electronically and at the individual request of the recipient of the service (e.g. provision of internet connection or use of various social networks or web platforms of professional, semi-professional or private nature)<sup>6</sup> may pose a problem. The second negative implication of such a legal structure is the belief that with regard to the rights and interests of minors, parents or legal guardians are able to objectively assess the conditions and legal consequences of giving a consent on behalf of the minor. This, of course, presupposes that the parents or legal guardians are capable enough to understand the conditions under which the information society services offered directly to the minor will be provided.<sup>7</sup>

However, such a premise is contradicted by the objective fact – i.e. the exponential growth in social media use and change in the scope and nature of processed personal data, often of a special nature according to the provisions of Art. 9 of GDPR. Therefore, if we are to state a basic scientific hypothesis (which will be verified using qualitative scientific methods – critical analysis, synthesis and deduction in order to draw generally valid scientific interdisciplinary conclusions in the field of media and civil law), we must state that GDPR as a basic European legal norm addressing the protection of personal data and the Slovak legislation as such deal with the issue of protection of the rights and interests of minors only minimally, as they transferred the legal protection obligation to the holders of parental responsibility over the child without verifying whether such persons are at all eligible to give such consent or authorization in relation to information society services. At the same time, however, Recital 18 GDPR explicitly excludes the following: *„This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.“*<sup>8</sup>

Notwithstanding the later legal arguments pointing out the „problems“ in the approach of the European and Slovak legislators, the problem of sharenting is a showcase of failure of the legal system to protect the privacy of minors. The extent and nature of information shared

<sup>5</sup> ŽULOVÁ, J., KUNDRÁT, I.: Service of Documents in the Context of Employment During Employee Quarantine. In *Central European Journal of Labour Law and Personnel Management*, 2020, Vol. 3, No. 1, p. 80.

<sup>6</sup> A special legal definition of the offer of an information society service, which, however, does not in its essence meet the essential content of the offer of information society services pursuant to the provisions of Art. 8 para. 1 GDPR, is outlined in Section 2 letter. a) of Act no. 22/2004 Coll. on electronic commerce.

<sup>7</sup> VALENTOVÁ, T., BIRNSTEIN, M., GOLAI, J.: *GDPR/Všeobecné nariadenie o ochrane osobných údajov. Zákon o ochrane osobných údajov*. Bratislava : Wolters Kluwer, 2018, p. 129.

<sup>8</sup> BESSANT, C.: Sharenting: Balancing the Conflicting Rights of Parents and Children. In *Communications Law*, 2018, Vol. 23, No. 1, p. 14.

about minors may be causally related to the development of emotional disorders and difficulties minors have in social interaction with other minors (feeling of shame, self-harm, grooming, minors becoming victims of sexual predators and the like).<sup>9</sup>

## 2. Methods

Based on a critical analysis of relevant legislation and the results of empirical surveys documenting sharenting and its impact on society, the aim of the paper is to identify the extent of the problem of sharing content on minors with family members on social media (sharenting), identify legal solutions to the problem and point out the importance of adequate social mechanisms (with regard to media and marketing) in order to raise awareness of the issue. To achieve the stated objective, we made use of several research methods. These, by their nature, helped us better understand the issue of protection of the rights and legally protected interests of minors on the Internet. The information sources used (sociology, psychology, cultural anthropology, management, marketing and especially legal sciences) helped us highlight the interdisciplinary nature of the issue and understand how social media facilitate information exchange. The individual parts of the paper follow up on each other. In addition to analytical-synthetic research methods, we also used induction, deduction and comparative research methods. The aim of the theoretical part of the paper was to define a key terminological apparatus on the basis of available domestic and foreign scientific literature, in particular monographs and peer-reviewed journal articles. The paper also reflects our own opinions which were based on our experience and several years of research under various scientific projects and grants in the field of digital marketing communication, including personal data protection and privacy of those using social media.

## 3. Results

Due to the constant growth in the number of internet users and consequently also registered users of social media platforms, the level of risk posed by sharenting parents for minors is increasing. Parents share various digital narratives about their children and other family members with other internet users through posts on social media, comments, reviews, blogs, web portals, as well as using available cloud services or e-mail, thus creating a digital record of their family and their private life. It often happens that information are posted/ shared in duplicate on several social media platforms at the same time. This multiple sharing increases the digital footprint of the minor. Often, the parent is not even aware of the pitfalls and risks of the online world.<sup>10</sup> The failure to take into account the possible undesirable consequences of such portrayal of minors on the Internet is the result of poor media and information literacy.

With regard to poor media and information literacy and based on the analysis of available research, we have identified several reasons for the rising popularity of sharenting in today's digital society. Insecurity, isolation, negative feelings, anxiety and depression (*feelings new parents may experience*) are the most common reason parents turn to social media as the online environment helps them overcome these problems. As Fox and Hoy pointed out, many biophysical changes women go through are related to psychosocial changes associated with coping with anxiety, insecurity, and taking on a new role - being a parent. With regard to the need to cope with and eliminate negative feelings, as well as the needs for obtain information,

<sup>9</sup> LIVINGSTONE, S.: Children: A Special Case for Privacy? In *Intermedia*, 2018, Vol. 46, No. 2, p. 20.

<sup>10</sup> UNLU, D. G., MORVA, O.: Whose Information Should Be Shared with Whom? Parents' Awareness of Children's Digital Privacy in Turkey. In *Media Literacy and Academic Research*, 2020, Vol. 3, No. 2, p. 111.

parents tend to share sensitive content on digital platforms.<sup>11</sup> Another reason for sharing sensitive information is the need to *archive* content. New media technologies have streamlined the process of archiving and storing family photographs and simplified the actions related to records-making, organizing and sharing visual materials. In this regard, sensitive data, such as date of birth or photos, videos or live broadcasts are disclosed and shared, thus posing a security risk to minors as well as other people living in the same household.<sup>12</sup> The need for self-presentation, recognition and acknowledgement also plays an important role here. Particular attention should be paid to the privacy setting in terms of access to the digital content in question. The problem here is the individual's lower sensitivity to the need to protect one's own privacy as well as the child's privacy in the online world as the online and offline world (and therefore privacy) are perceived differently.<sup>13</sup> Once online, people tend to forget about the need to protect their privacy as they wish to present themselves as having perfect and happy lives to the detriment of their privacy and the rights of the child. *Using social media in leisure time* and sharing sensitive content is risky due to the possible presence of an unknown number of anonymous contributors to public forums and an unknown number of recipients of shared content.

In view of the growing number of social media users, we consider it important in this context to point out the influence the age of the child has on sharenting. Sharenting or sharing content based on third parties, especially minors, starts very early, sometimes even before a child is born - the prenatal age (digital footprint of unborn child), sometimes after the birth (born into the Internet) or during infancy. The phenomenon is more common in the USA and Canada (34% and 37%), with a lower incidence in France (13%), Italy, Japan (both 14%) and Germany (15%).<sup>14</sup> Research on a sample of mothers in North America (USA, Canada), selected EU countries (UK, France, Germany, Italy and Spain), Australia, New Zealand and Japan also pointed to the continuous sharing of content on minors and confirmed the existence of a digital profile and a digital footprint of the minor by the age of 2 in 81% of cases. Data also showed an increased level of risk behaviour in the US (92%) compared to EU countries (73%). According to the above research, the so-called digital childbirth takes place when the minor is about 6 months old, while a third (33%) of photographs with information about children is published online within a few weeks after birth. In the United Kingdom, 37% of newborns have online lives immediately after birth, with results in Australia and New Zealand reporting as many as 41% of newborns.<sup>15</sup> Based on a more detailed analysis, we arrived at a relatively high value of the correlation coefficient (0,84594614) in the results of both examined variables: the number of legal guardians publishing digital content on minors of neonatal age and aged two. This is a high linear interdependence, with a causal dependence of 71% ( $r^2 = 0,7156$ ) variability in the number of parents who share photos of minors of neonatal age and aged two on social networks, thus indicating a strong trend of sharing content on minors on social media.

<sup>11</sup> FOX, A. K., HOY, M. G.: Smart Devices, Smart Decisions? Implications of Parents' Sharenting for Children's Online Privacy: An Investigation of Mothers. In *Journal of Public Policy & Marketing*, 2019, Vol. 38, No. 4, p. 417.

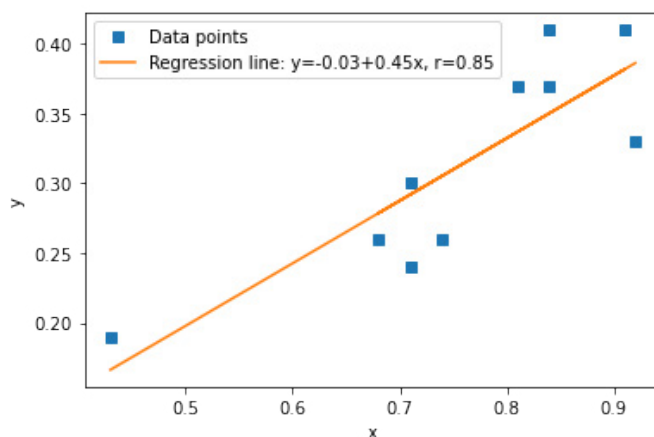
<sup>12</sup> SIIBAK, A., TRAKS, K.: The Dark Sides of Sharenting. In *Catalan Journal of Communication & Cultural Studies*, 2019, Vol. 11, No. 1, p. 118.

<sup>13</sup> HLADÍKOVÁ, V.: Mobbing And Cybermobbing: Risk Aspects Of (Digital) Communication In The Workplace And Possibilities Of Legislative And Non-Legislative Protection Under The Conditions Of The Slovak Republic. In *Media Literacy and Academic Research*, 2020, Vol. 3, No. 2, p. 92.

<sup>14</sup> CINO, D., DEMOZZI, S., SUBRAHMANYAM, K.: Why Post More Pictures if No One is Looking at Them? Parents' Perception of the Facebook Like in Sharenting. In *The Communication Review*, 2020, Vol. 23, No. 2, p. 126-127.

<sup>15</sup> Ibid., p. 132-134.





PICTURE 1: The scope of shared content and its dependence on the age of the minor

Source: own processing, 2021

At the time the minor becomes self-aware at a certain age, a potential problem arises – they may disagree with the content published in the past, as well as with the ongoing activities of similar nature (possibilities of expressing their disagreement with such behaviour are listed below in the legal analysis of the issue). Minors requesting photos of them to be taken down is the issue the Family Online Safety Institute researched in great depth. They state that out of a sample of 589 legal guardians of minors aged 6-17, one-fifth of legal guardians have published content about their child which the child might consider embarrassing in the future. 13% of children were embarrassed after looking at the published content about themselves and up to 10% of children asked the published content to be taken down.<sup>16</sup> Barnes and Potter's research in Australia on a sample of 613 legal guardians showed that parents do not usually have sufficient media skills to identify the recipients of the content they publish. Significant differences can be observed here between the ability to perceive potential risk and the digital skills regarding privacy settings on internet platforms. Media literacy and related legal skills of legal guardians of minors usually do not match the real need to protect minors in the online environment. The research also showed legal guardians are not aware of the fact that the real audience is usually wider than they think.<sup>17</sup> Barnes and Potter also pointed to a society-wide problem of tolerance of violations of the right to privacy of minors on the Internet. In this context, Donovan defines sharenting as an activity that denies the child's right to create their own digital footprint (identity), as well as the right to autonomy and self-determination as an integral part of an independent personality.<sup>18</sup>

From the point of view of the factual nature of the published information, the most frequently shared information is content on significant milestones in the child's development, child's leisure time and information on child's health condition. Portraits of minors taken by a professional photographer and photographs documenting embarrassing moments and everyday life are common. In their research study, Marasli et al. pointed to the diversity of published content, with up to 81,4% of parents saying they shared photos or videos taken at birthday parties, family or friendly gatherings and 54,98% share photos of everyday activities and personal

<sup>16</sup> *Parents, Privacy & Technology Use*. [online]. [2021-01-28]. Available at: <[http://fosi-assets.s3.amazonaws.com/media/documents/Full\\_Report-Web.pdf](http://fosi-assets.s3.amazonaws.com/media/documents/Full_Report-Web.pdf)>.

<sup>17</sup> BARNES, R., POTTER, A.: *Sharenting and Parents' Digital Literacy: An Agenda for Future Research*. [online]. [2021-02-05]. Available at: <<https://www.tandfonline.com/doi/full/10.1080/22041451.2020.1847819>>.

<sup>18</sup> DONOVAN, S.: Sharenting: The Forgotten Children of the GDPR. In *Peace Human Rights Governance*, 2020, Vol. 4, No. 1, p. 37.

development, leisure activities including e.g. artistic activities.<sup>19</sup> In addition, Fox and Hoy's marketing research revealed that mothers in particular share their children's personal data on request and do not hesitate to provide it to various companies upon entering competitions, challenges or bets.<sup>20</sup> Based on the analysis of social media, Haley states that „embarrassing“ photos most often show inappropriate content related to nudity, being dirty or various grimaces of the child.<sup>21</sup> According to another research, up to 56% of mothers and 34% of fathers publish sensitive content based on minors on social media several times a month. The alarming thing is that more than 70% of parents, thanks to other parents, have access to information on minors which may harm these minors in the short or long term.<sup>22</sup> The minor therefore has an online identity created to which they did not grant an express consent and about which they do not even know about due to their age. Most importantly, this online identity was created by parents without asking the minor. At the same time, some research projects show that parents active on social networks publish an average of up to 300 photos of a child's face per year. Such behaviour leads to loss of privacy and security risks due to the poor knowledge of the audience on a selected digital platform (online friends).<sup>23</sup>

In case privacy settings are set poorly, social media may allow third parties to view sensitive information on social media. Such information is exposed to potential misuse, e.g. online sexual predators. The violation of the rights of minors in connection with the publication of sensitive content in the online environment was exposed by a comparative research carried out in the Czech Republic and Spain. The research pointed out the violation of minors' rights to privacy in 92,5% of cases.<sup>24</sup> Extensive research into the issue on the territory of the Slovak Republic has not yet been carried out. However, in 2019 the research agency 2muse implemented an interesting social project analysing behaviour of parents of minors on social media. Following the international experience with sharenting, this quantitative survey has yielded results in many respects comparable to foreign studies. The statements of more than 500 parents aged 25-45 showed that up to 62% of them repeatedly publish photos of their children on the Internet. In terms of published content, 81% of shared information relate to family events and photos of minors, with up to 99% of all published photos showing the child's face. Quite often published material includes various sensitive information of a personal character.<sup>25</sup>

## 4. Discussion

In terms of protection of minors, the basic security issue is the violation of the privacy of minors and their private identity by their legal guardians. In the light of the above-described behaviour, we arrived at the conclusion that there is a very fine line between parental freedom

<sup>19</sup> MARASLI, M. et al.: Parents' Shares on Social Networking Sites About their Children: Sharenting. In *The Anthropologist: International Journal of Contemporary and Applied Studies of Man*, 2016, Vol. 24, No. 2, p. 403.

<sup>20</sup> FOX, A. K., HOY, M. G.: Smart Devices, Smart Decisions? Implications of Parents' Sharenting for Children's Online Privacy: An Investigation of Mothers. In *Journal of Public Policy & Marketing*, 2019, Vol. 38, No. 4, p. 424.

<sup>21</sup> HALEY, K.: Sharenting and the (Potential) Right to Be Forgotten. In *Indiana Law Journal*, 2020, Vol. 95, No. 3, p. 1009.

<sup>22</sup> HINOJO-LUCENA, F. J. et al.: Sharenting: Internet Addiction, Self-control and Online Photos of Underage Children. In *Comunicar*, 2020, Vol. 28, No. 64, p. 99-100.

<sup>23</sup> CIMKE, S., GURKAN, D. Y., POLAT, S.: Child Rights Neglect in Social Media: Sharenting. In *Guncel Pediatri – Journal of Current Pediatrics*, 2018, Vol. 16, No. 2, p. 264; RANZINI, G., NEWLANDS, G. E., LUTZ, C.: Sharenting, Peer Influence, and Privacy Concerns: A Study on the Instagram-Sharing Behaviors of Parents in the United Kingdom. In *Social Media + Society*, 2020, Vol. 6, No. 4, p. 5.

<sup>24</sup> KOPECKY, K. et al.: The Phenomenon of Sharenting and Its Risks in the Online Environment. Experiences from Czech Republic and Spain. In *Children and Youth Services Review*, 2020, Vol. 110, Art. No. 104812, p. 4.

<sup>25</sup> *Sharenting v prostredí sociálních sítí*. [online]. [2021-02-02]. Available at: <<https://nezdielam.sk>>.

and interference with the right to privacy of a minor.<sup>26</sup> The social phenomenon of sharenting thus penetrates into the area of the fundamental human rights and freedoms of the child, as outlined in international documents and national laws. The key legal paradigm in this case is GDPR (in reciprocity with the provisions under Article 8, par. 1 of GDPR) and the Slovak Civil Code of 1964 to a lesser extent, as the latter is not prepared to deal with issues arising during the digital age. The underlying legal framework therefore appears to be the wording of Recital 18 GDPR, in relation to the subsequent exclusion of Art. 8, par. 1 of GDPR. The inconsistency in the legislation is already reflected in the hierarchy of international law by which most Member States of the European Union are bound, i.e. 1995 *Amendment to Article 43(2) of the Convention on the Rights of the Child*, including its Optional Protocols (hereinafter referred to as the „Convention“). Article 19 of the Convention states that „States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.“<sup>27</sup> The provisions of Art. 19 of the Convention must be interpreted in the light of General Comment No. 13, under which the term „violence“ must be interpreted as „all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.“<sup>28</sup> However, for the purposes of paragraph 4 of this General Comment, the term „violence“ must be interpreted as representing all forms of harm to children referred to in Article 19, par. 1 of the Convention on the Rights of the Child, despite the fact that the term primarily refers to other types of harm (bodily harm, abuse, neglect or negligent treatment, torture and digital exploitation).<sup>29</sup> In this respect, however, the problem would not arise if we took into account only the wording of Recital 38 GDPR, which is based on the assumption that minors (children) are special groups of the population at risk of negative manifestations of social phenomena, including unauthorized and illegal interference with the private sphere of natural persons.<sup>30</sup> Recital 38 GDPR, as a follow-up to Art. 8 par. 1 of GDPR states that „Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child.“<sup>31</sup> Both international documents thus primarily ensure the legal protection of minors, including their private identity, without distinguishing their age or the purpose of legal protection, as the wording „in particular“ makes it possible to extend the legal protection to any area of possible misuse of the personal data of such minors.<sup>32</sup>

<sup>26</sup> HITKA, M. et al.: Knowledge and Human Capital as Sustainable Competitive Advantage in Human Resource Management. In *Sustainability*, 2019, Vol. 11, No. 18:4985, p. 7.

<sup>27</sup> *Convention on the Rights of the Child*. [online]. [2021-02-04]. Available at: <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

<sup>28</sup> *General Comment No. 13. Article 19: The Right of the Child to the Freedom from all Forms of Violence*. [online]. [2021-02-04]. Available at: <<https://resourcecentre.savethechildren.net/library/general-comment-no-13-article-19-right-child-freedom-all-forms-violence>>.

<sup>29</sup> Similarly, the ruling of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland* (41615/07) highlights and prioritizes the best interests of the child and the obligation of states which adopted the Convention to uphold it wording at national level.

<sup>30</sup> LIŽBETINOVÁ, L. et al.: The Approach of SMEs to Using the Customer Databases and CRM: Empirical Study in the Slovak Republic. In *Sustainability*, 2020, Vol. 12, No. 1:227, p. 12.

<sup>31</sup> DONOVAN, S.: Sharenting: The Forgotten Children of the GDPR. In *Peace Human Rights Governance*, 2020, Vol. 4, No. 1, p. 45.

<sup>32</sup> A similar approach of the legislator can be found in Art. 16 of the Treaty on the Functioning of the European Union, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.



In absolute contrast with the legal protection of minors thus set, however, the Recital 18 excludes the use of GDPR when it provides for an exception in the processing of personal data of minors in the course of purely personal or household activities and thus with no connection to a professional or commercial activity. Similarly, it further states that these personal or household activities „may” include correspondence and holding of address or social networking and online activities carried out in the context of such activities. This vaguely formulated exception provides a significant opportunity to break out of the application scope of the GDPR, including a fundamental expansion of possibilities for holders of parental responsibility over the child. The scope of these „parental” rights is wide as the legislation does not in any way take into account the opinion of the minor or their right to express disagreement with conduct of their legal guardian in the position of holder of parental responsibility over the child.

Recital 18 thus incorporates two basic points which significantly impede the possibility of exercising the child's right to protect their own privacy.<sup>33</sup> The legislation does not allow the child to voice their objection (does not outline another possibility for the child to protect their rights at the moment they consider that their rights are in conflict with the rights and freedoms of their legal guardian under the GDPR and Act no. 36/2005 Coll., on Family (hereinafter referred to as the „Family Act”), although by analogy to Article 3 of the Convention, the best interests of the child should always be protected: *„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”*<sup>34</sup>; Article 5 of the Family Act *“the best interests of the minor shall be a primary consideration in all matters affecting him ... (c) the protection of the dignity as well as of the child's mental, physical and emotional development ... (e) endangering the child's development by interfering with his dignity and endangering the child's development by interfering with the mental, physical and emotional integrity of a person who is a person close to the child”*<sup>35</sup> or Section 28, subs. 2 of the Family Act *„both parents are holders of parental responsibilities over the child as well as privileges. When carrying out parental responsibilities over the child and privileges, parents are obliged to protect the interests of the minor.”*<sup>36</sup> With regard to the provisions of Section 31 subs. 2 of the Family Act, the appointment of a children's guardian for the purpose of protecting the child from manifestly harmful sharing of information of a private nature on the minor by the holder of parental responsibility over the child is impossible to enforce in the conditions of the Slovak Republic. Besides the Family Act there is no other special legal regulation in this respect that would provide minors with any other form of legal protection. The provision of Section 9 of the Civil Code states that *„minors have the capacity only for such legal acts which are by their nature appropriate to the mental maturity corresponding to their age”*<sup>37</sup>, the provision of Section 11 of the Civil Code states that *„a natural person has the right to protect their life and health, as well as freedom, honour, dignity and privacy”*<sup>38</sup> and the provision of Section 13 subs. 1 of the Civil Code, states that *„a natural person has the right, in particular, to demand that unjustified interference with the right to the protection of his or her personality be waived, that the consequences of such interference be removed and that he or she be given adequate*

<sup>33</sup> FEDUSHKO, S. et al.: Development of Methods for the Strategic Management of Web Projects. In *Sustainability*, 2021, Vol. 13, No. 2:742, p. 10.

<sup>34</sup> *Convention on the Rights of the Child*. [online]. [2021-02-04]. Available at: <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

<sup>35</sup> *Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov*. [online]. [2021-02-04]. Available at: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/36/20170701>>.

<sup>36</sup> *Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov*. [online]. [2021-02-04]. Available at: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/36/20170701>>.

<sup>37</sup> *Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov*. [online]. [2021-02-05]. Available at: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40/20191201>>.

<sup>38</sup> *Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov*. [online]. [2021-02-05]. Available at: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40/20191201>>.

satisfaction”<sup>39</sup> – these provisions target the protection of a natural person, leaving minors without special protection against holders of parental responsibility over the child, who also act as their legal guardians under the provisions of Section 31 of the Family Act.<sup>40</sup>

Yet another problem is the wording of Recital 18 – it is vague and fails to define the term „personal or household activity and thus with no connection to a professional or commercial activity”<sup>41</sup>. Thus, the term could include basically any activity that the holder of parental responsibility over the child wishes to be included. Trying to find the boundary between the minor’s privacy invasion and the exercise of parental rights is an impossible task. In terms of Recital 18, a two-stage test of the activities of the holder of parental responsibility over the child on social networks should be carried out to decide whether the activities in question are of domestic or commercial/ professional natures.<sup>42</sup> The problem is unlikely to arise here as activities of holders of parental responsibilities are carried out in the household and could easily pass as activities of a private matter. The problem, however, is the second step of the test - are these activities linked to a professional or commercial activity? If we take into account the fact that social networks are a popular marketing tool, e.g. marketing, targeting and promotion of posts with a certain advertising message, posts promoting certain goods and services, it cannot be ruled out that information shared on social networks will be used for a commercial activity. Therefore, with regard to Recital 18 GDPR it can be stated that on social media, personal data are processed for commercial purposes (albeit in a secondary form). With regard to the proportionality test, the interest in protecting the privacy of minors clearly prevails over the right of the holder of parental responsibility over the child to share content on the minor on social networks. Yet, there is no protective mechanism neither in Slovak legislation nor EU’s legislation on the protection of personal data which could prevent the holder of parental responsibility over the child from sharing content on minors.

Unfortunately, the Recital 38 GDPR and Art. 8 par. 1 GDPR do little to help protect privacy of minors.<sup>43</sup> Although the legal protection described above applies in cases where the controller processes personal data of minors in connection with the provision of information society services (and in cases where we conclude that personal and domestic activity are linked to a professional or commercial activity) based on the consent granted by the holder of parental responsibility over the child (Article 6, par. 1, letter a) of the GDPR), this means very little for minors and their legal protection, at least not until they reach the age of 16. GDPR as such, similarly to its Recital 18, does not define the term „offer of information obligation services”. Depending on the specific situation the term may involve e-commerce, the use of online services, but also a user profile on a social network, including personal data sharing. When compared to international law, which deems a minor to be a person under 18, Recital 18 clearly defines a minor to be a person under age of 16. In accordance with the provisions of Art. 8 par. 1 of the GDPR, in relation to the offer of information society services directly to a child, processing of the personal data of a child shall be lawful where the child is at least 16 years old. If the child is less than 16 years old, such processing is legal only if consent was given by the parent

39 Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov. [online]. [2021-02-05]. Available at: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40/20191201>>.

40 ŽULOVÁ, J.: Sociálne práva zamestnancov vykonávajúcich teleprácu. In BARANCOVÁ, H., OLŠOVSKÁ, A. (eds.): *Pracovné právo v digitálnej dobe*. Praha : Nakladatelství Leges, 2017, p. 93.

41 Regulation (EU) 2016/679 of the European Parliament and of the Council 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). [online]. [2021-02-05]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=SK>>.

42 BUNN, A.: Children and the ‘Right to be Forgotten’: What the Right to Erasure Means for European Children, and Why Australian Children Should Be Afforded a Similar Right. In *Media International Australia*, 2019, Vol. 170, No. 1, p. 42.

43 ZIMMERLE, J., WALL, A.: What’s in a Policy? Evaluating the Privacy Policies of Children’s Apps and Websites. In *Computers in the Schools*, 2019, Vol. 36, No. 1, p. 40.

or the holder of parental responsibility over the child.<sup>44</sup> Apart from the setting the age limit in question, the GDPR influences the protection of the minors' right to privacy only minimally. The level of media literacy and digital competence of the minor's legal guardian will not change regardless of GDPR, as the consent of the holder of parental responsibility over the child is required until the minor reaches the age of 16. While according to Recital 18, the holder of parental responsibility over the child is not required by law to ask the minor for permission as they are entitled to evaluate the scope and nature of information shared, under Art. 8 par. 1 of the GDPR the holder of parental responsibility over the child gives consent on behalf of the minor on the basis of the same intellectual maturity and media literacy with the same thought process (in principle, Article 8, par. 1 of the GDPR brought the legal requirement „I hereby consent to the processing of personal data” wherever possible).

The legislator has not put in place any mechanism that would allow people to object to giving the consent to the provider of information obligation services. Although reference may be made to the cited provisions of the Civil Code<sup>45</sup> (in particular Section 9 and Section 11) their applicability is questionable. First of all, we must be aware that the provision of Section 9 of the Civil Code directly affects the implementation of legal acts by minors, which by their nature are adequate to the maturity corresponding to their age. Although we can discuss the nature of the consent to the processing of personal data, its implementation simply does not have the character of a legal act – taking into account the legal definition of the term „legal act” under the provisions of Section 34 of the Civil Code.<sup>46</sup> Granting consent to receiving promotional material does not entail creation, change or termination of the rights or obligations of the natural persons concerned and their legal status, neither does it have the power to change the scope of the rights or obligations. Under the Civil Code, minors are not eligible to legal acts. At the same time, however, we must also take into account the wording of Art. 8, par. 1 of the GDPR, which does not allow any other way of decision-making (or objection) until the age of 16 than the decision of the holder of parental responsibility over the child. Therefore, we must conclude (taking into account general legal principles) that if a natural person is incapable of consenting to the processing of their personal data in relation to the offer of an information society service directly to a child, such a person is not able to formally object to or reverse the decision to grant consent taken by the legal guardian. The provisions of Art. 8 par. 1 of the GDPR do not allow for the application of national regulations in this case, as there is clearly no reference to national legislation in the wording, except for the possibility of a Member State lowering the age limit for granting consent (the age limit for granting consent was not lowered in the Slovak Republic). Given this fact, the minor cannot seek judicial protection, as minors were not given such a right. The only option is to apply the provisions of Section 31 of the Family Act and appoint a children's guardian in cases where the legal guardian acts in a clear conflict with the legitimate interests of the minor.

Under Art. 8 of GDPR and given the available technology, the operator is obliged to make reasonable efforts to verify whether the holder of parental responsibility over the child has given their consent.<sup>47</sup> It is up to the operator to determine what measures are appropriate

<sup>44</sup> The set age limit also applies in the territory of the Slovak Republic. The set limit may be reduced to 13 years by decision of a Member State pursuant to Art. 8 par. 1 of the GDPR Regulation.

<sup>45</sup> See: KOCHAN, R.: *Súhlas so spracovaním osobných údajov dieťaťa*. [online]. [2021-02-12]. Available at: <<https://www.podnikajte.sk/zakonne-povinnosti-podnikatela/suhlas-so-spracovanim-osobnych-udajov-dietata>>.

<sup>46</sup> A legal act is an expression of the will aimed in particular at the creation, change or termination of those rights or obligations which are related to such an expression.

<sup>47</sup> AZURMENDI, A.: Children's Digital Rights and Big Data. The European General Data Protection Regulation (GDPR) 2016 and the Children's Online Personal Data Protection Act (Coppa). In *El Profesional de la Información*, 2018, Vol. 27, No. 1, p. 30.

in a particular case.<sup>48</sup> The only way the legal protection of minors for the purpose of protecting their private identity and the general right to private and family life could be strengthened is to lower the age limit under Art. 8 par. 1 of GDPR (as in the Czech Republic). In this respect, however, we would propose an amendment to Section 9 of the Civil Code as well as Section 31 of the Family Act along with the introduction of a special mechanism for the protection of privacy of minors, e.g. introduce the right of the minor to object to the consent given by their legal guardian, provided that they will be able to independently decide on giving such a consent or authorization when reaching appropriate maturity (such as the lower age limit in Criminal Code – 14 years, Labour Code – 15 years and the like).

If we conclude that sharing of content „harmful” to the minor’s private identity could be prevented only through awareness campaigns aimed at the holders of parental responsibility over the child, the whole protection mechanism against sharenting would be based on the will of those involved.<sup>49</sup> Although we have tried to find court decisions which would at least marginally address the issue of protecting minors from content shared by their parents, in principle no relevant decisions have been taken in this regard. Thus, although court rulings have highlighted the need to protect the person’s privacy, personal integrity, even the right to decide whether or not one’s audiovisual image will be shared (those persons may be entitled to compensation for non-pecuniary damage due to the invasion of privacy – invasion of physical and mental integrity)<sup>50</sup>, no increased legal protection for minors has been established. The reason is simple – the initiators were usually legal guardians (as holders of parental responsibilities over the child) who brought charges against third parties disclosing information about their privacy, including privacy of minors. In these cases, the legal protection of minors was included in the general legal protection of the natural person concerned (i.e. as secondary, not as primary).<sup>51</sup> Many publications, some of which are also referred to in this paper, used these lawsuits as a referencing material when analysing the protection of minors and invasion of privacy of minors. However, in the light of the above, we do not agree with such subsuming. Sharenting means sharing sensitive content by the holders of parental responsibility over the child, and, therefore, the court decisions in question and conclusions they arrived at cannot be used in this context. Undoubtedly, these could be of great use in court proceedings on parental responsibility and control over the sharing of information on minors, but not for resolving the conflict between the parental rights and the invasion of the child’s privacy. The Weller case<sup>52</sup> from the United Kingdom is worth noting, as it embodies the essence of increased legal protection of the privacy of minors. Minors cannot decide on their place of residence or place they are at a certain time because of their age and thus the invasion of their privacy is more severe due to the higher security risk they face compared to adults.

## 5. Conclusion

The legal conclusions we arrived at showed significant shortcomings in the legislation on the protection of privacy and private identity of minors. At the same time, they also pointed to the fact that the legal system absolutely lacks any consideration of the level of knowledge of holders of parental responsibility over the child in their decision-making on behalf of minors

<sup>48</sup> VALENTOVÁ, T., BIRNSTEIN, M., GOLAI, J.: *GDPR / Všeobecné nariadenie o ochrane osobných údajov. Zákon o ochrane osobných údajov*. Bratislava : Wolters Kluwer, 2018, p. 75.

<sup>49</sup> GLIGORIJEVIC, J.: Children’s Privacy: The Role of Parental Control and Consent. In *Human Rights Law Review*, 2019, Vol. 19, No. 2, p. 215.

<sup>50</sup> Judgments of the European Court of Human Rights in Douglas (595/2005), Bogomolova (13812/2009), Von Hannover (40660/2008 a 60641/08), Mosley vs. News Group Newspapers Ltd (1777/2008), Reklos vs. Greece (1234/05).

<sup>51</sup> Judgments of the European Court of Human Rights in Couderc v France Application (40454/07).

<sup>52</sup> Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176.

or when sharing content that might have a negative impact on the right to privacy of minors. Insufficient media literacy (education) and digital competence of these persons will clearly lead to a deterioration of the protection of the rights and legally protected interests of minors in the future. With regard to the above issues, a solution to improve the awareness of holders of parental responsibility over the child about their responsibility to protect the privacy of minors will therefore be of key importance. The only currently available solution appears to be self-regulation.

In an effort to find a mechanism that would contribute to reducing the negative consequences of sharenting in society, we would like to emphasize in particular the need for activities that would educate people in this regard. In this context, opinion-forming media must start a public debate on the pitfalls of the Internet, especially on the third party's right to privacy. These efforts can be complemented by the mass distribution of promotional and educational materials to teachers and parents of schoolchildren, in leisure centres, community centres and the like. The aim of the leaflets, brochures and posters in question should not only be to educate but also to provide basic legal advice on what to do if a person finds out that information on minors has been misused on the Internet. Information campaigns are a great way to disseminate information among people who might feel embarrassed talking about the topic. Many parents mistakenly believe that if they prevent the child from using social media this issue does not affect them. Unfortunately, they forget about their own actions - they exchange information with friends on social networks. By doing so, they may significantly jeopardize the healthy emotional and social development of the minor in the future. With regard to the sharing of text, visual, audio or audiovisual recordings showing the activities of children and young people, it is necessary that parents regularly check the privacy settings of the profile set up on the digital platform. The privacy settings of individual photo albums and other folders with files containing data on minors also require extra attention.

Artificial intelligence offers a great opportunity to protect the privacy of minors on social media. Thanks to the automatic face recognition, software is able to identify (relatively accurately) whether a photo or video features a child and then alert the author to consider the range of potential recipients and potential security risks. The convenient solution could be software which would be able to suggest a specific circle of persons to whom the content would be displayed based on the previous categorization of social media profiles. When sharing possibly sensitive content about children on the Internet, it is also important to avoid using different hashtags, which by default help categorize the published content and facilitate the search. This is especially undesirable when it comes to sharing of content that is perceived by others as very intimate (e.g. #bathing, #potty, etc.). At the same time, it is necessary to prevent sharing of information which would disclose the location of the minor or reveal how they spend their free time. Finally, it makes sense to warn close friends and extended family not to share or disclose information about the minor without the prior consent of the legal guardian. In addition, Internet users should regularly enter their and their child's name into an Internet search engine to find out what personal information is available to other Internet users.

The possible consequences of uncontrolled dissemination of the content through social media must also be carefully considered. In the case of theft of personal data of the minor, the problem might last much longer than it would for adults. We usually learn about the abuse of the child's identity only a few years later, when this person has already grown up and became a regular user of social media. In addition, the parent must take into account the possible mental issues the minor might develop in the future due to the personal nature of the information made available to other members of the Internet community. In no way should content shared point to the minor's vulnerabilities. Prior to sharing any material about their children on social media, if circumstances allow, parents should consult the minor, explain to them the principles of public information sharing and accept their views, especially if they express a negative attitude so that they are not denied the right to privacy. Sharing photos which do not disclose the minor's face



(and thus make identification almost impossible) seem to be a good compromise, although it might not work in every situation. It is important to realize that the practically unlimited availability of electronic information sources at any time and anywhere may influence the opinion (or decision-making process) of persons who have come into contact with the material in question by accident and might interpreted it in their own way.

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