

Processing of children's personal data: a comparative study of the EU legal framework and Vietnamese law

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Abstract: Children are the future of every nation and constitute a vulnerable group, as they lack the capacity to fully protect themselves. Therefore, the regulations of various countries emphasize the protection of children's legitimate rights. Especially in the digital age, protecting the personal data of this group has become more complex and presents numerous challenges for nations. In this article, the authors analyze and compare the legal frameworks of the EU and Vietnam regarding the protection of children's rights in the processing of personal data. The article provides an overview of EU regulations, particularly the 2016 *General Data Protection Regulation (GDPR)*, which includes strict rules on the collection and processing of children's data, requiring explicit consent from parents or guardians. In Vietnam, 'Decree No. 13/2023/ND-CP' is the primary legal mechanism analyzed and discussed by the authors, with the aim of highlighting the similarities and differences between the two legal systems. The analysis identifies key shortcomings, including the lack of a "best interests of the child" criterion, the absence of provisions on the "right to be forgotten" in Vietnamese law and the significant discrepancy in fines imposed for personal data violations between Vietnam and the EU. In this spirit, some recommendations are proposed to protect children's data rights in Vietnamese law based on EU experiences.

Keywords: *GDPR, parental consent, personal data processing, protection of children's data rights*

1. Introduction

Data is considered an increasingly important resource in the current era (Giao and Tuyen, 2020, p. 56). A notable example is 'Regulation (EU) 2016/679' or the *General Data Protection Regulation (GDPR)*, which was adopted on 14 April 2016 and came into effect on 25 May 2018. The *GDPR* created a unified framework for data protection legislation across all EU Member States and quickly became the international standard in terms of data protection. Many nations have adopted legislation on data protection inspired by the *GDPR* rules (Artzt and Dung, 2022, p. 40).

Recognizing the importance of protecting personal data and aligning it with the context of international integration, Vietnam has developed a legal framework to regulate personal data protection. Specifically, on 17 April 2023, the Vietnamese Government issued 'Decree No. 13/2023/ND-CP' regarding personal data protection. This Decree provides for personal data protection and the responsibilities of relevant agencies, organizations and individuals for the protection of personal data. Overall, Vietnam's legal regulations on personal data protection share many similarities with the *GDPR*, from the identification of personal data to specific provisions governing the processing of personal data. However, it is worth noting that the legislation applies not only to EU members, but also to any corporation, regardless of where it is based, that offers products or services to EU residents. This means that the global standards for protecting personal data will shift as a result of the *GDPR* (Thomas and Ravindra, 2023, p. 14). Vietnamese companies offering products or services to EU residents must comply strictly with the *GDPR*. This widespread impact demonstrates the influence of the *GDPR* on the legislative processes of various countries, including Vietnam, concerning the protection of personal data in general and children's personal data in particular.

Currently, the legal nature of personal data remains a contentious issue, as different perspectives on whether personal data should be considered as property or an object of personal rights will lead to different legal consequences, regulatory measures and methods of protection (Long, 2022, p. 33). According to Article 2(1) of 'Decree No. 13/2023/ND-CP', "personal

data refers to electronic information in the form of symbols, letters, numbers, images, sounds, or equivalences associated with an individual or used to identify an individual.” Personal data includes general personal data and sensitive personal data. In the EU, Article 4(1) of the *GDPR* explains that personal data is

any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person.

In general, these two definitions reflect an understanding of personal data as a collection of elements and characteristics that help identify and distinguish one individual from another.

Article 2(7) of ‘Decree No. 13/2023/ND-CP’ defines “personal data processing” as a series of activities that affect personal data, including collection, recording, analysis, confirmation, storage, rectification, disclosure, combination, access, traceability, retrieval, encryption, decryption, copying, sharing, transmission, provision, transfer, deletion, destruction or other relevant activities. This is a complex process, and without a strict legal framework to regulate this issue, there is a high risk of violating the right to privacy of the data subject. The increased data storage and processing of personal data pose a challenge to the protection of personal data and, consequently, to the privacy of individuals (Potaičuks, 2024, p. 74; Zolkin, Chochia and Hoffmann, 2023; Tropp, Hoffmann and Chochia, 2022).

Social media use involves numerous threats. Every internet user is vulnerable to various risks, but it is highlighted that children are frequently the initial targets of online criminals (Iskül and Joamets, 2021, p. 103). The percentage of children using the internet is on the rise. According to a 2022 UNICEF survey, up to 82% of Vietnamese children aged 12 to 13 use the internet daily, and this figure increases to 93% for those aged 14 to 15. With the country’s young population and an increasing trend toward digital technology use, protecting children’s rights in cyberspace presents new challenges for the implementation of children’s rights in Vietnam (Thanh, 2024). In accordance with physical and cognitive conditions, the legal regulations anticipated by lawmakers distinguish between children and adults. In other words, not all data subjects are equally vulnerable, which is why this regulation pays

special attention to situations in which the personal data of children are processed (Şchiopu, 2019, p. 23). The *GDPR* creates specific protections with regard to children's personal data, recognizing their limited awareness of the risks, consequences and safeguards concerned and their rights (Vološevici, 2019, p. 17).

Both Vietnam and the EU define children based on their age. In the EU, the age varies between 13 and 16, with nine states having the required age of 13 years (Belgium, Denmark, Estonia, Finland, Latvia, Malta, Portugal, Sweden and the UK), six states 14 years (Austria, Bulgaria, Cyprus, Italy, Lithuania and Spain), three states 15 years (Czech Republic, France and Greece) and ten states 16 years (Croatia, Germany, Hungary, Ireland, Luxembourg, Netherlands, Poland, Romania, Slovakia and Slovenia) (Vološevici, 2019, p. 21). According to Vietnam's legislation, children are defined as those under 16 years of age (*Law on Children*, 2016, Article 1). This demonstrates that age regulations for children in Vietnam bear many similarities to those in the EU.

This article aims to clarify the similarities and differences between Vietnamese and EU laws on the principles of processing children's personal data and consent requirements. It also assesses shortcomings in Vietnamese law, particularly the need to develop measures for protecting children's data and establishing strict sanctions for violators.

To achieve this, this article first examines the principles of processing children's personal data under EU and Vietnamese law. It then analyzes the legal requirements for the consent of children and their parents or guardians in processing such data. Finally, the authors evaluate existing shortcomings and propose recommendations to effectively protect children's personal data in today's context through legal improvements and necessary measures.

2. Principles of processing children's personal data

According to the provisions of 'Decree No. 13/2023/ND-CP' (Article 20(1)), the processing of children's personal data must always be carried out in accordance with the principle of protecting their rights and in the best interests of the child. This is consistent with the legal principle outlined in Article 5(3) of the *Law on Children (Vietnam) 2016*, which states that "the best interests of the child shall be ensured in all decisions related to

the child.” Considering the best interests of the child is a universal legal principle widely recognized in international conventions as well as the laws of countries around the world, including the EU. According to Article 3(1) of the *International Convention on the Rights of the Child* (1989), “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.”

Although it is affirmed in many important legal documents, the definition of what constitutes the “best interests of the child” still lacks a clear and explicit interpretation in legal texts. Although the European legislator clearly had the best interest of children at heart, it remains difficult to assess to what extent the children of today, who will become the adults of tomorrow, will be satisfied with the way their personal data have been used prior to the time when they could express their consent to the processing operations (Şchiopu, 2019, p. 27). The judiciary practice confirms that the best interests of a child as seen through the “eyes of parents” does not always coincide with the (child’s) best interest, as perceived through “a child’s eyes” (Shudra, 2023, p. 90). However, the placement of children’s personal data in a digital environment by their parents represents data processing for personal purposes, and the legal rules of data protection are not applicable to them under either the national or international regulation (Shudra, 2023, p. 93).

The *Data Protection Law (Netherlands)* also states that “the Data Protection Authority (DPA) must obtain valid consent from individuals under 16 years of age.” The Dutch DPA does not specify or recommend concrete methods for obtaining the consent of a minor’s parents or legal representatives but underlines the general principle that the data controller must be able to demonstrate that consent has been obtained; alternatively, consent is void and any subsequent processing of personal data online is unlawful (Macenaite and Kosta, 2017, p. 153).

Children have the same rights as adults over their personal data, but a number of legal provisions are designed to ensure strengthened protection of their rights (Vološevici, 2019, p. 17). Within the mutual responsibility created on the basis of a child’s best interests, the parents, private and public bodies should assume responsibility for the protection of children’s rights in the digital environment (Shudra, 2023, p. 100). In the process of processing children’s personal data, Article 20(3c) of ‘Decree No. 13/2023/ND-CP’ states that if there is sufficient evidence to prove that the processing

of personal data affects the rights and legitimate interests of children, the cessation of data processing, the deletion of non-recoverable data or the destruction of children's personal data may be carried out upon the request of the competent authority, unless otherwise provided by law.

As far as some parents agree on obtaining consent from their children, raising public awareness (with the aim of altering the attitudes of parents who refuse) and determining consent obligations are among the most efficient mechanisms (Shudra, 2023, p. 99).

3. The consent of the child, parents or guardians in the processing of children's personal data

In relation to children, a parent (authorized representative) is considered the protector of the minor's best interests in almost all aspects of legal relations. To a certain extent, this position is based on the institution of limited legal capacity reinforced by private law, which links the demonstration of the will (prior consent or post-approval) of the authorized representative to the authenticity of that of a minor (Shudra, 2023, p. 97).

In addition to 'Decree No. 13/2023/ND-CP', issues related to the protection of children's rights from the perspective of parental responsibility have been reflected in various legal documents. According to Article 68(4) of the *Law on Marriage and Family (Vietnam) 2014*, any agreement between parents and children related to personal and property matters must not affect the legitimate rights and interests of minor children. Furthermore, Article 75(1) of *Law on Children 2016* stipulates that parents and family members must respect, listen to, consider, respond to and explain the opinions and wishes of children in a manner that is appropriate to the child's age, development and the family's conditions and circumstances. From this, it can be seen that respecting the opinions of children on matters related to their rights is also one of the solutions to ensure the best interests of the child. In the case of processing children's data, the requirement for the child's consent from the age of 7 and above is also a mandatory element.

Article 20(2) of 'Decree No. 13/2023/ND-CP' stipulates that

the processing of children's personal data shall be subject to the consent of the children in the case where they are at least 7 years old or the consent of their parent or guardian as prescribed, except in the case

specified in Article 17 hereof. The Personal Data Controller, Personal Data Processor, Personal Data Controller and Processor, and Third Party shall verify the age of the children before proceeding with the personal data processing of children.

The legal issues surrounding the consent of the data subject are explicitly stated in Article 11 of ‘Decree No. 13/2023/ND-CP’.

In terms of the subject, when processing the data of a regular individual with full legal capacity in terms of age and awareness, only their own consent is required. However, for children—a specially protected group—it is not only necessary to obtain the consent of the data subject if they are 7 years old or older, but the law also requires the consent of the child’s parents or guardians. This is understandable as children do not have the capacity to make decisions regarding matters related to themselves. Parents and guardians create and share children’s data while also acting as representatives of their children when consenting to their data. However, all these entities, regardless of their role in the data lifecycle, are responsible for protecting children’s data and safeguarding their rights (UNICEF, 2021).

Consent is considered the most appropriate legal basis for data protection when services are provided to the children. UNICEF stated that “although other legal bases for data processing may exist, obtaining free and informed consent is the approach most consistent with children’s rights.” The “datafication” of society imposes clear, harmonized and strict measures to ensure the effective protection of children, who are direct consumers of a number of information society services (Vološevici, 2019, p. 22).

Free consent implies the real choice and autonomy of the data subject. Therefore, consent will not be free in cases where there is any element of coercion or inability to exercise free will (Vološevici, 2019, p. 19). Article 4(11) of the *GDPR* defines consent as follows: “any freely given, specific, informed, and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” Similarly, Article 2(8) of ‘Decree No. 13/2023/ND-CP’ also provides a definition of the data subject’s consent, stating that “consent of the data subject means an explicit, voluntary, and affirmative expression of the permission of a data subject for the data processing of their personal data.”

Thus, the requirement for data subject consent plays a decisive role in determining the lawfulness of data processing, and such consent must

be genuine and free from any external influence. However, children often struggle to read and fully comprehend privacy regulations because consent-related documents are typically lengthy and filled with technical terminology. Even if a child consents, it remains challenging for the data controller to prove that the consent was given voluntarily, affirmatively and explicitly (Long and Phuong, 2024). Therefore, when data-controlling businesses provide information and documents to obtain a child's consent, the content must be designed in a way that is easy to understand and appropriate for the child's age.

In addition to the child's consent, both Vietnamese and EU laws require the consent of the child's parent or guardian. According to Article 11(3) of 'Decree No. 13/2023/ND-CP', the consent of the parent or guardian can be expressed in writing, by voice, by ticking a consent box, through an affirmative syntax in messages, by selecting technical consent settings or by any other action that demonstrates such consent. However, in some rural areas, verifying parental consent poses a major challenge for businesses or regulatory agencies because of limited access to modern technology.

The consent of the data subject plays a crucial role in the processing of personal data. This is why EU lawmakers have dedicated a separate provision to regulate the conditions for consent in Article 7 of the *GDPR*. Accordingly, when processing is based on consent, the data controller must be able to demonstrate that the data subject has agreed to the processing of their personal data. If the consent of the data subject is provided in the context of a written statement that also addresses other matters, the consent requirement must be presented in a way that is clearly distinguishable from the other issues in a form, easy to understand and accessible, using clear and simple language. Any part of such a statement that constitutes a violation of the *GDPR* provisions is not binding. The data subject has the right to withdraw their consent at any time. Withdrawing consent will not affect the lawfulness of processing based on consent before withdrawal. Prior to giving consent, the data subject must be informed of this right. Withdrawal of consent should be as easy as giving it. When assessing whether consent has been given voluntarily, special attention must be paid to whether the performance of a contract, including the provision of a service, depends on the consent to process personal data that is not necessary for the execution of that contract.

Vietnamese law also has provisions similar to those of EU law regarding the withdrawal of consent. According to Article 20(3b) of 'Decree No. 13/2023/ND-CP', parents or guardians of children may withdraw their

consent for the processing of the child's personal data, unless otherwise provided by law.

Children are a vulnerable group, and thus, a subject of significant attention for EU lawmakers. Specifically, Article 8 of the *GDPR* outlines the conditions for the consent of children in relation to information society services. According to this provision, when point (a) of Article 6(1) applies, concerning the direct provision of information society services to children, the processing of children's personal data will be lawful only if the child is at least 16 years old. For children under age 16, the processing will only be lawful if and to the extent that the child's parent or guardian consents to or authorizes it. Member States may set a lower age limit for such purposes, provided that the minimum age is not below 13 years. In such cases, the data controller will make reasonable efforts to verify that the child's parent or guardian has consented to or authorized the processing, taking into account the available technology.

The requirement regarding the fact that the consent must be specific is linked to the requirement of "informed consent" and derived from the principle stated in Article 5(1) that personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes shall, in accordance with Article 89(1), not be considered incompatible with the initial purposes ("purpose limitation") (Vološevici, 2019, p. 19).

Vietnamese law follows a similar approach, as stated in Article 11(4) of 'Decree No. 13/2023/ND-CP', which specifies that "consent must be obtained for a single purpose. If there are multiple purposes, the data controller, the controller, and the processor of personal data must list the purposes so that the data subject can consent to one or more of the specified purposes."

Overall, when discussing data subjects' rights, there are many similarities between the *GDPR* and Vietnamese law; however, the *GDPR* is more comprehensive regarding clarity, voluntariness, affirmation and the content of consent (Hang, 2024, p. 19).

4. Some recommendations

The *GDPR* and Vietnamese law on personal data protection have many similarities in the processing of personal data in general, and the processing of children's personal data in particular. Because children represent a special case, the processing of their personal data must comply with certain additional conditions compared to the personal data of adults. In addition to the positive aspects, such as detailed regulations on the mechanism for identifying children's personal data, the consent of children aged 7 and older, and the consent of parents or guardians, the authors believe that there are still some issues that need to be clarified regarding the processing of children's personal data.

There is a need for provisions that clearly define the principles for processing children's personal data, with a focus on protecting the rights and best interests of the children.

As discussed in section 2 above, the principle of the best interests of the child is not a foreign concept; it has been applied and referenced in the legal systems of many countries around the world, including the EU and Vietnam. It is undeniable that the provisions in the *GDPR* and 'Decree No. 13/2023/ND-CP' of Vietnam aim to prioritize the best interests of children. For instance, if the processing of personal data negatively impacts the rights and legitimate interests of children, measures such as halting the processing, deleting non-recoverable data or destroying the personal data of children can be triggered. However, these regulations are scattered and unclear regarding the specific situations in which children should be best protected during the data processing process. Therefore, we believe that in the near future, lawmakers should develop a set of criteria to guide the determination of the "best interests of a child" when processing children's personal data. This would create a transparent basis for handling cases in which data processing does not serve the child's best interests.

Lawmakers should ensure transparency regarding the responsibilities of parents or guardians when publicly sharing or disclosing children's personal data in a digital environment.

Both Vietnamese law and the *GDPR* of the EU currently lack specific provisions for addressing cases where parents violate regulations regarding the processing of children's personal data despite the fact that such actions are common in practice. Perhaps it may have been desirable for the *GDPR*

to also include a warning for parents on disclosing children's personal data, especially via social media (Șchiopu, 2019, p. 27). From a practical standpoint, when parents post personal information about their children on social media, it has both positive and negative aspects. For instance, by sharing, families with medically fragile children are able to connect with one another. These families break down stereotypes, help raise money for important research and advocacy and often receive positive personal support from the community (Steinberg, 2017, p. 852). However, with regard to the specificity of the digital environment, where the information shared by parents is lost in a "boundless" space, secondary use of information frequently occurs as well. Consequently, a child sometimes cannot ask the parent to erase the information posted on the internet (Shudra, 2023, p. 101).

As a general rule, parents always want the best for their children, so many believe that it is perfectly normal for parents to publicly share their children's information and images on social media. However, parents forget that they are not owners of their children's data but just the legal representatives of the child with an obligation to act only in the best interests of the child (İskül and Joamets, 2021, p. 103). In fact, it is very difficult to study and come up with a specific sanction to address the above behavior. The processing of children's personal data is based on the principle of acting in the best interests of the child; therefore, in this case, a balanced, reasonable solution should be sought rather than applying harsh sanctions to parents or guardians who publicly share children's personal data. One obvious fact is that these children will grow into adults, and there is a possibility that they may change their minds regarding the processing of their personal data. The right to be forgotten framework could alleviate the tension between parents' rights and children's privacy interests in the context of sharenting, as it balances the competing privacy interests of children and their parents' rights to disseminate information about their children on social networking sites (Haley, 2020, p. 1015).

In the authors' opinion, the legal aspects of the "right to be forgotten" should be applied. In the future, Vietnamese law should consider adding the right to be forgotten as a personal right to align with the ongoing development of the digital environment. This is because the right to be forgotten "is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved in the processing and later wants to remove such personal data, especially on the internet" (Șchiopu, 2019, p. 25). The recognition of the right to be forgotten allows data subjects to have their personal data, which was publicly disclosed when they were

children, completely erased. Specifically, Vietnamese law should incorporate the right to be forgotten as a personal right in line with the ever-evolving digital environment. Accordingly, the authors propose adding a separate provision titled “The Right to be Forgotten” in the Vietnamese *Civil Code*, which affirms that “individuals have the right to be forgotten with respect to their personal data.”

Lawmakers should ensure transparency regarding the sanctions for violators of regulations in the processing of children's personal data.

In the processing of children's personal data, in addition to complying with general regulations, agencies, organizations and individuals must also meet the conditions and principles set forth by law. In the event of a violation of these conditions and principles, agencies, organizations or individuals may face rather severe penalties. In the EU, if a company is found to violate the *GDPR*, it might be fined up to more than 4% of its annual global revenue or 10 million or 20 million euros (Thomas and Ravindra, 2023, p. 16). It can be assessed that this represents a very high level of sanction, which directly impacts the interests of businesses. The fines stipulated in the *GDPR* at the EU level have increased substantially in comparison to those provisions in individual EU Member States. This level of fines is reasonable in the current situation, in which personal data can be easily processed, transferred and traded globally. A single breach of personal data could potentially affect thousands or even millions of individuals (Hang, 2024, p. 21).

In Vietnam, sanctions for violations related to personal data are currently lacking, ineffective and not sufficiently strong to deter or properly address violations (Ministry of Information and Communication, 2021). ‘Decree No. 13/2023/ND-CP’, in Article 4, also clarifies the mechanism for handling violations of personal data protection regulations. Accordingly, agencies, organizations and individuals violating personal data protection regulations may be subject to disciplinary actions, administrative fines or criminal penalties, depending on the severity of the violation. Depending on the level of violation, under current regulations, the administrative fines for violations related to the collection and use of personal information range from 10,000,000 VND to 30,000,000 VND (‘Decree No. 15/2020/ND-CP dated 3 January 2020 on penalties for administrative violations against regulations on postal services, telecommunications, radio frequencies, information technology and electronic transactions’, Article 84). However, compared to EU law, fines in Vietnam are relatively low. Therefore, the authors recommend that, in the future, competent authorities in Vietnam issue specific regulations

regarding administrative penalties for violations of personal data protection regulations, with an emphasis on increasing the severity of the penalties. This could include measures that directly target business revenues, similar to those in EU law. In particular, stricter sanctions should be imposed when violations involve the processing of children's personal data as opposed to comparable violations involving adult personal data. Such an approach would enhance deterrence and raise awareness among individuals, agencies and organizations regarding protecting children's rights in general and the personal data of children in particular.

5. Conclusion

Harmonizing legal frameworks is an important goal for bringing Vietnam's legal system closer to that of many countries and regions around the world, including the EU—one of Vietnam's strategic economic partners. In the digital age, cooperation between Vietnam and the EU is increasingly emphasized to ensure the goal of sustainable development and to work together to address the non-traditional security challenges faced by both parties. In the EU, the *GDPR* is highly regarded as an advanced and effective model that contributes to the development of the region's digital economy. Indeed, the EU's legal framework has provided many benefits, including the promotion of e-commerce and the digital economy (Long, 2024, p. 79).

In the field of personal data protection in general, and the protection of children's personal data in particular, Vietnamese legislation has selectively adopted many advanced provisions from EU law, as reflected in the *GDPR*. These include the identification of personal data, the principles governing the processing of children's personal data, and especially the system of transparent regulations regarding the consent of the data subject and the consent of parents or guardians in processing children's personal data. The similarities in the mechanisms for regulating personal data processing have, to some extent, brought Vietnamese law closer to the advanced legal framework of the EU.

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