



Internet Association Submission To ICO Age Appropriate Design Code Consultation

1. Introduction

Internet Association (“IA”) welcomes the opportunity to respond to the Information Commissioner’s Office (“ICO”) consultation on a draft Age Appropriate Design Code (the “draft Code”).

IA represents over 40 of the world’s leading internet companies.¹ IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA’s mission is to foster innovation, promote economic growth, and empower people through the free and open internet – in November 2018 IA established a London office to constructively engage in the internet public policy debate in the UK.

We are firm believers in the benefits that technology brings to everyday life and the economy, and for the potential that internet innovation has to transform society for the better. IA economic analysis shows that the internet sector contributes £45 billion to the UK economy each year, and is responsible for nearly 80,000 businesses and around 400,000 jobs. Recent IA polling found that 82 percent of British people believe that the internet had “made their lives easier and more enjoyable”.

IA believes that the internet sector needs a balanced policy and regulatory environment to continue, and grow, its contribution to the UK economy, consumers, and society in the future. The internet will drive 21st century prosperity, but there is a risk to this potential if policies and regulation is introduced – such as the draft Code in its proposed form – which will damage the ability of the internet sector to: 1) drive UK economic growth; and 2) provide services that people, including children, value highly.

2. Internet Industry Concerns With The Draft Code

Internet companies support the ambition of better protecting children’s personal data online, and want to work with policymakers and regulators to achieve this aim while also enabling the internet to continue providing benefits to the economy, consumers (including children) and society. In this context, IA has the following concerns with the draft Code.

2.1 Disproportionate And Unclear Scope

The draft Code applies to “information society services likely to be accessed by children” in the UK, and the ICO notes that the draft Code is not restricted to services specifically directed at children. Further, the draft Code states that companies should “apply the standards in this code to all users, unless you have robust age-verification mechanisms to distinguish adults from children”.

IA is concerned that the scope of the draft Code is too broad and disproportionate to the policy issue that it is seeking to address – safeguarding children’s personal data. The requirement to apply the draft Code’s obligations to services that are “**likely** to be accessed by children” will capture an extremely wide set of internet services. In effect, this will mean the draft Code will cover services that are “**able** to be accessed by children”, which is far beyond the intended scope and will cover services that are used

¹ IA Membership list here: <https://uk.internetassociation.org/our-members/>



predominantly by adults.

We are also concerned about scope inconsistency between the draft Code and both GDPR and the Data Protection Act 2018 (“DPA18”). GDPR does not define a “child”, although there is an implicit recognition within Article 8 that at age 16 parental responsibility will fall away, given from that age parental consent does not have a role to play in providing lawful grounds for the processing of the data of a child. Article 8.1 allows a Member State to determine that the ability of a child to think for itself in the context of an information society service may be lower, a step the UK took by placing the threshold where, in effect, a child’s own reasoning power must be replaced by that of the parent at below age 13 (the lowest age possible). It therefore appears inconsistent with the aims and objectives of GDPR and DPA18 to set wider standards capable of being interpreted as applying to anyone up to the age of 18. Put differently, we believe it is inconsistent for UK law to state that a 13–18 year old can **give consent** by themselves, but for the draft Code to take the position that a 13–18 year old **cannot understand enough about an online service** such that, for example, personalisation/profiling may be switched on by default.

On the issue of scope clarity, “likely to be accessed” is an unclear legal concept which creates uncertainty for business. What is to be considered “likely” will be clear in some cases and subjective in others. The draft Code also refers both to services “likely to be accessed by **children**” and “likely to be used by **under 18s**”. These terms are not directly the same, creating further uncertainty. There is also uncertainty as to when a service would be deemed to be accessed by a “significant number of children – even if this is only a small proportion of [a service’s] overall user base”, and this issue with lack of clarity would also apply between the various age-brackets for children set out by the ICO (e.g. 13+ vs 10+ etc).

The draft Code’s requirement to apply its standards to all users, unless age-verification is used, also means that it will have a disproportionate impact. While the draft Code states that age-verification is part of the solution, recent experience in the UK shows that age-verification is a complicated policy issue. At this point in time, for a range of technical, operational and legal reasons, it is not feasible or desirable to put in place the required age-verification mechanisms to distinguish adults from children across a wide range of online services. The ICO recognises in the draft Code that “age-verification tools are still a developing area” where “clear industry standards” are not yet established. The unintended consequence of these requirements is that adults’ use of the internet will be over-regulated by the draft Code.

The issue of scope raises wider questions about how we approach internet regulation. The proposed Code appears to start from the presumption that all internet users are children and need to be protected from content. As we continue to live more of our lives online, this approach seems out of step with how we approach regulation and responsibility in the real-world. While there may be some areas online that should require age-verification, such as sites related to the purchase of alcohol, weapons and pornography, to make this the norm for all internet sites is a fundamental shift.

Recommendation: Given the concerns set out above, IA believes that a more proportionate approach would be for scope to be set by determining whether a service is “targeted at children” (“children” defined as up to the age of digital consent in the UK – i.e. 13), rather than whether a service is “likely to be accessed by children”.

IA is happy to work with the ICO on appropriate guidance to help services determine whether they



“target” children. For example, definitions from the US COPPA Rule could be of relevance.² Further, GDPR itself (e.g. Article 38) speaks of “collection of personal data with regard to children when using services **directly offered** to a child” (emphasis added), which reflects a focus of active intent in targeting of services at children.

2.2 Inconsistency With Data Minimisation Principles

IA is concerned that the draft Code will result in a significant increase in the amount of data collected by companies, and in particular a substantial increase in the amount of children’s data collected.

The broad application of the draft Code to services that are “likely to be accessed” by children – but which in practice may have very few child users – will mean that a wide range of websites will collect unnecessary personal information, including ‘hard identifiers’ such as photo ID, which is inconsistent with data minimisation principles.

Further, the guidance on age-appropriate application is at odds with guidance on data minimisation. The ICO specifies that in order to ease the burden of essentially creating different services for different users, a service should “provide a child-appropriate service to all users by default with the option of age-verification mechanism to allow adults to opt out”. As set out in Section 2.1 above, this will result in a disproportionate scope, but it also raises concerns in relation to data minimisation. In order to tailor design or implement robust age-verification as the draft Code requires, services will need to collect additional information on their users that previously was never needed to be collected or stored, contradicting the principle of data minimisation.

Looking at the example of connected toys and devices, the draft Code expressly refers to the need to comply when processing data, but offers little guidance as to what is required in this context. The draft Code also seeks to require all users to be treated as if children as a default, or to require more complex and intrusive processing by potentially requiring, for example in the case of home hubs, the creation of individual voice profile accounts, such data being special category biometric data and therefore much higher risk than other kinds of preference data.

Finally on this point, the huge increase in the amount of data collected could actually undermine privacy for both adults and children, rather than improve children’s privacy as is intended. In general, there is an increased privacy risk should this information be hacked. In relation to children specifically, there are increased data protection risks and broader safety risks if children must verify their age to use a service, which will require the collection of additional personal data and evidence.

2.3 Risk Of Poor Outcomes For Children, And All Internet Users

IA is concerned that the draft Code will have the unintended consequence of limiting or removing

² “Web site or online service directed to children means a commercial Web site or online service, or portion thereof, that is targeted to children.

(1) In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.”



children's access to internet services, made possible through data collection, which provide them with significant benefits. It would undermine the business model of many free services by restricting their ability to use advertising to fund content.

As a result, children may no longer have access to important services such as news and information or educational resources. In addition, websites that are unable to develop 'child-friendly' services could just choose to not provide their services to people under 18 (similar to the example of US news websites blocking EU users post-GDPR). Pursuant to the UNCRC, children's rights to privacy must be balanced against their rights to freedom of expression, which includes "freedom to seek, receive and impart information of all kinds, regardless of frontiers". IA is concerned that the draft Code does not sufficiently balance these important rights.

The draft Code may also make it harder for children to use the internet safely, and harder for parents to manage their child's online experience. In relation to children, there is a risk that the draft Code prevents companies from providing child-friendly services targeted at specific age-groups. The default switch-off of geolocation could impact children getting home safely. In relation to parental controls, the draft Code may have the unintended consequence of making these important tools less effective by making it harder for parents to apply them and/or easier for children to circumnavigate them.

The draft Code could also create adverse impacts for wider internet users, should it require adults to be treated as children in the absence of robust age-verification mechanisms. Although the ICO has set out five different "age ranges" of children who may have different design needs, this does not reflect the economic reality of technology product build. As drafted, companies caught by the draft Code are unlikely to be able to say with confidence that their product is used by one age range only. Companies would therefore face a number of sub-optimal choices, for example making the entire product suitable for the lowest age range (creating a poor experience for adult and older child users), creating multiple versions of the same product with different design features per age bracket, or preventing children from using their product entirely.

2.4 Risk Of Double-Regulation Of Wider Internet Policy Issues

IA is concerned that the draft Code strays beyond the remit of data and privacy issues and seeks to address wider issues, in particular online harms. For example, one of the stated reasons behind the proposed prohibition of "nudge techniques" is to prevent "extending the use of services" (i.e. concerns about screen-time). The draft Code also states that "profiling, such as content feeds which gradually take the child away from their original area of interest into other less suitable content, raise much more significant concerns." (i.e. concerns about potentially harmful content).

Similarly in relation to health and wellbeing, the draft Code states that services should not use personal data in ways that have been shown to be detrimental to children's wellbeing or that go against industry codes of practice, and the ICO can take this into account in considering compliance with the Age Appropriate Design Code. This has the effect of giving statutory force to non-statutory codes by enabling, for example, the ICO to enforce against a service if it does not properly consider the impact of the CAP Code on content relating to fat, salt or sugar in foods or other CAP Code matters. Further, the draft Code states that services should not process data in ways that have been "formally established" requiring further research or evidence to establish whether or not they are detrimental to the health or wellbeing of children.



Recommendation: These are wider policy matters related to internet safety and health and wellbeing, and are being addressed through other processes such as the government’s Online Harms White Paper. IA encourages the ICO to restrict the draft Code to the regulation of data and privacy issues.

2.5 Further Practical Concerns

The draft Code suggests that a company would need to evidence that its service was not likely to be accessed by children. However, from a practical standpoint this may not prove to be possible. The draft Code suggests that a company could provide evidence on the number of children actually using its site – however, if a company has not been verifying for age, and has been previously reliant on self-declaration, it cannot reasonably provide reliable figures on the number of children on its site. In addition, there is a lack of clarity on how companies are likely to be judged on this measure, whether it be in absolute terms or as a proportion of their user base.

Returning to age-verification, there are further practical issues with implementing this solution in relation to existing users (as well as for new users). Companies would need to assume existing users were not over 18, unless they had previously age-verified the user. In this scenario, companies may need to turn off a user’s consents, even if they have been provided these previously.

In relation to the draft Code’s requirements on “Default Settings”, we are concerned about the provision which requires “that children’s personal data is only visible or accessible to other users of the service to the extent that the child amends their settings to allow this”. Many online services are intrinsically social by nature, and it should be sufficient that this is well understood and / or well-communicated to users during sign-up. To additionally require that these features be “default off” seems to be disproportionate and to the detriment of user experience. To this end, we encourage the ICO to give further guidance on what it considers “a compelling reason for a different setting taking into account the best interests of the child” (the exception from the “default off” rule). The draft Code also states that “any settings which allow third parties to use personal data have to be activated by the child”, which we believe is unclear (in particular what is meant by the term “use”) and not commercially realistic. Many internet services cannot run without sharing data with third parties, such as hosting providers, and we believe the ICO should give further clarity on this provision.

3. The Draft Code Will Have A Significant Impact On The Internet Economy, In Particular Advertising–Funded Services

IA economic analysis shows that the internet sector contributes £45 billion to the UK economy each year, and is responsible for nearly 80,000 businesses and around 400,000 jobs. IA is concerned that the draft Code will reduce this significant economic contribution, in particular through undermining the business model of many free services by restricting their ability to use advertising to fund content. There would be a consequential negative impact on the media, content and other services enjoyed by people in the UK, whether adults or children.

The impact on the wider UK economy is also concerning, especially given the general economic climate in the UK. Calculating the cost to the economy of additional regulation should be a significant factor taken into account by the ICO when it finalises the draft Code. The impact would be felt by companies large and small but, as is usually the case, regulatory requirements and implementation and compliance



costs would disproportionately affect start-ups and smaller businesses.

From a foreign investment perspective, IA is concerned that the draft Code will create more complex and costly regulations for businesses operating in the UK, and that companies will therefore choose to invest in other countries with a more proportionate regulatory regime. From a start-up and small business perspective, there is equally the risk that companies will choose to establish their businesses elsewhere. Economic risk was recognised in the parliamentary debate on DPA18, where in relation to the scope of the draft Code Lord Ashton of Hyde stated that “these amendments go further than permitted [by GDPR], creating a risk for our future trading relationships”.³

Overall, IA is therefore concerned that the draft Code will have negative consequences for the UK economy.

4. Process Concerns

In addition to the substantive concerns with the draft Code set out above, IA is also concerned about the process undertaken to date for developing the draft Code and believes that much more consultation is needed across industry, the public (including parents and children) and society to consider the best way forward. Best practice is for regulators and policymakers to set out a deliberative process of consultation and debate with the aim of developing balanced regulation that takes into account a range of competing factors, especially when policy or regulation affects such a wide range of companies. IA believes that a longer consultation period for the draft Code is needed to achieve a balanced, proportionate outcome.

In addition, the ICO envisages the Code will come into force only 21 days after the date the Code is issued. While IA hopes that the ICO will amend the draft Code to take into account the concerns expressed in relation to the proposals, if the draft Code is adopted in its current – or even similar – form, then IA believes that industry needs a much longer transitional period to enable it to comply with the Code. The draft Code has potentially significant business impact on companies large and small – potentially requiring companies to set up age-verification or adapt services for use by children. New mechanisms and tools will likely need to be built to achieve compliance, and the time needed to integrate this into existing products would be considerable.

Recommendation: There are serious issues with the draft Code, and the immediate focus should be on resolving these reasonably. Further ahead, IA believes that a significantly longer implementation period – to be determined in further consultation with industry – would be a reasonable means of helping to ensure internet companies can continue to provide a wide range of services in the UK while also complying with the Code.

IA also questions the extent to which the draft Code is consistent with parliament’s intent as expressed during debate of DPA18. IA’s inference from the debate was that parliament’s intent was for a more targeted, proportionate draft Code that addressed child-specific concerns about data and privacy, but did not have such a wide-ranging scope – for example capturing services used by adults – or potential unintended consequences for internet services used by people (including children) in the UK or the wider economic contribution of the internet industry to the UK. Section 123 (1) of DPA18 refers to the ICO preparing a code of practice [...] on standards of age-appropriate design of “**relevant** information

³ [https://hansard.parliament.uk/lords/2017-11-06/debates/107E5465-94B7-4604-981C-1BC49C43FF84/DataProtectionBill\(HL\)](https://hansard.parliament.uk/lords/2017-11-06/debates/107E5465-94B7-4604-981C-1BC49C43FF84/DataProtectionBill(HL))



society services” (emphasis added) and not of **all** information society services. IA encourages the ICO to reflect further on parliament’s intent in relation to the draft Code.

Further on process, we are concerned about the low level of consultation with children with respect to the draft Code. Under Section 123 (3) of DPA18, the ICO must consult widely on the draft Code, including with children, and we are concerned that the research to date has not fully taken into account the views of children. While the research undertaken covered over 2000 parents, it only engaged with 280 children, and an open online survey was completed by only 3 children. The limitation of the research with respect to representing the views of children was recognised by the researchers themselves. The lack of consultation with children also raises concerns about consistency with the UNCRC, which states that children have rights to personal freedoms and to participate in decision making – i.e. that they have a right to have their views listened to and to be taken seriously.

Recommendation: IA is concerned about the apparent absence of a full regulatory impact assessment in relation to the draft Code. IA believes that the ICO should undertake a detailed impact assessment of its proposals – covering not only technical feasibility and economic impact, but also issues such as the impact on privacy and freedom of expression.

5. Internet Association Regulatory Principles

IA believes that the ICO should take a more balanced, proportionate approach in developing the draft Code. IA has previously set out a number of regulatory principles which it hopes will help policymakers and regulators in the UK strike the right balance when considering internet policy and regulation more broadly. In the context of the draft Code, the following principles are relevant.

IA believes that regulation should:

- Be **targeted** at specific harms, using a risk based approach;
- Provide **flexibility** to adapt to changing technologies, different services and evolving societal expectations;
- Be **technically possible** to implement in practice, and also take into account that resources available for this type of activity vary between companies;
- Provide **clarity and certainty** for consumers, citizens and internet companies.

IA encourages the ICO to take these principles into account as it amends the draft Code following the consultation period. IA is very happy to meet with ICO officials to discuss how the application of these principles could help lead to a more targeted, proportionate Age Appropriate Design Code.

6. Conclusion

IA welcomes the opportunity to respond to the ICO’s consultation. IA has a number of concerns with the proposed Age Appropriate Design Code – in particular the potential for poorly designed regulation to damage the internet economy and prevent people (including children) accessing services that they enjoy and find useful. IA is concerned that the application of the regulations will go beyond the intended audience of children, and may lead to worse outcomes for children and adults alike. IA is also concerned that the potential interaction between the draft Code and other policy processes, such as the government’s Online Harms White Paper, has not been fully considered, and more broadly that there



has not been sufficient time set aside to consult and discuss the draft Code before implementation.

IA supports balanced, proportionate regulation that achieves the joint objectives of protecting people from harm online and ensuring that the internet can continue to deliver benefits to the economy and society. IA has proposed a number of regulatory policy principles which it believes can help deliver this outcome, and IA and its members will continue to work with policymakers and regulators on these important issues.

Internet Association
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