

techUK response to ICO's draft Age Appropriate Design Code

Background

techUK represents the companies and technologies that are defining today the world that we will live in tomorrow.

More than 900 companies are members of techUK. Collectively they employ approximately 700,000 people, about half of all tech sector jobs in the UK. These companies range from leading FTSE 100 companies to new innovative start-ups. The majority of our members are small and medium-sized businesses.

Introduction

techUK is pleased to respond to the ICO's consultation on the draft Age Appropriate Design Code. techUK and its members are committed to creating a safe environment for children online. techUK will continue to work with stakeholders, including the ICO, to find the most effective means of achieving this objective whilst preserving the opportunities and openness of the internet and the digital economy.

techUK has chosen not to utilise the consultation form provided by the ICO to structure its response to the consultation as we believe this does not offer an opportunity for respondents to consider the draft Code as a whole and does not provide an opportunity for respondents to offer views on the effectiveness, appropriateness and proportionality of the approach being considered.

In the following response, techUK will address: the process by which the code has been developed; the extent of its scope; its implications for the wider digital economy; specific elements of the code which will raise practical questions of compliance (such as age verification for children); and concerns about potential conflicts with other areas of regulation, future government policy and the wider international context.

1. Process

1.1 The consultation period

The draft Code proposes a radical change to the UK's regulatory environment for "information society services" operating in the UK and the ICO acknowledges that it wishes to position the UK as a 'world leader' in this space.¹ We believe that a six week consultation period is insufficient given the scale and significance of what the ICO is proposing. This is clearly a very ambitious proposal that breaks new ground. It has very significant implications for the providers of information society services. We believe that in order to consult effectively and gather the views of the many businesses and organisations and, where possible, users, that will be affected the ICO should consider extending the consultation period. It is in everyone's interests that we get this code right.

techUK notes that the consultation on the draft Code was preceded by a call for evidence which ran for a longer time period; however, this is the first opportunity to respond to the draft Code specifically, and for many will be the first time engaging with the issues given the breadth of companies, features and business models being covered by a single set of rules. This is evidenced by the low number of responses from industry (and more generally – the call for evidence garnered only 97 responses), suggesting a lack of awareness.²

techUK urges the ICO to extend the consultation period to allow companies and other relevant stakeholders to submit full responses. techUK also encourages the ICO, throughout the consultation period and beyond, to undertake significant outreach and awareness raising activities utilising its network of contacts to ensure a good level of understanding of the draft Code and to fully assess the practical and technical requirements it would place on different

¹ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/06/blog-children-s-privacy-call-for-evidence/>

² <https://ico.org.uk/media/about-the-ico/consultations/2614764/20190108-aadc-summary-of-responses-with-ico-comment.pdf> p.1

businesses. We would be happy to help coordinate such outreach to our membership and beyond.

1.2 The implementation period

Looking beyond the consultation it is clear that the Code will have a significant impact on organisations and the products and services they provide or are in the process of developing. If the draft Code is implemented as currently proposed this will require the retrofitting of products and services to ensure compliance.

In some respects, the technical and front-end changes that will be required in order to comply with the Code will be more significant and technically challenging than those required for the initial implementation of GDPR. This is primarily due to the fact that rather than making a wholesale change for the whole, different products/services will require multiple changes to address the different age brackets and consequential different requirements placed on those within scope. Some of the changes necessary may be incompatible with companies' implementations of GDPR, requiring a complete re-architecting of their GDPR solutions and back end data infrastructure to meet these goals.

For example, companies would be required to re-write T&Cs and privacy policies – as well as their consumer-facing websites, sign-up procedures and more, potentially covering a large part of the internet – in language which could be understood by a range of different age groups (from 5+ upwards) simultaneously in order to meet standards on *transparency* and *best interests of the child*. This challenge is compounded by the obligation companies have to include various legally required provisions in T&Cs which may be difficult to simplify for younger audiences. This approach is also inconsistent with GDPR parental consent requirements and would conflict with general legal consent/capacity requirements of minors.

Companies who offer household level services where one member of the household is the account holder may be forced into a fundamental redesign of their products, allowing the creation of multiple profiles on an account so that, for example, different privacy settings can be served. This act of creating different profiles so that the requirements of the Code can be met will, in almost all cases, involve the collection of more personal data than the service provider would otherwise have had. Similarly, proposals to avoid strategies to extend user engagement, such as pause buttons in games or limitations to 'nudge techniques' could require fundamental changes to the core content at great cost.

techUK calls on the ICO to recognise the scale and significance of the requirements proposed in the draft Code on companies and organisations and ensure that the implementation period would allow sufficient time for companies to comply with the code.

techUK hopes that the ICO will retain the approach championed thus far – that of 'evolution not revolution' guiding companies towards compliance and reflecting the risk-based, proportionate approach that is a hallmark of the ICO.

2. Scope

The draft Code will be applicable to all "providers of information society services" that are "likely" to be accessed by children. However, in reading the Code there is a significant risk that it could be interpreted to mean any service that is 'able' to be accessed by a child, which risks bringing almost all information society services into the scope of the code. This seems to go beyond the intention of s123 of the Data Protection Act, 2018 and would have significant implications that could be to the detriment of both citizens (including children) and the providers of information society services.

Revisiting the debate on what would become s123 of DPA,2018, it is clear that Parliament did not wish to tie the ICO's hands too tightly in devising the Code – this is apparent on closer inspection of s123 which for example includes the word "relevant" before information society services and says it

must have “regard” to the United Kingdom's obligations under the United Nations Convention on the Rights of the Child thereby allowing room for interpretation.³

techUK calls on the ICO to further clarify the type of companies and services that should be in scope with particular reference to the wording of s123 which states it should only be “relevant” information society services.

The phrasing “likely to be accessed by children under 18” will also undoubtedly have an impact on the ability of adults to enjoy the full benefits of the internet and the digital economy with age-gating/log-ins/and data collection likely to become mandatory as companies seek to minimise risks of non-compliance. Additionally, the definition of children as under 18 is inconsistent with the parental consent age adopted by the UK under GDPR. This will require companies to deal with two regimes in the UK – one for GDPR, and another for the Code.

Whilst the ICO appears to suggest that the draft Code targets only companies or services designed to “appeal to children”⁴, the draft Code goes on to state that even if “only a small proportion”⁵ of the user base is children the draft Code will apply. The ICO suggests a company could undertake some market research or refer to current evidence on user behaviour and the user base of existing services and service types in order to establish whether children are “likely” to access the service; however no guidance is offered on how often this should be undertaken or what evidence would need to be demonstrated to take that company/service out of scope. This lack of clarity creates huge uncertainty which will inevitably lead to companies taking a cautious approach. This is unsurprising given the ICO’s desire to stress that GDPR level fines could be applied in cases of breach.

A cautious approach could lead to withdrawal of services from under-18s through the use of age-verification and therefore the collection of more data on users than previously required – contradicting GDPR’s objective of data minimisation. Small businesses would be encouraged to collect more information about all their users to avoid the high costs of market research. Additionally, there is no support under the law to establish an obligation on companies to procure market research or gather specific evidence about their users.

An example of an impacted service is an online news service. Many such services are free-to-air and ad-funded. Most such services are not targeted at children but could be accessed by them. Under the current proposals, the most obvious way to comply without undermining the funding model would be to introduce -age-gating the service which would in turn lead to a reduction in the availability of reliable news. This would seem to be at odds with article 17 of the United Nations Convention on the Rights of the Child which requires state parties “*to recognise the important function performed by the mass media and ensure that the child has access to information and material from a diversity of national and international sources*” and also to “*encourage the mass media to disseminate information and material of social and cultural benefit to the child.*” The only alternative to age-gating is to implement the other measures of the draft Code, which will include the collection of more data on users than previously required – contradicting GDPR’s objective of data minimisation.

techUK believes the draft Code fails to clearly define “likely” and undermines the use of the word “likely” by going on to talk about a “small proportion”. This suggests that the true scope could be services ‘able’ to be accessed by a child. This will undoubtedly have significant repercussions unless clarified.

techUK would point to the approach taken by the Office of Fair Trading who in their *Principles for online and app-based games* offer a clearer explanation of “likely” – if “it may be reasonably foreseeable that a game is likely to appeal to children through its content, style and/or presentation”. techUK believes an approach similar to this would better meet the intention of s123 and give companies in scope of the Code greater confidence.

³ <http://www.legislation.gov.uk/ukpga/2018/12/section/123>

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614762/age-appropriate-design-code-for-public-consultation.pdf>, p.13

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614762/age-appropriate-design-code-for-public-consultation.pdf>, p.14

The draft Code makes only one mention of proportionality and explicitly states that the Code is applicable “regardless of the size of your organisation”. No indication is made of proportionality in terms of the type of service provided, the risk posed to children’s data security and privacy, or any other means. As discussed above the Code is likely to require significant technical changes to the design of products and services that are already available to users as well as significant investments into the design of new products and services. This could be prohibitively expensive for smaller companies to manage, particularly when taken with further regulatory changes currently in the pipeline such as those foreseen in the *Online Harms White Paper*.

techUK is concerned that the draft Code nudges the ICO to move away from its traditional proportionate and risk-based approach and adopt a one-size-fits all model that is likely to entrench dominance and create a less positive regulatory environment for UK businesses and those wishing to invest here.

techUK requests that proportionality and a risk-based approach be explicitly embedded into the Code. In particular, techUK calls for an express statement in the Code to the effect that enforcement of it in the context of any breach of the DPA will be carried out by reference to the principle of proportionality and will specifically consider factors such as (1) the likelihood of children accessing the product/service, (2) any evidence on volumes of children accessing the product/service, (3) the likely harm or intrusiveness to any children who have accessed the service, (4) whether the service provider has a direct relationship with children, (5) whether the service provider collects personal data from children and the nature of that data, and (6) whether the service provider has taken any measures, outside of those set out in the Code, in order to protect children’s data.

techUK also asks for guidance and support for start-ups and small and medium sized enterprises should be made available through the implementation period.

3. Balancing privacy and other rights

The need for nuanced interpretation is vital if the ICO’s Code is to strike the right balance between privacy on the one hand and the rights to freedom of expression, thought, association, access to information and to play and engage in recreational activities appropriate to their age on the other (all obligations under the UNCRC).

This is of particular relevance for children transitioning from childhood to adulthood for whom expression and the ability to source and interrogate information freely is critical to their development. The draft Code threatens to wall off significant parts of the online world which could be detrimental to their development. This is predominantly due to the fact that there is little commercial incentive for companies to do anything other than age-gating at 18 given the prohibitive costs of delivering tailored services and products to the different age brackets the ICO identifies in its draft Code.

While the GDPR specifies 13 as the age of consent online, allowing companies to process data the draft Code suggests additional consideration for children between ages 13 – 17 (inclusive), this could create confusion and legal uncertainty for companies and again may lead to them deciding to simply age-gate at 18.

techUK urges the ICO to more fully consider its responsibility to ensure the draft Code does not impinge on obligations under the UNCRC to guarantee the rights of the child to express and explore freely. This should recognise that the needs of 16 and 17 year olds are very different from 13-15 years olds.

techUK would encourage the ICO to apply the Code to children under the age of consent, rather than under 18, and undertake further dialogue with third-sector organisations such as Internet Matters and the NSPCC as well as PEN and the Creative Industries to ensure a balanced approach is found.

4. Impact on the wider digital economy

techUK was pleased to note that the ICO commissioned a study to explore the views of parents, carers and children on a range of issues suggested by the government as areas for inclusion in the code.⁶ Given the radical nature of the draft Code it is important that the ICO undertakes work to understand the impact it is likely to have on society and how people are interacting, wish to interact with, the digital economy.

techUK believes that the draft Code could have very significant implications for the success of the UK's thriving digital economy. The Code equates all data collection and processing with harm to a child, and conflates essentially processing to provide a service with non-essential processing. For example, the standards include requirements for personalisation services, geo-location and what the draft Code calls "nudge techniques" to be turned-off by default. Nudge techniques, without definition, could require many products to be removed from availability since they are typically built into a product as opposed to being an additional "feature" that can be turned on or off. For example, turn based gaming.

This is likely to have a direct impact on user-experience (not only that of children) and have a detrimental impact on businesses (including many small businesses and start-ups) who use these tools to generate revenue. Personalised adverts for example support a diverse ecosystem of independent content, and many smaller publishers rely on them to continue operating. The content of these adverts (and their appropriateness for children) is already well-regulated by the CAP Code. Having two codes that regulate similar or overlapping areas is potentially confusing and inconsistent.

Moreover, the requirement to set privacy standards to maximum could have a detrimental impact on consumers and the quality of service that they enjoy. For example, an on-demand content service provider who recommends content to their consumers based on their previous viewing would have to switch off that functionality, meaning that the consumer would miss out on product recommendations and have a less personalised service. Personalisation of this nature is very often not seeking to sell to consumers any products or services other than those already available to them at no extra cost.

techUK recommends that before any further progress is made, the ICO should commission an economic impact assessment of the draft Code on the UK's digital economy and specifically explore the impact the Code will have on small and medium sized businesses and start-ups which rely on personalised ads, geo-location etc for the continued viability of their business.

5. Age-verification/Age-gating

The draft Code presents those within scope a choice of either (a) providing a child-appropriate service to all users by default or (b) introducing age-gating and age-verification mechanisms to allow older children, teenagers and adults to allow them to receive the full benefits of the products and services on offer. This conflicts with the GDPR regime that presumes that everyone is an adult user unless they state otherwise.

Discussions with techUK members have revealed that many companies would struggle to re-configure their services in a way that would enable them to address their customers, regardless of their age, as if they were children.

Consequently, it is likely that age-verification will become the norm online for most, if not all services. This could have very significant implications that need to be assessed and thought through carefully. There are real questions about whether the wider use of age verification is in the interests of either the user of a service or the service provider. Despite the Code's requirement for data minimisation, implemented badly the Code could lead to a situation where companies are encouraged to collect more data, including documentation to verify age and introduce log-in measures to minimise disruption to user experience.

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614763/ico-rr-report-0703.pdf>

Moreover, it is questionable whether robust, privacy centric and user-friendly age-verification tools are sufficiently well developed to be deployed at the scale and pace that would be required for companies to comply with the requirements and timescales set out in the code. This is particularly of concern if the ICO is suggesting age-gating at ages lower than 18, when children do not have the normal requisite documents to prove age, for example a driving licence.

Many companies have no desire to collect highly personal ID that may be used to verify age, such as passports. Not only does such a verification regime place high burdens on companies, it risks unintentionally excluding children from disadvantaged backgrounds from the internet if they are required to purchase new forms of ID. Wherever possible we would encourage neutral age-screening mechanisms that do not require identification and manage balance age verification with data minimisation.

techUK recommends that the ICO carries out a technical feasibility study before proceeding further. The reliance on age-verification as a mechanism is not yet fully tested and as the ICO acknowledges, can be easily circumvented.

6. Context, timing and the need for coordination

The digital technology sector is going through a period of transition as Governments, both in the UK and across the globe as well as the EU-level seek to find new regulatory approaches. In the UK alone digital technology businesses will face action stemming from the *Online Harms White Paper*, the draft Age Appropriate Design Code, reviews on the adtech market and the Centre for Data Ethics and Innovation's work into targeted advertising and algorithmic decision-making. Much of this work overlaps and is complimentary, yet different timelines and the siloed nature of this work makes it difficult for our members to understand where to prioritise their efforts given limited resources and how these different workstreams will eventually interact with one another.

Of particular concern with regard to the draft Code is the apparent requirements that spill-over into content regulation moving away from the ICO's areas of expertise – data protection and privacy. Standard 5 (policies and community standards) and Standard 11 (Profiling) both seem to stray into the field of content regulation which is being addressed through the work on *Online Harms*. For example in offering further information on Standard 11 the draft Code notes that “you need suitable measures in place to make sure that children aren't ‘fed’ or presented with content which is detrimental to their physical or mental health or wellbeing, taking into account their age” it goes on to list the type of content that could be considered detrimental.⁷ The draft Code requires information society services to consider a range of non-data protection risks, such as access to inappropriate content, nudge techniques and ‘stickiness’. It is not clear yet how this will sit with the list of harms being consulted on as part of the *Online Harms White Paper*, and runs the risk of resulting in conflicting guidance, definitions and the possibility of double regulation.

The creation of a code with such broad scope risks the development of a digital environment where parents rely upon reputable companies to protect their children, leaving them vulnerable to less scrupulous online actors.

techUK believes that the ICO must limit the Code to areas within its direct competency as the body set up to uphold information rights. The ICO should work with others such as DCMS, Home Office, the CMA, the CDEI and Ofcom to ensure that conflicts are minimised and that companies have legal certainty whilst meeting the needs of different regulators.

techUK is concerned that the draft Code would see the UK get out of step with its European and global allies. We are not aware of any other country interpreting GDPR in such a strict manner on these issues and urge the ICO to consider this as it moves forward.

⁷ <https://ico.org.uk/media/about-the-ico/consultations/2614762/age-appropriate-design-code-for-public-consultation.pdf>, p.65