

## TELEGRAPH MEDIA GROUP LIMITED RESPONSE TO THE ICO'S AGE APPROPRIATE DESIGN CODE CONSULTATION

### Overview

Telegraph Media Group Limited – publisher of The Daily Telegraph, The Sunday Telegraph, telegraph.co.uk and other digital products - is a leading provider of high quality journalism in the UK and globally.

We are members of the News Media Association and of Internet Advertising Bureau UK, and endorse their respective submissions to the ICO. In its current form, the draft Age Appropriate Design Code could wreak havoc upon the news media and threatens legitimate and lawful use of data for advertising purposes. It has a potentially wide and damaging impact on ad-funded content and services.

The Code seeks to apply to all information society services with UK based establishments which are likely to appeal to or be accessed by children, even if not the intent of the service. These include *search engines, social media platforms, online messaging systems, online marketplaces, content streaming services (video, music, gaming), news, education websites, and any websites offering other goods or services over the internet.*<sup>1</sup>

There are limited exclusions. The Code will not apply to:

- Small businesses, but there is little guidance to help identify what qualifies as a small business.
- Services that are **not** accessed by a “significant” number of children. There is no indication as to the meaning of *significant* number, but, the draft Code shall apply even if only a small proportion of the users are children.

The age range of persons defined as “children” for the purpose of the draft Code spans from children of pre-literate and early literacy ages (0-5 years) to children under the age of 18 years. Yet, the GDPR expressly provides that processing of personal data of a child shall be lawful where a child is at least 16 years old, and that member states can provide for a lower age not below 13 years.<sup>2</sup> In the UK, that age is 13 years.<sup>3</sup>

Given the broad age range, it will be almost impossible for many UK based websites to demonstrate that less than a significant number of children access its services. If businesses do not know which users are children, businesses are required to apply the Code to all users.<sup>4</sup> In practice, for many businesses this will mean the highest privacy settings and content tailored to the lowest age group (0-5 years).

Statistics published by the Department of Education<sup>5</sup> show that in 2018, English is a second language for 49% of students in London primary schools and 41% for London secondary schools. Aggregated across England, English is a second language for 21% of 4.7 million primary school students and 17% of 3.25 million secondary school students. This indicates that significant numbers of children that will be accessing all types of websites, if nothing more, than for the purpose of assisting their parents, who may not be English speakers.

In the case of UK news websites, children under the age of 18 years will access content based upon their interests, be it sports, fashion, travel, entertainment, celebrity, the Royal

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<sup>1</sup> Draft Age Appropriate Design Code Version 1.0 for public consultation (15/04/2019-31/05/2019) page 12 (**Draft AADC**)

<sup>2</sup> General Data Protection Regulations (**GDPR**), Article 8

<sup>3</sup> Information Commissioner's Office, Guide to the general data protection regulation GDPR /children and the GDPR 1-0

<sup>4</sup> Draft AADC, page 22

<sup>5</sup> <https://data.london.gov.uk/dataset/percentage-pupils-first-language-borough>, 2007-2018

Family, as well as more hard hitting news, such as politics and business. In the UK overall, national newspapers are syndicated through NLA Media Access (a news industry licensing body) to approximately 28,000 schools and over 7.6 million students. News content is used in exam papers, complementing the government's own media literacy programme.

This means that the Code will apply to the websites of UK news publishers, unless children are barred from their online services.

The crude application of the Code to multitudes of UK-based online businesses, including news publishers, and the principle requirements *to put the best interests of the child as a primary consideration*<sup>6</sup> and *tailor services to the different needs of children at different ages and stages of development*,<sup>7</sup> at the heart of the design of the service,<sup>7</sup> is unworkable for many businesses.

The Code goes beyond the regulatory remit of the ICO. It blatantly spurns the carefully debated and drafted principles of GDPR that state that the fundamental right of privacy is *not absolute* and needs to be *balanced against other fundamental rights, in accordance with the principle of proportionality*.<sup>8</sup> The Code gives undue priority to the fundamental right of data protection over the fundamental rights of freedom of expression and information and freedom to conduct a business. It is shamefully disproportionate and does not account for the nature, scope, context and purpose of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons.<sup>9</sup>

The Code will not apply to broadcast services,<sup>10</sup> such as the BBC, Sky, ITV, Channel 4 and others. And, the Code will not apply to non-UK based establishments that are under the remit of a lead supervisory authority outside the UK, and not the UK Information Commissioner's Office.<sup>11</sup> This means that the large players, such as Google, Facebook, Amazon, Apple, Snapchat, Netflix and others, would not have to comply, unless they choose to be regulated by the UK Information Commissioner's Office as their lead data protection regulator.

The application of the Code to UK based establishments places onerous burdens on legitimate UK businesses and reinforces market conditions that, in the case of UK news publishers, already strongly favour large non-UK based international players and the publically funded broadcast news.

Specifically for non-broadcast UK news publishers, there are a number of serious implications.

The requirement to apply the highest privacy settings to services means unless a news publisher implements robust age-verification mechanisms, it will be effectively precluded from undertaking its normal business including: serving personalised advertising, contextual advertising, personalised content, performance monitoring of its content and effectiveness of advertising, audience measurement, data analytics to help develop its content strategy and so forth.

Unless able to exclude children from our service, the requirements *to put the best interests of the child as a primary consideration*<sup>12</sup> and tailor the service to *the different needs of*

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<sup>6</sup> Draft AADC, 1<sup>st</sup> Standard, Best Interest of the Child, page 19

<sup>7</sup> Draft AADC, 2<sup>nd</sup> Standard, Age Appropriate Design, page 22

<sup>8</sup> GDPR, Recital 4

<sup>9</sup> GDPR, Article 24(1)

<sup>10</sup> Draft AADC, page 13

<sup>11</sup> Draft AADC, page 14

<sup>12</sup> Draft AADC, 1<sup>st</sup> Standard, Best Interest of the Child, page 19

*children at different ages and stages of development*, at heart of the design,<sup>13</sup> mean that UK news publishers would need to:

- censor the news to such an extent as to inhibit ordinary news reporting, on the basis that a number of children ranging from 0-17 years of age may access it, in order to *protect and support their well being, to protect and support their physical, psychological and emotional development*.<sup>14</sup>
- publish different versions of the news for the different age groups on a daily (or more frequent) basis, in order to *recognise the evolving capacity of the child to form their own view, and give due weight to that view*.<sup>15</sup> This could mean the displaying news in video and cartoon formats for children between the ages of 0–5 years, even if there is little likelihood of those children accessing news content.

Consequently, the online content of news publishers which is intended for the public at large will need to comply with the standards of the Code which are more appropriate to pre-school than a national newspaper. These restrictions do not apply to the printed newspaper.

The requirement to *dumb-down* the news in order to comply with the Code is contrary to the fundamental right of freedom of expression and cuts across the government's media literacy initiatives. It would curtail our ability to (1) report on controversial issues, criminal activity, murders, sexual exploitation, terrorism and so on, which may be distressing, with particular impact on younger children;<sup>16</sup> and (2) publish opinion pieces and politically biased news, because it may not meet the Code's requirement to *respect the right of the child to freedom of thought, conscience and religion*.<sup>17</sup> Yet, in the long term, such curtailment would also be harmful to a child's own education, development and media literacy.

The Code fails to give due regard to the fundamental right of freedom of expression. High quality journalism is of fundamental importance to a healthy democracy,<sup>18</sup> as is a diverse media. Whilst UK broadcasters are bound by requirements for impartiality,<sup>19</sup> the press is not required to be politically impartial and can offer a "greater diversity of viewpoints and opinions".<sup>20</sup>

With falling revenues, news publishers rely on innovative initiatives to increase their revenues and to increase user engagement. "The value of an ad targeted with data that picks out the people it is most likely to influence is worth at least two to three times as much as one where there is no such data."<sup>21</sup> Furthermore, the collection of data is critical for the development of subscription based revenue models.

The indiscriminate and blunt application of the Code in its current form, with abysmal disregard for the protections set out in the GDPR for freedom of expression and information and for freedom to conduct legitimate businesses is harmful to UK news publishers.

UK news publishers are already facing a number of challenges from the BBC, Google and Facebook, amongst others. The Code will operate effectively as a regulatory ad blocker, which would detrimentally impair the ability of UK news publishers to have meaningful

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<sup>13</sup> Draft AADC, 2<sup>nd</sup> Standard, Age Appropriate Design, page 22

<sup>14</sup> Draft AADC, page 20

<sup>15</sup> Draft AADC, Page 21

<sup>16</sup> Psychological and emotional development, Draft AADC, Page 20

<sup>17</sup> Draft AADC, page 18

<sup>18</sup> Cairncross Review, Chapter 1, page 13

<sup>19</sup> Cairncross Review, page 16, quoting from Ofcom Broadcasting Code, January 2019 - [https://www.ofcom.org.uk/data/assets/pdf\\_file/0016/132073/Broadcast-Code-Full.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf).

<sup>20</sup> Cairncross Review, page 17

<sup>21</sup> Cairncross Review, Chapter 3, page 43.

engagement with their audiences and to earn revenues through advertising. It will be a threat to the sustainability of UK news publishers and media plurality and put more influence in the hands of these other players.

The Code's unapologetically strong bias against freedoms of expression, of information and of business fails to meet government's vision for a free, open and secure internet, freedom of expression online, and a thriving UK digital economy, with a prosperous ecosystem of companies developing innovation in online safety.<sup>22</sup> It runs the risk of driving legitimate online businesses off-shore and thwarting innovation in the UK.

The presumption under the Code is that businesses which are otherwise GDPR compliant but have not met the disproportionate standards of the Code will be *prima facie* in breach of GDPR and businesses will need to justify and provide *compelling reasons* which take into account the *best interests of the child* merely for operating according to legitimate business norms. This is a reversal of the onus that strikes against the long established foundations of British justice.

Children do not need to be protected from the news or legitimate news websites *per se*. Many UK news publishers have an editorial duty of care and observe the self regulatory codes published by the Independent Press Standards Organisation and the Committee of Advertising Practice, which include content guidelines for the protection of children.

However, children do need protection from what they may be accessing online via search engines, such as the more patently harmful child grooming and pornography websites and from the more innocuous social media platforms and content sharing platforms, which may not be adequately moderated for online child safeguarding purposes. Many of these are likely to be regulated by a lead supervisory authority outside of the UK and therefore beyond the remit of UK Information Commissioner's Office and beyond the purview of this Code.

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<sup>22</sup> DCMS Online Harms Paper, April 2019, para 12

## Specific Comments on the proposed Standards

### Age Verification Mechanisms and High Privacy by Default

GDPR states that children merit *specific* protection in respect of services *offered directly* to children.<sup>23</sup> The Code goes beyond this. It requires businesses to apply the highest privacy settings to its services unless the business is able to implement robust age-verification mechanisms upfront to confirm the ages of each user.<sup>24</sup>

The Code acknowledges that there are no recognised age verification systems available.<sup>25</sup> The requirement to implement high privacy settings by default<sup>26</sup> also precludes businesses from applying data analytics to infer the ages of users without their prior consent. And asking users to self declare does not amount to robust age verification.<sup>27</sup>

Without a robust age verification mechanism, news publishers would be required to request users to provide a passport or a similar identity document in order for news publishers to be able to serve advertising to that user. Not only would this be an excessive request that would drive users to other sources of news, save for age verification purposes, the requirement for news publishers to process passport or other identity documents would contravene the GDPR and the Code's requirements for data minimisation.

Meeting the requirements of the Code in its current form is unattainable for UK news publishers. The alternative may be to put the news behind a paywall. However, "if the UK moves towards a market where newspapers are increasingly available only behind a paywall, it will leave those with lower incomes with fewer quality news sources. This evidence suggests that there is a real divide in the news available to people of different socioeconomic backgrounds, creating a democratic gap in news engagement."<sup>28</sup>

### Best Interests of the Child and Age Appropriate Design

The Code has classified the different age groups as follows:

0-5	Pre-literate and early literacy
6-9	Core Primary School Years
10-12	Transition years
13-15	Early teens
16-17	Approaching adulthood

Unless we are able to prevent children from accessing our services, in respect of each of the different age groups, the standards in the Code require businesses to:

- *protect and support their well being,*
- *to protect and support their physical, psychological and emotional development,*<sup>29</sup>
- *recognise the evolving capacity of the child to form their own view, and give due weight to that view,*<sup>30</sup>
- *respect the right of the child to freedom of thought, conscience and religion,*<sup>31</sup>

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<sup>23</sup> GDPR, Recital 38

<sup>24</sup> Draft AADC, page 22

<sup>25</sup> Draft AADC, page 25

<sup>26</sup> Draft AADC, page 43

<sup>27</sup> Draft AADC, page 23

<sup>28</sup> Cairncross Review, page 24

<sup>29</sup> Draft AADC, page 20

<sup>30</sup> Draft AADC, Page 21

<sup>31</sup> Draft AADC, page 18

and so forth. This would mean UK news publishers would have to censor and to tailor its online news to the different needs of children at each of the different ages and stages of development set out above.<sup>32</sup> This may include creating videos or cartoons for 0-5 year old children, even if the likelihood of this particular age group accessing our service may be negligible. None of this is workable for a daily news publisher.

UK news publishers should not be required to censor the news based upon the Code's prescribed age groups.

Compliance by UK news publishers with the self-regulatory codes published by the Independent Press Standards Organisation and the Committee of Advertising Practice is sufficient. The ICO is not and should not use the Code to become a *defacto* content regulator.

### **Nudge Techniques**

The Code precludes the use of techniques that would “nudge” a user towards the service provider's preferred option.<sup>33</sup> This would mean that businesses would not be able to use personal data to encourage a user to complete a transaction, for example, abandoned shopping baskets, or, in the case of a news publisher, to complete the purchase of a subscription following a free trial period. Nor could UK news publishers use personal data to drive content and personalise the news and increase user engagement with its website content. Nudge techniques are also used to verify whether or not a failure to complete a transaction is due to a technical glitch, or an unintended oversight by the user.

Prohibition on nudge techniques for legitimate purposes is seriously detrimental to the business of online news publishers.

### **Detrimental Use of Data**

The Code suggests that strategies to extend user engagement should be precluded.<sup>34</sup>

The financial sustainability of news publishers is dependent upon extending user engagement and enhancing the value of our advertising inventory through targeted advertising.

### **Data Sharing**

The high data privacy settings required by the Code means that businesses would need to cease all data sharing, including the most basic data processing, such as the use of cloud servers or third party customer data technology specialists, unless there is a *compelling reason* to do so, taking into account the *best interests of the child*.<sup>35</sup>

The Code provides that “a clear example of a compelling reason is data sharing for safe guarding purposes, or the purposes of preventing or detecting crimes against children, such as online grooming”,<sup>36</sup> which is already permitted under GDPR.<sup>37</sup>

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<sup>32</sup> Draft AADC, Best Interest of the Child, Age Appropriate Design, pages 17-27

<sup>33</sup> Draft AADC, 12<sup>th</sup> Standard, Nudge Techniques, Pages 67-72

<sup>34</sup> Draft AADC, 4<sup>th</sup> Standard, Detrimental use of data, Pages 37-38: *Until such time as a formal position is adopted you should therefore not use children's personal data to support these types of mechanism and strategies*

<sup>35</sup> Draft AADC, page 51

<sup>36</sup> Draft AADC, page 52

<sup>37</sup> GDPR Article 6(1)(d)

However, the Code gives no indication as to whether ordinary, legitimate business practices, for example, the use of cloud servers or third party data processors, such as customer data technology specialists, would be adequately *compelling*.

This means that although GDPR permits businesses to share data, providing that the appropriate data processing provisions and protections in place, the Code requires further *compelling* justification to use third party data processors, even if already compliant with GDPR.

This is unrealistic and fails to respect the GDPR requirement to balance privacy rights with other fundamental rights, including freedom to conduct a business.<sup>38</sup>

### ***Parental Controls, Governance and Accountability***

The Code requires businesses to:

- put into place an accountability programme to effectively address the standards in the Code, and to assess and revise the programme on an ongoing basis, building changes to reflect the changing environment of *children's privacy*; and
- to implement *parental controls*, which although not specifically stated to be mandatory, would be a required measure if a business was to meet the standard of putting a child's *best interest as a primary consideration as central* of the design and development on online services. This would mean that the business would also be required to provide age appropriate information to children so that children, in the different age groups, know that parental controls are in place and *educate parents* as to the child's right of privacy.

These standards are not appropriate to news publishers that provide an online news service for the general public, not specific to children. The Code does not provide any latitude for taking into account the nature, scope, context and purpose of processing nor the risks of varying likelihood and severity for the rights and freedoms of natural persons, as is provided for under GDPR.<sup>39</sup>

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<sup>38</sup> GDPR, Recital 4

<sup>39</sup> GDPR, Article 24(1)