

**ICO consultation**  
*Age appropriate design: a code of practice for online services*  
**IAB UK response**

**About the IAB**

1. IAB UK is the trade association for digital advertising, representing over 1,200 of the UK's leading brands, agencies, media owners and technology providers. We have a Board comprised of 23 leading businesses in the sector, including news media brands. Our purpose is to build a sustainable future for digital advertising, a market that was worth £13.4bn in the UK in 2018.
2. The IAB is actively engaged in working towards the optimal policy and regulatory environment to support a sustainable future for digital advertising. We also seek to promote good practice to ensure a responsible medium.

**Introduction and overview**

3. IAB UK welcomes the opportunity to provide comment on the ICO's Age Appropriate Design Code ("draft Code"). We fully recognise the importance of protecting children's rights and ensuring that their data is processed fairly and lawfully. The success of the final Code in meeting its important objectives is dependent on developing a 'codesigned' workable solution with ISS providers and other affected businesses.
4. When announcing plans for the Code, the then-Secretary of State for Digital, Matt Hancock, said: "This must be done in a way that protects the wonderful freedom and opportunity of the internet, without jeopardising the future flow of data between the UK and EU."<sup>1</sup> We are not confident that the draft Code or the swift consultation process will achieve that outcome.
5. We have chosen not to respond to the consultation using the form provided by the ICO as the structure does not provide space for thoughts and consideration of the draft Code as a whole or reflect the complex interrelationship between the standards. Nor does it provide space to comment on its effectiveness, impact, and proportionality.
6. In response to the ICO's questions about whether the standards and the ICO's expectations are clear, our view is that they are not. The draft Code raises significant questions and areas of uncertainty for business and our consultation response sets these out. We are also concerned that it overreaches into areas that are beyond the ICO's remit, including regulation of content online (including advertising content).
7. The Code will be a world first, making it vitally important that it is proportionate and achievable. To ensure that policy in this area is developed in a proportionate and evidence-based way, and delivers outcomes that can be implemented in practice, it is imperative that industry is given time to understand and respond to proposed standards that will significantly impact their businesses. The time provided by the ICO to submit a full and considered response to this consultation

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<sup>1</sup> <https://www.gov.uk/government/news/children-to-be-given-extra-protection-online>

has been too short and not proportionate to the significance of the draft Code, which is far-reaching and quasi-statutory in nature. Industry needs longer than six weeks to review, understand the implications, and respond. By way of comparison, the Government's consultation on its Online Harms White Paper, which breaks similar ground, has a three-month consultation period (and will be followed by further opportunities for stakeholders to review and input to draft legislation), which is standard practice for consultations of this nature, and double the length of the ICO's consultation.

8. We are also concerned that the ICO does not appear to have produced an economic impact assessment of what is effectively new policy, as part of the consultation process.
9. As it stands, the draft Code is sweeping in scope, potentially applying to every site, service or app online, irrespective of whether it is aimed at children. The impact of this both on ISS and businesses that provide services to, or through ISS, should be considered. In particular, third-party advertising companies that advertisers rely on to reach their audiences online, and that media owners and publishers rely on to generate revenue, stand to be significantly affected by the Code.
10. A likely unintended consequence of the draft Code is that, in order to comply with its provisions, ISS providers will be required to create barriers to access to their services and content. We would welcome clarification from the ICO that the purpose of the Code, in pursuing appropriate protections for children, is not to create barriers to children (or adults) accessing legitimate, legal content.
11. IAB UK welcomed the opportunity to respond to the ICO's Call for Evidence in 2018<sup>2</sup>. We are, however, disappointed that key issues that we and others raised as part of that process do not appear to have been considered or responded to in the Code. This includes issues relating to consumer privacy and recognising the difference between 'good' versus 'bad' profiling.
12. The draft Code appears to assume that access to services online that process personal data is inherently a threat to children. As drafted, it characterises all (non-essential) data processing as potentially harmful to children and as being incompatible with privacy. For example, the draft Code conflates agreement to non-essential data processing with a 'lowering' of privacy protections and refers to the 'risks' of children 'activating extra elements of the service or changing default settings' (p26). We would therefore welcome more information on what consideration was given in drafting the Code to the concerns that were raised in the pre-consultation and we urge the ICO to address them in its revised draft Code.
13. We are also concerned that the Code does not achieve the right balance right in terms of complementing, rather than duplicating or overlapping, matters that fall

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<sup>2</sup> IAB UK submission, ICO Age-Appropriate Design Code Call for Evidence, 2018  
<https://ico.org.uk/media/about-the-ico/consultation-responses/2018/age-appropriate-design-code-responses/2260151/iab.pdf>

within the remit of the CAP Code<sup>3</sup> and the UK's advertising regulator, the Advertising Standards Authority (ASA). Existing legislative and regulatory frameworks already provide effective, robust protection for children from potential harm from advertising, and the scope and content of ICO's Code should reflect this.

14. Businesses need as much clarity, certainty and time as possible to enable them to effectively comply with the Code. Without this, there is a serious risk of the Code not achieving its objectives, and of significant harm to the digital economy and to competition in the digital advertising market at a time when other factors, such as the uncertainty around Brexit, are already threatening its continued success.
15. We therefore urge the ICO to consider timelines for implementation very carefully. IAB UK would like to see a workable implementation period, following the publication of a revised Code that has taken into account industry's concerns regarding proportionality and applicability. We do not agree that an implementation period of 3 months is sufficient given the extensive nature of the Code and its broad scope and are concerned about the prospect of different implementation periods for each Standard. We ask that the ICO sets out a clear timetable of next steps following this consultation process to provide certainty to ISS, and other service providers that are indirectly affected by the Code, and to enable them to develop and implement any necessary changes to their services.

## Scope

### *Definition of a child*

16. One of our key concerns with the draft Code in the context of digital advertising is the confusion arising from its definition of a 'child'. Whilst we acknowledge that the UNCRC<sup>4</sup> defines a child as being "under 18", the GDPR does not define the age of a child. Nor does the DPA, although s.9 sets the age at which a child can give consent for data processing in the UK as 13. The CAP Code (except where it reflects s.9 of the DPA) defines children as under 16. The draft Code sets the age of a child as under 18, defining five sub-categories of age. If implemented as it stands, the advertising industry would have three different child-related age categorisations to manage for the same or different purposes (and therefore also three different definitions of 'adults'). These conflicts create legal uncertainty and unnecessary confusion for children and parents as well as for businesses.
17. As we stated in our 2018 response, in the context of advertising regulation, CAP has published work exploring children's recognition and understanding of online advertising, resulting in publication of its guidance *Recognition of advertising: online marketing to children under 12* in April 2017. As part of this work, CAP reviewed the evidence on children's critical understanding capabilities at different

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<sup>3</sup> CAP Code, The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing <https://www.asa.org.uk/uploads/assets/uploaded/bd9575a1-cd07-48e7-979b4cbec70dd31f.pdf>

<sup>4</sup> UN Convention on the Rights of the Child (UNCRC) [https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC\\_summary-1.pdf?\\_ga=2.128723340.1883489102.1558099649-1074782694.1558099649](https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_summary-1.pdf?_ga=2.128723340.1883489102.1558099649-1074782694.1558099649)

ages. This indicated that children have three distinct stages of cognitive development: 0-7; 8-11; 12-15. The guidance was subsequently developed to address issues arising with the first two age groups, i.e. those under 12. The ICO's proposed age brackets do not align with those identified by CAP. We reiterate our view that age categories used for similar purposes need to be aligned.

### *Proportionality*

18. While we recognise that the ICO has set out its approach to enforcement in its regulatory action policy, IAB UK would welcome more evidence that proportionality and applicability have been considered when compiling the Code.
19. The blanket application of all standards within the Code to all ISS does not reflect a proportionate approach. It is not proportionate, for example, for a predominantly adult-accessed site to treat all its users as children, unless they have been age-verified. Nor is it a good user experience for adults to receive this treatment. The Information Commissioner stated recently that 20% of internet users in the UK are children.<sup>5</sup> Those children are afforded additional protection under existing law, but there needs to be a balanced approach that recognises that the majority of people online are therefore not children. The current lack of focus on proportionality and applicability could particularly impact smaller businesses and affect their ability to compete in the market. This should be taken into account in an economic impact assessment (see para 62).
20. The draft Code should be amended so that its scope is focused on services provided to children. For instance, as it stands, the draft Code treats a service clearly aimed at young children, e.g. the Disney website in the same way as a business that is clearly not, e.g. Business Insider. A more risk-based approach – the importance of which has been recognised by Government in other policy areas, such as its work on online harms – should be reflected in the Code, alongside the factors that the ICO will take into account in assessing that risk, and examples provided of likely circumstances where an ISS would fall outside the scope of the Code's provisions. Relevant factors for determining which ISS should be in scope could include whether the service is directed to or likely to appeal to children based on, for example, its content, features, or marketing.
21. Related to that, the draft Code states that it is applicable to all providers of information society services that 'are likely' to be accessed by children. We are very concerned that 'likely to' is far too broad a description and could be interpreted to mean any ISS that 'could be' accessed by a child, particularly as the draft Code states: 'If you believe only adults are likely to use your service so that this code does not apply, you need to be able to demonstrate that this is in fact the case'. As this interpretation would widen the scope significantly – which we presume is not the ICO's intention – the Code should provide a clearer definition of 'likely to' and set out the factors that should be considered by an ISS

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<sup>5</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/dcms-subcommittee-on-disinformation/the-work-of-the-information-commissioners-office/oral/100459.html> (Question 57).

provider (and by the regulator) in making such an assessment. In doing so, the ICO should consider the inherent challenges for ISS providers of evidencing the age of users via market research, or of proving a negative (that your service is not likely to be accessed by children), not least as it is not straightforward to carry out market research that includes children.

22. The Ofcom Broadcast Code<sup>6</sup> provides a definition that could provide a useful guide for the ICO in developing an appropriate definition for the purpose of the scope of the Code, although it would require adapting and adding to in order to be appropriate for this purpose. The Ofcom Code states:

*'...factors affecting whether content is likely to be accessed by children include (but are not limited to):*

- *the nature of the content – whether it is aimed at or has appeal to children; and*
- *the nature of access to the content e.g. whether there are measures in place that are intended to prevent children from viewing and/or listening to the content'*

23. The draft Code also does not adequately set out the implications of the proposals on adult ISS users, especially as age-gating and mandatory accounts and log-ins (likely requiring people to provide more personal data) will undoubtedly become a standard response for businesses in order to ensure that they are Code-compliant. If this is not the intention of the ICO, this should be made clear. If it is the intention, this raises serious questions about the approach, if it will result in unnecessary data collection and an inherent conflict with the principle of data minimisation. We have expanded on these implications later in our response.

24. The revised Code should make clear how companies should proceed if a person self-declares their age as being 18 or over. The draft Code is written entirely from the perspective of an ISS interacting with or providing a service to a 'child'; however, there are many services where the vast majority of users will be aged 18+. The revised Code needs to distinguish between these scenarios as they warrant very different treatment, and provide clear guidance for both ISS and for businesses that process the personal data that is collected and provided to them by ISS.

25. With regards to advertising, the draft Code could be interpreted to mean that unless an ISS provider verifies all users' ages and identifies those over (or under) 18, the provider can only show 'child-friendly' adverts (irrespective of other measures and methods used to comply with advertising regulation in respect of age-restricted advertising). This goes beyond what either the law or the UK's advertising regulator requires. We expand on this point in the following section, but to ensure maximum clarity, the revised Code should reflect a clear delineation between its scope and that of the ASA.

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<sup>6</sup> [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)

26. Should the final Code include requirements for ISS providers to verify the age of all their users if their services are aimed at or are likely to appeal to children, this will present a significant challenge and place a substantial burden on ISS providers and others they work with. The Code should be much clearer about what the ICO's expectations are for age verification – to whom it applies, when, and what actions are contingent on it. For under-18s, age verification is significantly more challenging than for adults, as under-18s are much less likely to have 'proof' of age, and this could therefore vastly increase the amount of personal data held by ISS providers. We believe this is a significant unintended consequence of the draft Code. (See paras 50-56 for more details).

#### *Regulatory remit and duplication*

27. Our interpretation of standard 11 ('Profiling') of the draft Code is that the ICO's objective is to prevent inappropriate or potentially harmful advertising being seen by under 18s as a result of data processing for 'profiling', e.g. interest-based targeting. We have two concerns about this stance. The first is that profiling is a useful tool in helping to establish the likely age of a user, and restricting the use of data for this purpose risks making it more difficult for businesses to provide age appropriate content and advertising. The second is that we consider this objective to go beyond the remit of the ICO and the Code, as it addresses regulation of access to and provision of content, including advertising content.

28. There is already a well-established, respected regulator for this purpose in the ASA. The CAP Code sets out the rules that advertisers must follow, and that the ASA enforces, and it reflects relevant legislation including the GDPR, DPA and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

29. The CAP Code rules cover (among other things) the content and placement of age-restricted advertising (whether data is used in order to target that advertising or not), preventing harm to and unfair treatment of children, and the processing of children's data for advertising purposes. Rules 10.15 to 10.17 of the CAP Code focus on the use of data in marketing techniques with specific safeguards for children.

30. In relation to online services, the CAP Code states – reflecting article 8 of the GDPR – that 'where marketers process the personal data of children under 13...they must obtain the verifiable consent of the child's parent or guardian' (rule 10.15). Where the consent of a child is appropriate, rule 10.16 specifies that marketers must provide intelligible information for a child, whilst rule 10.17 instructs marketers to avoid using personal data of children to create personality or user profiles especially 'in the context of automated decision making'. This is in addition to rule 5 of the CAP Code, which clearly sets out the rules marketers must adhere to when addressing children in marketing communications, and to rule 2 (and accompanying CAP guidance specifically taking into account advertising to children under 13) that addresses the requirements that marketers must meet in relation to transparency of advertising.

31. Standard 11 of the draft Code states: 'Only allow profiling if you have appropriate measures in place to protect the child from any harmful effects (in particular,

being fed content that is detrimental to their health or wellbeing).’ As set out above, preventing harm through advertising is already a core tenet and key requirement of the CAP Code.

32. We are also concerned that the ICO’s draft Code is creating administrative and legal uncertainty by potentially overriding the CAP Code and ‘extending’ the age of a child to under 18 for the purposes of the advertising rules.
33. The draft Code refers to ISS assessing the ‘risk’ to children of data processing for the purpose of delivering content, including advertising, to children and applying controls around data processing in response to that risk. The existing, comprehensive rules relating to advertising to children in the CAP Code already represent an assessment of the likelihood of harm to children that could arise from different types of and approaches advertising content and placement. The rules are designed precisely in order to mitigate that risk. The ICO should recognise the role of the CAP Code in this respect both in principle, and in the content of the Code itself. We see no reason why the ICO’s Code on age-appropriate design should seek to address these areas, other than by referring to existing advertising regulation, for completeness.
34. It should be made clear in the age appropriate design code that, in relation to advertising, profiling for advertising purposes is legitimate subject to compliance with the CAP Code (and the law). The ICO should also recognise that ‘profiling’ is used in order to support regulatory compliance, for example as set out in CAP’s guidance on *Children and age-restricted ads online*<sup>7</sup> in order to exclude users who are likely to be children from audiences that are targeted with ads that are age-restricted.
35. We recommend that the ICO works with CAP/the ASA to ensure that its Code does not conflict with or undermine its rules or guidance.
36. The Government is currently consulting, via its Online Harms White Paper, on a new regulatory framework for content online. The ICO should coordinate its work on the Code with the Government’s work on online harms to avoid overlap, conflict or duplication.

#### *Interaction with GDPR and ePrivacy legislation*

37. Under article 8 of the GDPR and s.9 of the DPA a person is lawfully able to provide consent for their data to be processed if they are aged 13 or over. This age was specifically set by the UK Parliament as part of the derogations available to it under the GDPR (which sets the ‘default’ age at 16). The Explanatory Notes to the s.9 of the DPA state, in explaining this decision:

*This means children aged 13 and above would not need to seek consent from a guardian when accessing, for example, information society services which provide educational websites and research resources to complete their homework... As long as a child is capable of understanding the processing to which they are consenting and is capable of making a free and informed decision,*

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<sup>7</sup> <https://www.asa.org.uk/resource/children-age-restricted-ads-online.html>

*then it is considered that the child is capable of consenting to any processing of personal data.<sup>8</sup>*

38. The draft Code (through Standards 6 and 12) appears to directly contradict this intention, as it requires businesses to ‘turn off’ by default any processing of personal data for ‘non-core’ purposes, and to encourage anyone aged under 18 – going beyond even the maximum age set by the GDPR at which parental consent is required – to seek approval or external support (in one form or another) before changing their ‘privacy settings’ to consent to data processing. This risks giving under 18s a false impression that all data processing, whatever the purpose, is inherently risky or potentially harmful and does not represent ‘free and informed’ decision-making for those whom the law considers able to make such decisions. It is essential that this conflict is resolved.
39. Under GDPR and the Privacy and Electronic Communications Regulations (PECR), where consent is the legal basis for data processing consent must be obtained first, prior to data being processed. If consent is not given, the data cannot be processed. This means that, in effect, much data processing for advertising purposes is already ‘off’ by default unless a person consents, in which case it is then ‘on’. We would welcome clarification from the ICO as to what the age appropriate design Code is intended to add to these provisions, apart from in relation to the nature of the information provided to children of different ages about their privacy and data choices.
40. As it stands, the draft Code would require all ‘privacy settings’ to be re-set to the ‘defaults’ set out in the draft Code by the time it is in force. It is unclear, however, whether the intention is that the application of the Code would invalidate any existing consent for data processing obtained by businesses (in accordance with the requirements of the GDPR or PECR) and on what basis an individual’s previously-exercised choices can be overridden. The Code also does not address the scenario where an ISS has already verified the ages of its users (perhaps for a different original purpose) before the Code comes into force, and how it should proceed in those cases.
41. There is apparent duplication or overlap between the provisions of the draft Code and the DPA and PECR in relation to processing certain kinds of personal data. The draft Code stipulates that certain settings that control access to personal data (geolocation of a device, for example) should be turned off as default, and, if then used, turned off again. However, in order to process geolocation data for non-core services, an ISS and any third parties that it shares data with are almost always required to obtain consent first. That this setting should always be turned off after each session is not proportionate in all cases. The ICO should recognise that consent can persist beyond a single session provided that the requirements of the GDPR and PECR are complied with. This example illustrates the confusion that the Code creates between it and existing data protection and privacy

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<sup>8</sup> <http://www.legislation.gov.uk/ukpga/2018/12/notes/division/6/index.htm>



legislation, and which takes precedence. It is vital that this confusion is addressed before the Code is finalised.

42. GDPR provides several legal bases for data processing and consent is only one of these. For most digital advertising purposes, consent or legitimate interest are likely to be the most appropriate legal bases. It is unclear how the general principle of the Code, i.e. that all non-core data processing is 'off' unless 'switched on' is compatible with processing data based on legitimate interest, which does not require affirmative action from the user. While we recognise that processing children's data based on legitimate interest requires particular consideration, there is no support under the law to argue that it is not a valid legal basis for the processing of children's data. In particular, the wording of Article 8 of the GDPR ("Where point (a) of Article 6(1) applies [...]") recognises that consent is not the only applicable legal basis for processing. Further, because the scope of the draft Code means that its standards could be applied to people who are not children, we are concerned that it minimises the possibility of reliance on legitimate interest by placing such a significant weighting on a consent-based approach to data processing. It is also unclear whether the ICO intends that an ISS may only process data on this basis if it has verified its users' ages.
43. In summary, we are strongly of the view that GDPR and PECR, the CPRs and the CAP Code provide effective, robust protection for children from potential harm from advertising, and that the scope and content of ICO's Code should be revised to recognise those existing protections.

### Privacy settings

#### *Changing privacy settings*

44. In Standard 6, the Code states that all non-core data processing must be 'off' and voices an aspiration that 'many children will never change their privacy settings from the default position'. The draft Code does not address the question of when an ISS can present to users the option to change their privacy settings in order to be able to benefit from the provision of tailored information or services, following the initial default 'off' setting, and or/their age being declared or verified. While the draft Code implies a business would be able to provide a tool to enable people to change their settings, it does not state how or when this option can be presented to users.
45. It is legitimate for an ISS to seek to process its users' data if it does so lawfully and appropriately. ISS providers and digital advertising businesses need clarity as to how they can continue to do this in practice, and whether existing practices that involve, for example, presenting choices to users at the point that they visit a website or service can continue. It is critical that the Code addresses this point.
46. Ultimately, if all users' settings must be changed to 'off' by default, and a business is unable to present the option to change this at the point of contact, this poses a serious threat to the ability of ad-funded businesses to monetise the provision of their content and services. The likely consequences are that ISS providers would introduce 'paywalls' for their on services or age-gate access to a

disproportionate degree, likely only to over 18s, therefore reducing the availability of legitimate and legal online content and services to children and to those who are not willing or able to prove their age to the ISS provider.

#### *Providing privacy controls*

47. The notion of each individual user of a site or service providing ‘privacy settings’ in a dashboard-type manner is one that only holds true for certain ISS providers. Some do require users to register, set up an account and provide ‘privacy settings’ within those accounts in the way envisaged by the draft Code. The vast majority, however, do not. Even where sites do require users to register in order to access a full, or fuller version of its content (for example a news site that restricts the number of articles that can be read by non-registered or -logged in users), many only collect a minimum amount of information and will manage ‘privacy settings’ through a different process. The Code is overly prescriptive in this respect and encroaches on the legal obligations of data controllers and processors to undertake their own deliberations about how to comply with the law and to best meet their users’ needs, including in relation to the specifics of the design of privacy controls, user interfaces and the overall user experience of their service. The Code should instead take a principles-based approach to the design of ‘privacy settings’.
48. IAB Europe has, with its members (including IAB UK), invested significant time and resource to develop the cross-industry Transparency and Consent Framework (TCF)<sup>9</sup> to provide a means of transmitting signals of consent (and, under version 2.0 to be released later this year, objections to data processing on the basis on legitimate interest) from a user to third party companies working with publishers and site/app owners to deliver advertising services. It is unclear under the draft Code whether publishers and third-party advertising companies would be able to continue to use the TCF. It is a technology-neutral framework does not depend on individual accounts and log-in mechanisms, but it is not clear whether it could continue to operate under the system envisaged by this draft Code. The Code implies that every service has to provide users with a ‘privacy settings’ tool, and needs to be able to identify each individual person using its service, which would likely only be achieved by providing ‘accounts’ and requiring individual log-ins. This is a clear example of where the Code creates a risk of unnecessary data collection, which conflicts with the principle of data minimisation.
49. The ICO needs to consider the different design of different types of ISS and engage with a wide range of providers to understand how privacy settings are currently provided and managed in practice, and how they could be used or adapted to comply with the Code. The ICO should work with industry to develop guidance on this point.

#### **Age verification**

##### *Methods of age verification*

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<sup>9</sup> <https://advertisingconsent.eu/>

50. The draft Code does not clearly set out the ICO's expectations in relation to age verification. If the expectation is that all users are treated as children unless proven otherwise (as per page 22 of the draft Code, for example), there are very real practical challenges to making this work in practice. As we have said, the ICO needs to set out more clearly its expectations as to how users of different ages can be treated in respect of the Code's standards and when and how age declaration or age verification should be used. As it stands, however, there are a vast number of sites and services that would currently fall in scope, most of which are not currently login or account-based environments. Indeed, most services where a user is required to verify their age – or a company is required to verify the age of their users – are where the service, content or product is itself age-restricted and therefore requires the user to be over the age of 18 (e.g. in order to access pornographic content). This draft Code would appear to reverse this principle.
51. We are therefore concerned that many ISS providers, and other businesses that process data collected by those ISS providers, will remain unclear about how they could feasibly change their services to interact with all customers based on them being children without entirely undermining their service or creating a poor customer experience for their adult users. As previously stated, the most likely outcome would be that almost all services' default would be to make age verification a requirement of access, which would have a significant impact on users. The ICO should work with industry and engage with a wide range of types and sizes of ISS providers to design an approach to determining users' ages that is practical and workable.
52. As already mentioned in our response, we foresee that a repercussion of businesses aiming to be Code compliant will be an increase in data collection, moving away from the principle of data minimisation and requiring additional collection and storage of personal data. An inherent contradiction arises from the potential requirement for companies to gather more data to verify age and create accounts and logins to record this information, and then associate this information with an identified individual on an ongoing basis, in a secure way. There are particular risks associated with this approach, not least the inexperience of many ISS in handling evidential documents.
53. Age verification is a relatively new and untested industry in the UK, particularly for under-18s. We are aware that age verification providers exist, some of whom have come into existence as a consequence of the age verification provisions in the Digital Economy Act. These have not been without controversy, however, including in relation to the privacy risks they may pose, and are currently untested in a live environment. Many are also designed to enable verification only of the fact of a person being over 18 (or not). Such services are not necessarily suitable for the purpose of age verification by ISS for the purpose of this Code.
54. The ICO should provide guidance to industry ahead of the Code coming into effect on how businesses should go about verifying age in a secure and privacy-safe way. We encourage the ICO to consider age-verification mechanisms that are compatible with the principle of data minimisation, for example, the role of

neutral age-screens that require the user's self-declaration, and a restriction of the scope of the obligation to age-screen users to only those services that are directed to children under the age of 13. The ICO should also take into account the fact that UK internet users are largely unused to having to prove their age to use services online and further research and user-testing should be carried out to better understand the impact that this would have on adults, children, and ISS.

55. The draft Code (p. 25) implies that standards and certification schemes are being developed. We ask that the ICO provides more information about these at the earliest opportunity, and we urge the ICO to ensure that any such standards and schemes are made available in time for businesses to be able to make use of them in preparing to comply with the Code.

56. The ICO should also ensure that the Code does not create an implied requirement for age verification to be a requirement in respect of other regulatory regimes, particularly the CAP/ASA system.

### Impact on individual and business rights

#### *Increased processing of highly personal data*

57. Given that the draft Code creates the potential risk of increased collection and processing of data of a highly personal nature (related to identity) we suggest that the ICO conducts a Data Protection Impact Assessment on the requirements the Code creates for ISS to verify age and to be able to identify (and subsequently re-identify) individual persons online (e.g. through accounts and logins).

#### *Freedom to access information and freedom of expression*

58. We do not believe that the draft Code achieves the right balance between privacy, freedom of expression, access to information and engagement with (age appropriate) activities. It is not clear that the ICO has adequately had regard to UNCRC in drafting the content of the Code. Article 17 states that "Every child has the right to reliable information from a variety of sources, and governments should encourage the media to provide information that children can understand. Governments must help protect children from materials that could harm them." The draft Code creates a very real likelihood that ISS will move to put their services behind an age gate in order to comply with the Code, when there is no other need to do so. This would prevent children from accessing information, including sources of play and entertainment, educational information and news, despite these being appropriate to their age.

59. We have a real concern that the effect of the draft Code in practice will be to prevent internet users, of all ages, from accessing 'legitimate', legal content unless they are willing and able to prove their age to each and every ISS they wish to use. We do not believe that this is the intended consequence, nor that this is an outcome that Parliament intended, or that children or parents want. Legislative restrictions on access to content, products or services based on the basis of age is not a new concept, such as for pornographic content within the scope of the age verification provisions in the Digital Economy Act. We do not believe, however, that is appropriate, necessary or proportionate to apply a

similar approach to whether an ISS can process a person's data and allow them to access ad-funded content.

60. The draft Code would mean that online and digital services are treated differently compared to offline services, as the likely consequence of the draft Code is an increasing number of age-gated services despite the same product (news, for example) having no legal age restrictions for access or provision in the 'offline' world. As we have already outlined in our response, data processing for advertising purposes is regulated effectively through existing legislative and regulatory frameworks and it is difficult to see why advertising and, as a consequence, access to ad-funded content should be age-restricted by this Code.
61. The ICO should review its approach to ensure that in seeking to uphold one right, others (whether children's or adults') are not directly impeded.

#### *Economic impact*

62. We acknowledge that the Code is a requirement of the DPA. We also acknowledge that commercial considerations do not carry a greater weight than considerations of the best interests of a child – but that does not mean that they should be disregarded. Appropriate consideration should be given to the economic impact of the Code. The digital advertising ecosystem is fragile: the effects of GDPR on key parts of the ecosystem and the uncertainty around Brexit are taking a toll on the industry. Content creators face challenges in monetising their services and the Government has recognised the current challenges to the sustainability of journalism in the UK which relies in part on funding from advertising revenue. We therefore believe that the Code should be accompanied by an economic impact assessment to ensure that these impacts are identified, understood, and appropriately mitigated so that the Code does not, in seeking to uphold children's rights, have a disproportionate impact on businesses' rights and freedoms.

#### **Timescale and process**

63. As drafted the Code will require a radical change for ISS providers of all types of sizes whether or not they are aimed at children, and will have significant implications for the way they operate in the UK. We recognise that service redesign is the intended consequence of the Code. However, the Code itself states:

*You must build the standards set out in this code into your design processes from the start, into subsequent upgrade and service development processes – and into your DPIA process. To be effective, you need to design these measures in, not bolt them on.*

64. Current proposals will require, where relevant, the retrofitting of products and services to ensure compliance, involving redesigns of both 'front end' and 'back end' processes and interfaces – which may require significant or extensive changes in order to be compliant – and research and user-testing, alongside accommodating differing and misaligned approaches to categorising children's

(and adults') ages between the CAP Code, GDPR/DPA and the age appropriate design Code.

65. We therefore urge the ICO to allow a workable implementation period following the publication of the final Code to enable the standards, where applicable, to be incorporated fully and properly. This is not a process that should be rushed, if the objectives of the Code are to be achieved in practice. Considering the significant changes that businesses of all sizes will have to make to their pre-existing products and services in order to be compliant, we do not agree that an implementation period of 3 months is enough.
66. This draft Code is significant, far-reaching and quasi-statutory in nature and requires a much longer implementation period than currently envisaged. The development, introduction and implementation of the GDPR was an eight year+ process, involving the input of organisations, industry and civil society and a two-year period allowed for implementation of the final Regulation. The recent efforts undertaken by businesses to achieve GDPR compliance involved months of preparation, planning, and user content and software development, along with significant financial outlay. To require those same organisations to make further, potentially wide ranging and costly changes to achieve compliance with the draft Code in so short a space of time is not realistic and risks undermining the effectiveness of the Code.
67. We are also concerned that the consultation document implies that there may be different implementation periods for each standard and we strongly discourage this approach. It would create a confusing and inconsistent experience for children and parents, adults, and businesses, and would increase the complexity of implementation.
68. Following the Code coming into force, it is essential that there is a realistic and proportionate transition period before companies and organisations are legally bound by its requirements. The UK Parliament provided for a transition period of up to 12 months in the DPA. There is no reason why the full 12-month period should not be allowed, given the complex and wide-reaching nature of the Code.
69. When considering the implementation period, we also urge the ICO to also have regard to the wider regulatory context for digital businesses in the UK and elsewhere. There is a plethora of regulatory proposals and workstreams under way within government and by non-governmental bodies and organisations, all of which could have a significant impact on digital advertising businesses and the advertising industry as a whole. We are especially concerned that, without careful coordination and a coherent approach to policy in this area, the challenge of dealing with this degree of regulatory change in a similar timeframe will disproportionately impact smaller businesses. Businesses therefore need as much clarity, certainty and time as possible to enable them to effectively comply and ultimately achieve the Code's objectives.
70. We ask the ICO to also consider and coordinate with the UK Government on the timing of its work on introducing a new regulatory framework for online harms and the forthcoming review of digital advertising announced by the Secretary of State

in February this year. These significant pieces of work cannot be considered in isolation from one another. Without a coherent and coordinated approach, the associated lack of legal and regulatory certainty and predictability creates a serious risk of significant harm to the digital economy and to competition in the digital advertising market at a time when other factors, such as the uncertainty around Brexit, are already threatening its success and sustainability. We therefore urge the ICO to consider timelines for implementation very carefully and in consultation with relevant Government departments.

71. As stated elsewhere in our response, the process of pre-consultation on high-level concepts, followed by a 6-week consultation on the content of the draft Code – with 16 interrelated standards and over 100 pages – has been insufficient to allow for full and proper consideration by industry. We recommend that the ICO carries out further consultation and detailed sector-specific industry engagement with companies of all sizes who would be affected, before the draft Code is finalised and presented to the Secretary of State. The IAB is happy to help facilitate this process with its members.

### Conclusion & recommendations

72. IAB UK understands and fully recognises the importance of ensuring that children’s rights are protected and that their data is processed fairly and lawfully.
73. We have significant concerns, however, about the approach being taken in the draft Code and that it will be unworkable – and potentially damaging – in practice. We urge the ICO to reconsider its draft Code following this consultation process and to produce a revised version for further consultation. As outlined in this submission, the success of the final Code in meeting its important objectives is dependent on working with ISS providers and other affected businesses and drawing on relevant expertise to developing a ‘codesigned’, practical solution.
74. Specifically, the revised Code should address the following issues:
- The overly wide scope of the draft Code and the apparent lack of proportionality that does not properly reflect the relative risks of different types of data processing. Specifically, the scope should be narrower, with reference to ISS that are aimed at or are likely to appeal to children. The revised Code should set out relevant factors to be considered in determining whether a service is “likely” to be accessed by children.
  - The need for clarity on where the Code sits in relation to the existing legislative and regulatory frameworks for data, privacy and advertising and explicit recognition of the remit of those frameworks, which the Code should complement and not conflict with or duplicate. In particular, the relationship of the Code with the CAP Code and the ASA should be set out more clearly. This clarity is essential in order to provide legal and regulatory certainty and predictability.
  - The lack of clarity on when and how ISS are expected to use age verification and for what purpose(s).

- How the Code interacts with existing industry practices to ensure compliant data processing in line with relevant legislation.
- The need to take into account impact of the draft Code on data protection (due to the high likelihood of increased data processing), its economic impact, and its impacts on other rights and freedoms.
- The need for practical guidance to be developed in consultation with industry to support the implementation of the Code, prior to it coming into effect, including standards and guidance on age verification (whether managed 'in house' or via a third party provider).

75. The ICO should conduct wide and extensive consultation and industry engagement to inform the development of a revised draft Code, which should also be subject to a formal consultation process.

76. The IAB is happy to work with the ICO on developing a revised draft Code and accompanying guidance and to facilitate engagement with the digital advertising industry. We reiterate our view that co-designed solutions that benefit from input from companies with expertise in the design and delivery of online services is essential to the success of the Code in meeting its objectives and helping to ensure that children have a safe, informed and positive experience online.

*IAB UK  
May 2019*