



British Screen Advisory Council
'Bringing the audiovisual industries together'

Submission to:

**Information Commissioner's Office
Consultation: Age Appropriate Design Code**

31 May 2019

About BSAC

1. The British Screen Advisory Council (BSAC) is an independent, industry-funded body which works to advance the prosperity and enhance the prestige, effectiveness and reputation of the audiovisual and interactive industries of the United Kingdom. As a membership organisation comprising senior executives from the broadest possible range of interests in the screen sectors, it provides an informed lead on emerging business trends and advice on policy.
2. Members¹ are senior figures drawn from a wide range of businesses and organisations operating in the film, TV, video game, online and/or mobile sectors. We aim to cover the whole value chain as well as the full range of means of distribution, so include members who can speak for writers, technicians, independent producers, directors, studio operators, distributors, exhibitors, broadcasters, games publishers, games developers, pay TV platforms and online platforms. It's a unique cross-sectoral mix, with a balance of creative, policy and business specialists.

Introduction

3. This BSAC paper is submitted to the Information Commissioner's Office (ICO) in response to ICO consultation on the proposed Age Appropriate Design Code ("the Code").
4. BSAC has taken a long-standing interest in regulatory developments affecting screen sector businesses and fully supports the aim of ensuring that online services appropriately safeguard children's personal data. However, this is a complex area and we are concerned that the Code goes well beyond safeguarding children's personal data and that the process is being rushed. In particular, we consider that there are significant risks of unintended negative consequences, both for screen sector businesses and for the children that use their online services, which have not been fully considered. The Code states that it covers all services 'likely to be accessed by children'. This could prove difficult for screen sector ISS, including those who provide services aimed at a general audience, such as BBC iPlayer. We ask that that the code should therefore strike an appropriate balance taking into account the varying purposes of different types of service provider.

¹ For a full list of BSAC Members see our website, at <https://www.bsac.uk.com/membership/>

The consultation timetable

5. We appreciate that the protection of children is an urgent need, but query whether it is sensible for the process in relation to the Code to run on such a short timetable and in a manner which, in particular, does not properly allow for consideration of the potential interplay between the Code and the outcome of the current consultation on the Online Harms White Paper. The latter includes proposals for a statutory duty of care to be placed on providers of online services, overseen by an independent regulator (which may be either an existing regulatory body or a new one).
6. The Online Harms White Paper consultation acknowledges that:

“...this is a complex and novel area for public policy. To this end, as well as setting out the government’s proposed approach, this White Paper poses a series of questions about the design of the new regulatory framework and non-legislative package”²
7. Those questions invite submissions on a wide range of issues which may be relevant also to the Code, including key issues of effectiveness and proportionality (Question 5) and the nature of any advice or support that the regulator could provide to businesses, particularly start-ups and SMEs, to help comply with the regulatory framework (Question 9). Given that the deadline for submissions to the Online Harms White Paper consultation is not until 1 July, with the Home Office and DCMS then expected to take time to consider the views and evidence provided before finalising the government position, the timetable set out for the consultation on the Code and for it to come into force would not allow for a full and proper assessment of the combined impact of the two interventions. The risk is that, in addition to the potential unintended consequences identified below, the interplay between the Code and any final legislation that develops from the Online Harms White Paper may have further consequences that cannot be properly identified at this stage in the Online Harms process.
8. Even without the complication of the Online Harms White Paper, a six week timetable for consultation is unnecessarily and disproportionately short given the substantial changes potentially required by the Code. The government consultation principles³, which give clear guidance to government departments on conducting consultations, advise as follows:

² See DCMS and Home Office, ‘Online Harms White Paper – Executive Summary’ (April 2019), paragraph 49, at <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper-executive-summary--2#an-independent-regulator-for-online-safety>

³ See HM Government, ‘Consultation Principles 2018’ (March 2018), at <https://www.gov.uk/government/publications/consultation-principles-guidance>

“Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses.”

9. We note that Ofcom, for example, would normally provide a 12 week consultation period, including for potential changes which are arguably less significant than the proposed adoption of the Code.

Unintended consequences

10. As noted above, we consider that there are significant risks of unintended consequences, both for screen sector businesses and for the children that use their online services, which have not been fully considered. Among these are the negative effects on innovation and, especially, on SMEs.

11. It is well established that new regulatory requirements tend to have a disproportionately large effect on SMEs. For example, in its report on “Regulatory barriers and firm innovation performance”⁴, one of the key findings of the EC Business Innovation Observatory is that:

“SMEs are more affected than large companies by regulatory costs as the latter can often take advantage of economies of scale and scope associated with the administration of regulatory obligations and the investment required for compliance with these obligations.” [page 7]

12. This issue was raised in the ICO call for evidence, and the ICO acknowledged in its response⁵ that:

“Some of these challenges, such as [] cost implication remain and may be the subject of future work.” [page 16]

13. BSAC considers that the cost implications, especially for SMEs, should be fully considered before the Code is finalised. Otherwise, there is a significant risk that the Code will stifle innovation, especially among SMEs, and entrench the position of scale players.

⁴ See European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, ‘Regulatory Barriers and Firm Innovation Performance’ (June 2018), at <https://publications.europa.eu/en/publication-detail/-/publication/a4bbo0fc-7822-11e8-ac6a-01aa75ed71a1>

⁵ See ICO, ‘ICO’s call for evidence – Age appropriate design code: summary of responses’ (April 2019), at <https://ico.org.uk/media/about-the-ico/consultations/2614764/20190108-aadc-summary-of-responses-with-ico-comment.pdf>

14. That is not to suggest that the Code would not adversely affect established services. The Code in its current form is also likely to have a significant impact on such services, including popular free-to-access video-on-demand (VOD) services such as ITV Hub and All4. Services such as these rely on viewers to self-select their age and thus would not meet the criteria established in the Code of having a robust age verification system.
15. Even when they target users aged 16 and over, the Code would require such services to adopt by default high privacy settings, significantly hindering their ability to carry out targeted advertising to adults. This would in turn have a significant impact on their ability to generate digital advertising revenue and therefore on their ability to fund original content. For Public Service Broadcasters, this would be likely to adversely affect investment in UK public service content including children's programmes.
16. In addition, the potential impact of the Code on different types of providers of Information Society Services (ISS), whether within or between sectors, needs further consideration without which the markets within which such ISS operate may be distorted in ways which are detrimental to users. For example, the costs associated with implementation may reduce children's ability to access age appropriate ISS at least two ways:
 - such services being provided at increased cost to the child user as the increased costs of regulation are passed on; and
 - such services becoming commercially unviable and being withdrawn.

Some such impacts will be hidden, specifically potential new services which are not developed in future as a result of the increased costs of provision.

17. BSAC also notes the danger that the code may result in an increase in the collection and processing of personal data from children. There is an inherent tension between the practical requirement for such data in order to comply with certain aspects of the Code and the principle of data minimization enshrined elsewhere in the Code. Given the risks of data breaches associated with any such collection and processing, this may also require further consideration if inadvertent negative consequences are to be avoided. This point is particularly relevant to our comments on age verification systems, below.

Age verification systems

18. The Code places significant emphasis on the use of robust age verification systems as a means of ensuring age appropriate application. In particular, Standard 2 requires that all 16 standards are applied to all users by default unless such age-verification processes are in place.

19. BSAC notes that under separate legislation, the UK is about to bring into force age verification requirements for online pornography. Under section 14(1) of the Digital Economy Act 2017, all providers of online commercial pornographic services accessible from the UK will be required to carry age-verification controls to ensure that their content is not normally accessible to children. This requirement will come into force on 15 July 2019 and is expected to affect many millions of UK users of online commercial pornographic services.
20. Given the concerns that have been expressed about the reach, efficacy and cost of such systems, and about the additional data protection risks associated with any additional collection and processing of personal data, BSAC considers that it would be sensible for the ICO to allow time for an assessment of how the Digital Economy Act 2017 provisions have worked in practice before putting in place a statutory requirement for all ISS to either default to a child-appropriate setting or put in place robust age verification systems.
21. Additionally, the ICO should consider the type of age-verification that should be undertaken. Requiring users to submit passports, driving licenses or ID cards would be disproportionate in a great many cases and gives rise to a number of other issues, including amplifying the scope of data collected by the service provider.

Proportionality

22. BSAC notes that the Code appears to significantly overreach the requirements set out in the GDPR and we are concerned that the blanket approach taken by the Code will result in additional regulatory costs which are disproportionate to the sorts of harms that children might face when using screen sector services which are already providing a trusted space for young people and which already collect and process data in line with GDPR.
23. BSAC notes that screen sector ISS already operate within a variety of regulatory frameworks, including GDPR and a range of sector-specific statutory, co-regulatory and self-regulatory regimes.
24. An ISS which is also an on-demand audiovisual media service⁶ is already regulated under the EU Audiovisual Media Services Directive (the AVMS

⁶ Article 1 of the Audiovisual Media Services Directive defines an audiovisual media service as “a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph”. While television broadcast services are excluded from the scope of the Code, on-demand audiovisual media services are clearly intended to be included, if they are likely to be accessed by children.

Directive). In the UK, the provisions of the AVMS Directive are enforced by Ofcom which has put in place statutory rules for UK on-demand programme services (ODPS) which provide for even greater protection for children than are required by the Directive.

In particular, the Ofcom Rules for ODPS⁷ require that such services:

- must not contain any material likely to incite hatred based on race, sex, religion or nationality;
- must not contain any prohibited material (i.e. material which has been or would be refused a classification certificate for sale offline);
- must not contain any specially restricted material (i.e. material which would be restricted to sale in a licensed sex shop if supplied offline, or other material that might seriously impair the physical, mental or moral development of under 18s) unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it; and
- comply with a range of restrictions on sponsorship and product placement, including:
 - a ban on sponsorship or product placement by a tobacco company or for the purposes of promoting tobacco products, electronic cigarettes or prescription-only medicines;
 - a ban on product placement in children's programmes;
 - a ban on sponsorship of news or current affairs programmes;
 - a requirement that sponsorship must not influence the content of that service or programme in a way that affects the editorial independence of the provider of the service;
 - a ban on direct encouragement to purchase goods or services that are the subject of the sponsorship;
 - a ban on sponsorship or product placement relating to alcoholic drinks if the service, programme or sponsorship announcement is aimed specifically at persons under the age of eighteen or encourages the immoderate consumption of such drinks; and
 - a requirement to clearly inform users of the existence of a sponsorship agreement.

⁷ See Ofcom, 'On Demand Programme Service Rules' (April 2017), at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/on-demand-programme-service-rules>

25. BSAC notes that the revised AVMS Directive, which must be implemented in all Member States by 19 September 2020, extends the reach of such rules to include on-demand programme services which provide access to short-form content⁸ and also includes the following requirement⁹:

“Personal data of minors collected or otherwise generated by media service providers pursuant to paragraph 1 [i.e. in order to ensure under 18s will not normally see or hear material which may impair their physical, mental or moral development of minors] shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.”

26. In addition, the revised AVMS Directive brings within its scope video sharing platforms, requiring them, among other things, to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development; and also requiring that personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to operating age verification systems or parental control systems shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising¹⁰.

27. Many screen sector ISS are therefore already operating within a highly respected statutory regime which provides protections for both child and adult users without requiring the services to default to a child appropriate setting. Others operate within well-established voluntary regulatory regimes. For example, the video games sector operates within the PEGI system¹¹. All gaming consoles, handheld devices and operating systems for PC and Mac are equipped with parental control systems, allowing parents to protect their children's privacy and online safety according to various parameters. With these control tools, parents can:

- select which games children are allowed to play (based on the PEGI age ratings);
- control and monitor the use of digital purchases;
- limit access to internet browsing by applying a filter;
- control the amount of time that children can spend playing games; and
- control the level of online interaction (chat) and exchange of data (text messages, user-generated content).

⁸ Services providing access to short-form content had not previously been considered to meet the criteria defining an on-demand programme service as they were not sufficiently 'tv-like'. The revised AVMS Directive broadens the definition of an 'on-demand audiovisual media service' and explicitly brings such services within its scope. Article 1; see: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>

⁹ Article 6a. 1, *ibid*

¹⁰ Article 28b, *ibid*

¹¹ Ratings provided by PEGI have statutory force in the UK for games rated 16 and 18 which are supplied to the consumer on a physical storage medium, such as a disc; for other games – including online games – the scheme is self-regulatory.

28. In addition, many screen sector service providers – whether they fall within the definition of an ODPS or not - have put in place additional, voluntary, child-protection measures to ensure that the service is a trusted space. These include, for example, various types of content labelling and parental control systems which are widely used by ISS providing TV catch-up or video on demand services.
29. As well as providing YouTube Kids, Google provides the free Family Link app which helps parents 'stay in the loop' and set and enforce ground rules that are appropriate for the particular child, including screen time, app downloading and in-app purchases with applicable devices.
30. In adopting a blanket approach, which forces every ISS to default to a child appropriate setting for non-age verified users, the Code would not only impose disproportionate costs on such services (risking the negative inadvertent consequences noted above), it would also damage the frictionless experience users enjoy when accessing many screen sector ISS, for example the on-demand services provided by free to air broadcasters (including BBC iPlayer, ITV Hub and All4) or news and current affairs websites such as CNN and BBC News. It is not at all clear that users of these services, including parents, would regard the imposition of age-verification to be a proportionate response to the level of risk that might conceivably be faced by child users.
31. Given the wide range of services that fall with the definition of an ISS (and the wide range of services that might be contained with a single ISS), the very different sectors within which they operate, the variety of measures already in place, and the potentially significant implications for both service providers and users, BSAC considers that a sector by sector impact assessment should have been conducted. Without such an impact assessment, there is a very real danger that the impact on many services, including in the screen sectors, will be disproportionate.

Parental attitudes and engagement

32. Finally, we are concerned that the 'default on' approach may send a message that a 'magic bullet' solution has now been deployed by the state, absolving parents from the need to engage pro-actively in the process of protecting children online.
33. It has long been a fundamental tenet of online child protection that there must be an active partnership between government, industry, parents and children, with each playing their part. This approach has been founded in an understanding that there are no fool proof, all-encompassing measures than can be used to make sure that all children are safe at all times when online, just as there are no foolproof, all-encompassing measures than can be used to make sure that all children are safe at all times when offline.

34. BSAC notes that in her 2008 report, Safer Children in a Digital World¹², Dr Tanya Byron argued against default 'child appropriate' settings because they encourage a misplaced sense of safety and set up a binary safe/unsafe paradigm which hinders children's ability to develop the skills they need to protect themselves in the online world, favouring instead parental control initiatives which encourage the active engagement of parents in making choices about the services and content which are appropriate for their particular child. We would therefore query whether a blanket 'default on' approach really is the best way of protecting children over the longer term.

Conclusion

35. BSAC considers that there should be significant further engagement with industry in order to ensure that any necessary further safeguards for children's personal data can be put in place in a manner which is proportionate (taking into account existing mechanisms in sectors such as the screen sectors) and which minimizes the risks of unintended negative consequences, including in relation to any interplay with the Online Harms White Paper. We would be happy to engage with the ICO to help achieve this aim.

*For more information about BSAC
Please see our website
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¹² See The Byron Review, 'Safer Children in a Digital World' (March 2008), at <https://webarchive.nationalarchives.gov.uk/20120107041050/https://www.education.gov.uk/publications/eOrderingDownload/DCSF-00334-2008.pdf>