

Response to the ICO's Age Appropriate Design: Code of Practice for Online Services

About the Advertising Association

1. The Advertising Association promotes the role, rights and responsibilities of advertising and its impact on individuals, the economy and society. We bring together companies that advertise, their agencies, the media and relevant trade associations to combine strengths and seek consensus on the issues that affect them. We develop and communicate industry positions for politicians and opinion-formers, as well as publish industry research through advertising's think-tank, Credos, including the Advertising Pays series which has quantified the advertising industry's contribution to the economy, culture, jobs and society.

Context

2. The membership of the Advertising Association is very broad and includes the associations representing industry sectors, such as the advertisers (through ISBA), the agencies and advertising production houses (through the IPA and APA), all the media (from broadcasters and publishers, cinema, radio, outdoor and digital) and marketing services such as direct marketing, promotions and market research.
3. Advertising is a driver of economic growth and competition. Every pound spent on advertising returns £6 to GDP. Advertising spend will be over £23.6 billion this year and this results in over £142bn to GDP, supporting 1 million jobs across the UK.
4. According to Deloitte research carried out on behalf of the Advertising Association, the one million jobs supported by advertising can be broken down as follows:
 - 350,000 jobs in advertising and the in-house (brands) production of advertising
 - 76,000 jobs in the media sectors supported by revenue from advertising
 - 560,000 jobs supported by the advertising industry across the wider economy
5. The UK is a world-class hub for advertising, with the latest available figures also showing exports of British ad services reached a record high of £6.9bn in 2017.
6. Advertising is important. It plays a crucial role in brand competition, drives product innovation and fuels economic growth. It also provides revenues to fund a diverse and pluralistic media enjoyed by children and young people. There are a number of dedicated children's media providers, and much content specifically, for a younger audience. These companies employ a substantial number of people and contribute to economic growth and each benefit from the freedom to advertise to children responsibly.

ADVERTISING ASSOCIATION

7. The industry acts in accordance with the advertising CAP (Committee of Advertising Practice) codes. The advertising industry is highly regulated and compliance levels are high. The public has an easy and well-known route of recourse through the consumer-facing Advertising Standards Authority (ASA). The advertising industry is committed to ensuring that the self-regulatory system remains fit for purpose and that advertisers market responsibly to children in digital as well as traditional media.
8. Please contact Konrad Shek [REDACTED] for further information on any of the points raised in this submission.

Our Response

9. We welcome the opportunity to respond to the draft ICO's Age Appropriate Design Code of Practice for Online Services consultation.
10. The Advertising Association supports the UN principle that the best interest of the child should be a primary consideration. The advertising industry has responded positively with constructive outcomes to independent reviews concerning the welfare of children, such as the Bailey and Bryon reviews. The advertising industry recognises that children, particularly younger children, warrant special care and attention. This is why extensive and stringent rules are in place across broadcast and non-broadcast, and why particular care is taken in advertising in and around children's media.
11. The CAP Code, as a matter of principle, ensures that care is taken when featuring or addressing children in marketing communications. It also fully recognises that the way that children perceive and react to marketing is influenced by their age, experience and context of the message. Advertising age-restricted products on children's websites fall foul of the CAP Code and the ASA has remit to intervene. The Advertising Association is very open to exploring further ways to enhance the protection of children within commercial communications.
12. However, we strongly recommend that any new restrictions, particularly those that have direct impact on ad-funded online services and content, need to be proportionate, enforceable and practical. The general concern is that the current scope of the Code is very broad and could have an adverse impact on the wider ecosystem, by reducing advertising revenue for many Information Society Services (ISSs). This will be detrimental to competition, and put the UK at a distinct disadvantage to other markets. Moreover, it could reduce diversity and curb the creativity of content and services.

Services based outside the UK

13. Page 14 of the draft Code states that if the ISS has a lead supervisory authority other than the ICO and does not have a UK establishment, then the Code will not apply. Additionally, given that

ADVERTISING ASSOCIATION

Article 15 of EU Directive 2000/31/EC (eCommerce Directive)¹ states that *Member States cannot impose a general obligation to monitor*, it appears there is a clear opportunity for regulatory arbitrage. This could conceivably put UK-based ISSs at a competitive disadvantage.

14. Regulation (EU) 2017/1128² on cross-border portability of online content services protects the rights of consumers that are temporarily present in a Member State to receive content to which they have subscribed to in their Member State of residence. We could find ourselves in a situation whereby EU citizens, temporarily living in the UK, could access non-age appropriate content under different restrictions to that of UK citizens.
15. We also note that the draft Code could apply to some services based outside the UK. Enforcing the draft Code against non-EEA based ISSs could potentially drain considerable resources of the ICO.

Applying the standards in this code to all children

16. The draft Code stipulates that the standards should apply to all children, and to all users unless there are robust age checks in place to distinguish children from adults.
17. Identifying children online is notoriously difficult and potentially infringes on the privacy issues that the draft Code is trying to prevent. ISSs would therefore be reliant on adults to undergo mandatory or voluntary age verification. Introducing the concept of “likely to be accessed by children” sets an unnecessarily high bar to prove that no child accesses the content or services even for ISSs not directed at children. It could result in two outcomes for risk mitigation: either self-censorship of the content or service, and/or wide spread adoption of age verification technology. In the case of the former this would mean a curbing or limiting of the freedom of expression. Whereas the latter would effectively mean a *de facto* registration system to use the internet in a less restrictive manner.
18. In either scenario this could lead to a reduction in online traffic to affected ISSs. From an advertiser’s point of view, this would mean that the ability to reach target audiences would be reduced and therefore the return on advertising investment less attractive. From an ad-funded publisher’s point of view, it would mean a reduction in ad revenue to support their “free” content.

Making age-verification robust and privacy friendly

19. The draft Code states that ISSs should make sure that the age-verification mechanisms are robust and effective. And be able to demonstrate that children cannot easily circumvent age checks.

¹ EU e-Commerce Directive Article 15 - *Member States shall not impose a general obligation on [ISS] providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R1128>

ADVERTISING ASSOCIATION

20. What constitutes a “robust” mechanism, and to what standard this is measured against is not entirely clear. Trading Standards Institute official advice on online sales of age-restricted products makes a similar point: *“There is no definitive answer as to what constitutes taking all reasonable precautions or exercising all due diligence.”*³
21. Moreover, the internet is global, and social networking is a worldwide phenomenon, the lingering question is whether domestic solutions “scale” for globally available networks⁴.
22. Virtual Private Networks (VPNs) and Tor Browsers, which are readily available on app stores or from websites, easily mask the location of the user, provide a means to evade age-verification checks. When asked about the prospect of children using VPNs, the British Board of Film Classification (BBFC), the regulator, admitted age-verification was “not a silver bullet”⁵. There appears to be no verified figures on the number of children using VPNs, but there is anecdotal evidence that a notable minority of teenagers are using such technology⁶.
23. The BBFC and NCC Group, in cooperation with industry, have developed an age-verification certification scheme⁷ to ensure age-verification providers maintain high standards of privacy and data security. This is a welcome initiative; however, we note that this scheme is voluntary and non-statutory. Additionally, there currently does not appear to be a single framework for age verification practices in operation across Europe⁸. This means that there is a real risk that competing standards may emerge that could confuse users and may or may not achieve the same standards of privacy.
24. It will be extremely important for users that online third-party age verification vendors do not retain identifiable data longer than is necessary and this data is not mined or resold. Given their role, regulators should be sensitive to the risks that these organisations could develop into “internet gatekeepers” and ensure that competition rules are strictly enforced.

Codes or advice likely to be relevant

25. We welcome the specific reference to CAP which has published guidance on online behavioural advertising and has specific rules on advertising to children. We think it would be appropriate to include an explicit reference to the IPSO Editors’ Code of Practice, given the relevance to news publishers who are caught under the scope of the draft Code. The IPSO Code upholds high standards of journalism, protects individual rights and also has rules on the treatment of children⁹.

³ <https://www.businesscompanion.info/en/quick-guides/distance-sales/online-sales-of-age-restricted-products>

⁴ Social Networking and Age Verification: Many Hard Questions; No Easy Solutions; A Thierer (2007) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=976936.

⁵ <https://www.ageverificationregulator.com/faq/#19>

⁶ <https://blog.globalwebindex.com/chart-of-the-day/vpn-users/>

⁷ <https://www.ageverificationregulator.com/av-certification>

⁸ <https://www.oii.ox.ac.uk/archive/downloads/publications/Effective-Age-Verification-Techniques.pdf>

⁹ <https://www.ipso.co.uk/editors-code-of-practice/>

ADVERTISING ASSOCIATION

26. Restricting child access to news, which age-profiling or age verification would do, appears to be misaligned with the spirit of Article 13 and 17 of the UN Convention of the Rights of the Child (UNCRC)¹⁰.
 27. Article 13 states that the *child shall have the right to the freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice*. Article 17 recognises the important function performed by the mass media and ensures that *the child has access and material from a diversity of national and international sources* [...]. Article 17 (e) also encourages *the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Article 13* [...]. We would argue that the IPSO Code already provides appropriate guidelines for publishing news, and that age-profiling and age-verification goes beyond this requirement by restricting access.
 28. Ofcom¹¹ also regulates editorial content on UK video-on-demand (VOD) services that cover platforms such as ITV Hub, All4 (Channel 4) and My5 (Channel 5) among others. On demand programme services already have specific rules on protecting the under-18s: specially restricted material is made available in a way that under-18s would not normally be able to hear or see it; and prohibited material does not appear. The draft Code would effectively be duplicating regulation in this area.
 29. We note that the Code does not provide any explanation on the legal relationship between these various codes, how conflicts are resolved and whether legal hierarchy is introduced.
 30. We think a better solution would be operate carve outs or exclusions for ISSs that are subject to codes that already have specific measures that take the needs of children in account and are consistent with the UNCRC.
 31. We would also request further clarification on how this Code relates to the Unfair Commercial Practices Directive, Audio-visual Media Services Directive and Competition laws which all have relevance to online regulation.
- Providing 'high privacy' default settings
32. The draft Code recommends that privacy settings must be high by default. This is understandable in one sense that it takes the best interest of the child into account. However, given the difficulties of ISSs in identifying children online, as explained earlier, it seems that lower privacy settings could only be lawfully set if all adults were required to go through age-verification checks to prove

¹⁰ https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.223449179.139368610.1557919107-1434768823.1557919107

¹¹ <https://www.ofcom.org.uk/tv-radio-and-on-demand/advice-for-consumers/television/video-on-demand>

ADVERTISING ASSOCIATION

that they were not a child. Logically speaking, this would equally apply to households who do not even have children.

33. Needless to say, this would have a profound effect on online behavioural advertising, that relies on processing personal data to improve, enhance and personalise the advertising experience. Personalised content helps enable recommendations for more suitable content to users, and can even help prevent age-inappropriate content from being suggested to the wrong target audience. Moreover, advertisers and marketers would have their ability to measure and evaluate online advertising campaigns severely curtailed. Without these metrics in place it would make it harder for advertisers and marketers to justify ad spend. ISSs that rely on ad revenue to fund their free content would ultimately suffer.
34. The Code should also recognise that “high privacy” by default does not mean having all settings off but ensuring data minimisation; offering users the ability to make informed choices; and giving users full control of their privacy settings.

Conclusion

35. Advertising is important. It plays a crucial role in brand competition, drives product innovation and fuels economic growth. It also provides revenues to fund a diverse and pluralistic media enjoyed by children and young people. The general concern is that the current draft of the Code could have an adverse impact on the wider ecosystem, by reducing advertising revenue for many ISSs. This will be detrimental to competition, and put the UK at a disadvantage to other markets. Moreover, it could reduce diversity and curb the creativity of content and services.
36. We think a better solution would be operate carve outs or exclusions for ISSs that are already subject to stringent codes (i.e. CAP, IPSO and Ofcom VOD rules) that already have specific measures that take the needs of children in account and are consistent with the UNCRC.
37. We would also request further clarification on how this Code relates to the Unfair Commercial Practices Directive, Audio-Visual Media Services Directive and relevant Competition laws.
38. Should the Code be implemented, an appropriate implementation period should be put into place due to the potentially wide-ranging technical changes that would be required. Furthermore, we recommend that the ICO should conduct a technical and economic impact study, as well as a feasibility study before taking next steps.

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