

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

Context

1. The Association of Online Publishers ("**AOP**") is an industry body representing digital publishing businesses which create premium original content.
2. The AOP has consulted with its members in relation to the Age Appropriate Design code of practice for online services issued by the ICO (the "**Code**") and received detailed feedback from a number of them, including several news publishers.
3. We have taken a proactive approach in providing our members' feedback on the Code and whilst identifying the areas where we consider that the Code will be problematic for publishers, we have set out suggested alternatives to the approach taken by the Code or supplementary options to make the Code more workable in its practical application.

Observations

4. Digital publishers are caught within the definition of a provider of information society services ("**ISS**") as set out in the Code. If the Code were to be applicable in its current form, this would have problematic and far reaching consequences for all publisher sites. Our members' concerns include the following:

Application of the Code:

5. The key concern is identifying whether the Code is applicable to publisher sites. The Code applies to all online services likely to be accessed by children. 'Likely to be accessed' is a vague term. While the Code states that an ISS can demonstrate that it believes that only adults are likely to use the service (and therefore that the Code does not apply) by relying on a) market research, b) the nature and context of the service and/or c) specific measures taken to limit access by children, this is likely to be problematic for publishers to demonstrate in practice. This would also leave open the question of how many children need to access a particular site for it to be "likely" that children will access that site for the purposes of the Code.
6. Publishers compete for users, and advertising revenue, with all manner of online and offline publishers. Many of those are not based in or publish from the UK, and there is a real danger of creating an unlevel playing field and placing UK publishers at a considerable disadvantage as compared with those competitors.

Age verification:

7. In its current form, the Code requires publishers to apply all 16 standards in the Code to all users, *unless there are robust age-verification mechanisms in place to distinguish children from adults.*
8. Identifying children online is an infamously difficult task. As the Code points out, age verification tools are still a developing area and there is not currently a market solution which has been recommended by the ICO as being adequately robust and complying with data protection standards. Age verification for accessing online pornography will be required in the UK from 15 July 2019. Even here, where it is widely accepted that measures are required to protect children from exposure to such content, privacy campaigners have raised substantial

concerns about how the data collected by the site operators and the age verification solution providers will be used and protected from disclosure.

9. A market accepted robust age verification mechanism will need to take into account:
 - i. Ensuring that the age-verification provider maintains a high standard of privacy and data security;
 - ii. Ensuring that there is a single framework for age verification standards (ideally applicable across Europe) which is easy for individuals to navigate and for ISS providers to apply;
 - iii. Ensuring that third party age verification vendors comply with data protection standards, including in relation to data retention and only using the data for the purposes for which it has been collected; and
 - iv. Minimising over-collection of personal data (and sensitive personal data in particular).
10. Until one or more such tools have been approved by the ICO, or perhaps by an industry body such as JICWEBS, publishers will not have sufficient guidance on how best to carry out age verification, and as a consequence may need to treat all of their sites as being “likely to be accessed by” children, regardless of whether this is the case in practice.

Age- appropriate application:

11. The obligation to ensure that the standards in the Code are applied to all users, where it cannot be verified that they are adults, would require all publisher sites to ensure that all content on their sites is age-appropriate. The key issues we envisage with this, in relation to publisher sites, are as follows:
 - v. It would be difficult for publishers - who are not currently required to address this issue - to determine what content is age appropriate. For example, the content of a news website is likely to include editorial content relating to war, terrorism and gang violence, etc. Whilst Annex A of the Code provides guidance on key considerations relevant to age and developmental stages, the guidance is not tailored to scenarios such as this.
 - vi. If publisher sites are required to censor the content being provided to users, to avoid the risk of “inappropriate” content being accessed by children, there is a risk of self-censorship of the content that the publishers provide. Publishers need reassurance that the Code considers its effect on editorial content and publishers’ editorial freedom.
 - vii. The Code creates a contradiction between:
 - a) ensuring that children are exposed to a range of views and not provided with biased opinions, and
 - b) ensuring that content provided to children is tailored and age appropriate.
 - viii. As regards advertising content published on publishers’ sites, the Code does not differentiate between:
 - a) advertisements served as a consequence of direct deals between publishers and advertisers or their media agencies; and
 - b) advertisements served by ad exchanges where inventory is bought and sold via programmatic auction (real time bidding).

In the former case, publishers have more control over what is being advertised on their sites, and by whom. Even there however, If publishers would be restricted from the accepting commercial advertising on their sites that would have severe financial consequences for publishers of consumer sites, which are predominantly ad funded.

Recommendations:

Application of the Code:

12. As mentioned above, the key concern for publishers is the wide application of the Code. In its current draft, publishers which are not targeting children can easily be caught by the Code given:
 - a) the low threshold for being 'likely to be accessed' by children; and
 - b) the lack of approved age verification tools on the market.

Recommendation:

13. Publishers can obtain statistics on their online audience breakdown by age profile based on audience measurement data provided by UK Online Measurement Limited ("UKOM"). UKOM's data is in turn currently provided by comScore and is generally accepted as being accurate and reliable by the UK media industry.
14. We propose that a benchmark is derived and agreed between the publishers and the ICO for a publishers' exemption, which provides that if UKOM data indicates that less than x% of the average audience of a publisher's site are under the age of 18, then the Code is not applicable to that site.

Requirement for default privacy settings:

15. If the Code is deemed to be applicable to publisher sites, in its current form the Code would require that features which rely on user profiling are switched off by default (unless there is a compelling reason to do otherwise). The Code makes clear that a 'commercial purpose' would not qualify as a compelling reason. The consequences of this are that unless a publisher knows which site users are children, it would be unable to serve any targeted advertisements on its users at all. Programmatic advertising is often bought on the basis of audience segment data indicating that an advertisement served on inventory bought through an exchange will be served on an audience having particular characteristics such as age and demographics for example. On the face of it, sites which are subject to the Code would not be able to collect the data required to create those audience segments.
16. At the same time, the Code would appear to preclude publishers from providing recommendations for editorial content on their site which may be of interest to their users, which could downgrade the user experience. Personalised content can even help to prevent age-inappropriate content from being suggested to the wrong target audience.

Recommendation:

17. Given that, as we understand it, the ICO's principal focus is on minimising the risk of children being exposed to inappropriate advertising, we suggest looking at a number of alternative measures, including:

- Consider requiring publishers to review their cookie policies to provide transparent information to individuals regarding the cookies which are likely to be placed on a user's browser;
- Consider requiring publishers to provide guidance to individuals which states that if they are under the age of 18 then they should consider activating an ad blocker;
- Consider putting in place a code of practice between publishers, advertisers and media agencies which requires them not to use user profiling to serve advertisements on individuals who are or appear to be under the age of 18 on a publisher's site;
- Where the publishers permit contextual advertising on their sites, consider requiring that user browsing is reviewed and where browsing habits indicate that a user is likely to be under the age of 18 then they will be flagged as not to be served advertisements, or, if applicable only served with advertisements which are appropriate to be served on a minor; and
- Ensuring that any new restrictions the ICO plans to put in place, particularly those that are likely to have a material impact on ad-funded online services and content, are proportionate, enforceable and practical, taking into account the variety of ISS providers that will be affected.

The Association of Online Publishers

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