



## Response to ICO Age Appropriate Design Code Consultation

May 2019

### About ISBA

1. ISBA is the only body representing the UK's leading advertisers. Speaking with one voice on behalf of over 3,000 brands, we advocate a trusted advertising environment – transparent, accountable and effectively regulated. Working with our network of senior marketers, we help our members make better decisions both now and for the future.
2. ISBA is one of the tripartite stakeholders that make up The Advertising Association, which represents advertisers, agencies and media owners. We play a unique advocacy role, ensuring our members' interests are clearly understood and are reflected in the decision-making of media owners and platforms, media agencies, regulators and Government.
3. Our priorities fall into the following areas;

#### **Accountability & Responsibility**

Through both public and private advocacy we will:

- Drive faster progress within a defined timeframe for accountable, cross-platform, cross-channel audience measurement of commercial video.
- Hold technology companies to account for improved standards of brand safety and ad fraud.
- Shape future self-regulation of advertising to be fit for purpose.
- Play a leading role in delivering industry accountability for digital content.

#### **Agency Alignment**

To ensure transparency and competitiveness we will:

- Drive wider industry adoption of ISBA's contract frameworks.
- Ensure contract advice remains current and addresses marketers' needs.
- Define and drive take-up of best practices in media agency / client relationships.

#### **Data Compliance and Equivalency**

Through our advocacy and capability building we will:

- Ensure that implications of data protection authorities' GDPR enforcement actions are understood by advertisers.
- Continue to exert influence on the finalised drafting of European ePrivacy regulation.
- Ensure that government and advertisers are fully cognisant and prepared for the impact of Brexit on the sector.

4. ISBA represents advertisers on the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) - sister organisations of the Advertising Standards Authority - which are responsible for writing the Advertising Codes. We are also members of the World Federation of Advertisers (WFA) and use our leadership role in such bodies to set and promote high industry standards as well as a robust, independent co-regulatory regime.

## Framing our response

5. ISBA share the goal of promoting practices that will help enable children to engage with online content in a safe environment. We support the UN Convention on the Rights of the Child, and in particular appreciate the focus on the role of parents and caregivers in protecting and promoting the best interests of the child. ISBA is committed to creating a safe and secure environment for children to operate online and wish to work with the ICO in amending the Code so that it achieves its objectives while maintaining and encouraging the benefits that online services give to children.
6. However, having considered the proposals set out in the draft Code carefully we do not believe that they achieve the stated ambition to protect children. Instead we believe they will create confusion and the potential for a new set of risks and vulnerabilities.
7. Given the significant nature of our concerns, those of our members and other trade bodies about the draft code, we believe more time should be allowed to consult and reconfigure the code so that it can meet its objectives without creating such adverse and damaging outcomes.

## Commentary

8. The ICO sets an ambitious scope for the proposed Code. This ambitious scope sets requirements that are significantly more demanding than those under GDPR and go beyond privacy issues and cross over into content decisions. This will require fundamental changes to the way products and services are provided for different age groups
9. As an example, the Code goes beyond the concept of requiring verifiable parental consent by including any online experience from which children are not specifically blocked.
10. The draft Code sets out that it applies if the online product or service is *“likely to be accessed by children in the UK”*. This will lead to a broad interpretation in the draft Code. As set out in a joint letter with other industry bodies, we do not believe this was Parliament’s intention when drafting the relevant legislation (s123 of the Data Protection Act 2018) and would encourage the ICO to look at existing interpretations. Using a well-established definition is also helpful to ensure consistency and better understanding and compliance from industry.
11. Furthermore, setting a *“likely”* standard would result in the Code having a broader extraterritorial reach than the GDPR and could create incentives to geo-block UK users to avoid the application of the age verification and other requirements of the Code.
12. Finally, certain aspects of the proposed Code go far beyond data protection requirements. Standard 15 on Data Protection Impact Assessments (DPIA), requires companies to consider *“broader risks to the rights and freedoms of children, including the potential for any significant material, physical, psychological or social harm”*, as well as issues like self-esteem, peer pressure, encouraging excessive risk-taking or unhealthy behavior, excessive screen time, and interrupted/inadequate sleep patterns. These considerations fundamentally change the nature of DPIAs and broaden their application well beyond the data protection purposes of the GDPR.

## **Age Verification**

13. The compliance options set out in the Code are either to apply standards to all users by default or to offer a robust and effective age-verification mechanism. The recommendation is for the latter in order to tailor the experience for each age range.
14. Whilst the ICO make clear that age verification does not solve every issue, the draft Code will inevitably encourage much greater use of it. This is likely to deliver two consequences; requiring significantly more data collection of both adults and children in direct contradiction to the principle of data minimization; or potentially lead to arbitrary age-gating that would restrict children's ability to benefit from the online world. The latter would seriously limit their rights outlined in Article 13 of the UN Convention on the Rights of the Child *"to seek, receive and impart information and ideas of all kinds, regardless of frontiers"*.
15. The draft Code states that providers of information society services (ISS) should make sure that age-verification mechanisms are robust and effective and demonstrate that children cannot easily circumvent age checks. 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."*<sup>1</sup>
16. ISBA and our members have long sought improved enforcement of age limits through improved age verification techniques. Further innovation is needed in this area to improve standards and there are a range of age verification techniques that could be deployed, up to and including formal identification through documentation. We would welcome working with the ICO on this issue, a fundamental prerequisite to the draft Code.

## **Interaction with CAP**

17. In terms of content regulation, we would welcome clarity from the ICO on how its proposals relate to online content that is already regulated under the law, the CAP Code and by the CMA. The transparency of online content often involves situations in which personal data are not processed, and such situations are already regulated by the UCPD, the AVMSD and the CAP Code.
18. 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.
19. Importantly, in April 2017, CAP reviewed the evidence on children's critical understanding capabilities at different ages. This indicated that children had 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. They should do.

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<sup>1</sup> <https://www.businesscompanion.info/en/quick-guides/distance-sales/online-sales-of-age-restricted-products>



20. With such a wide range of concerns, we urge the ICO to extend the consultation period, conduct a full impact assessment and feasibility study and ensure they engage effectively with all stakeholders to ensure that the draft Code meets its objectives.