Which?, 2 Marylebone Road, London, NW1 4DF
Date: 19th September 2018

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

About Which?

Which? is the largest consumer organisation in the UK with more than 1.3 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers. We are funded solely by our commercial ventures and receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Introduction

Which? welcomes the opportunity to respond to the Information Commissioner's call for evidence on an age appropriate design code. The Code will provide guidance on the design standards that the Commissioner will expect providers of online 'Information Society Services' (ISS), which process personal data and are likely to be accessed by children, to meet and is a requirement of the Data Protection Act 2018 (the Act).

Our comments focus on how the Code should deal with issues relating to use of data for marketing and specifically, advertising.

Advertising and Mobile Game pricing

A recent Which? policy report, *Control, Alt or Delete*[1], explored the world of consumer data and highlighted the importance of the digital advertising industry. Digital advertising is the primary manifestation of data use to consumers and the concentration of the digital advertising industry has driven competitive behaviour that we are only now beginning to understand the implications of. This raises particular challenges for the protection of children from inappropriate practices.

In particular, targeted advertising is highly effective which means that there is a need to be more vigilant over what advertising children are being exposed to and the impacts of that advertising. The Advertising Standards Authority and the ICO guidance on Children and the GDPR set out appropriate principles for advertising and digital advertisers often ban targeting

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[1] https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report

on the basis of sensitive characteristics and consumer vulnerabilities. However, we are concerned that there is insufficient monitoring of the type of adverts children now see. In particular, the use of algorithms to determine adverts may identify characteristics correlated with vulnerabilities and we are not convinced that companies are doing enough to satisfy themselves that this is not occurring.

It is extremely important, therefore, that there is good monitoring of the type of adverts seen by children and how they differ based on the data held by companies, so that the type of targeted advertising that is being directed towards children can be properly understood. This will allow the ICO and the advertising industry to understand how the principles are interpreted in practice and to focus on those practices that could cause harm and are widespread.

The use of personal data within the pricing models of mobile games are another area of concern. We have highlighted evidence that app developers have tested using personal data to try different pricing for in-app purchases[2], and there are at least two companies actively offering such services. We are concerned that if games are actively using data for this purpose, it is not transparent and the impacts are poorly understood. It is therefore very difficult to understand what children are currently being exposed to – and for parents or guardians to police this.

Food advertising

Which? has long campaigned for effective controls over the marketing of unhealthy foods (ie. foods that are high in fat, sugar or salt (HFSS) to children. The Department of Health and Social Care (DHSC) recently published a Childhood Obesity Charter (Chapter 2)[3] which set out a range of measures to try to tackle the UK's high rates of childhood obesity. This recognised that the evidence shows exposure to food advertising can have both an immediate and longer-term impact on children's health, by encouraging greater consumption immediately after watching the advert and altering children's food preferences and that effects are significant and independent of other influences. The Government has therefore committed to introducing further controls over digital advertising of HFSS foods to children, along with tighter TV advertising restrictions.

It is important that the Age Appropriate Design Code is consistent with the aims of the Childhood Obesity Charter and includes provisions relating to the use of children's data for this type of advertising, which raises concerns for children's health protection – in addition to the wider protection they need because of their vulnerability. These protections need to apply to children up to 16, consistent with Ofcom advertising restrictions on advertising of HFSS foods to children.

The current guidance issued by the ICO on children and the GDPR does include marketing and states that when considering marketing, children's reduced ability to recognise and critically assess the purposes behind the processing and the potential consequences of providing their personal data should be taken into account. The guidance also makes reference to sector specific guidance on marketing, such as that issued by the Advertising Standards Authority, to

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[2] VentureBeat, (2015), Cut the rope 2 gets more in-app spenders by using Gondola's dynamic pricing: https://venturebeat.com/2015/12/15/cut-the-rope-2-gets-more-in-app-spenders-by-using-gondolas-dynamic-pricing

[3] https://www.gov.uk/government/publications/childhood-obesity-a-plan-for-action-chapter-2

make sure that children's personal data is not used in a way that might lead to their exploitation.

The Code, however, needs to be based on a more in-depth understanding of the sophisticated and integrated approaches that are now practiced to ensure that it provides sufficient protection – including understanding the extent to which algorithms and apps for example, as referred to above, are already being used by food companies - and also recognise that regardless of children's ability to critically assess the purposes behind provision of their data, they will still need to be protected.

Data Security and Connected Devices aimed at children

For consumers to use digital products and services with confidence they need the reassurance that their data is secure. As relatively vulnerable consumers and users of digital products and services, children's online protection should be a priority for governments, retailers and manufacturers. Our testing and research on connected toys[4] has found a range of data security risks and Consumers International have highlighted further problems in internet-connected children's products[5].

The ICO should consider in detail the implications of how children use connected toys and other devices, including in particular the security of the data that the devices collect and use. We have been working closely with Government on establishing a Code of Practice for Security by Design[6] and would strongly encourage the ICO to consider the implications of this Code of Practice for connected devices aimed at children when considering the Age Appropriate Design Code.

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[4] https://www.which.co.uk/reviews/smart-toys/article/smart-toys-should-you-buy-them
[5] https://www.consumersinternational.org/what-we-do/consumer-protection/safer-products/connected-toys/
[6] https://www.gov.uk/government/publications/secure-by-design