CIPL's Response to the ICO consultation on the draft Guidance for 'Likely to be accessed' in the context of the Children's Code

I.   Introduction

The Centre for Information Policy Leadership (CIPL)[1] welcomes the opportunity to respond to the ICO consultation on the draft Guidance for 'Likely to be accessed' in the context of its Children's Code[2].

CIPL recognises the importance of designing and delivering appropriate online environments for children and has continuously worked to identify effective and practical solutions that can ensure the protection of children online so that they can participate and thrive in the digital space.

CIPL considers clear and concise regulatory Guidance one of the key tools in this process and has already provided comments and recommendations to the initial ICO consultation on the Draft Age Appropriate Design Code[3] and the Irish DPC Draft Guidance Fundamentals for a Child-Oriented Approach to Data Processing[4]. In 2020 we supported the UK cross-departmental Verification of Children Online (VoCO[5]) by hosting a series of workshops on issues around age verification and assurance. In April 2021, CIPL launched a special global project on Children's Privacy and issued a first detailed Policy Paper, *Protecting Children's Data Privacy Policy Paper I: International Issues and Compliance Challenges* in October 2022.[6] The paper examines key compliance challenges and issues central to children's data privacy in the context of globally divergent legal standards and policy approaches and will be followed by additional papers focussing on key topics identified.[7]

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[1] CIPL is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 85+ member companies that are leaders in key sectors of the global economy. CIPL's mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL's work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world. For more information, please see CIPL's website at http://www.informationpolicycentre.com/. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

[2] ICO consultation on the draft Guidance for 'Likely to be accessed' in the context of the Children's Code available here

[3] 2019 CIPL Response to UK ICO Consultation on Age Appropriate Design - A Code of Practice for Online Services available here

[4] 2021 CIPL Response to the Ireland Data Protection Commissioner's Draft Guidance on Fundamentals for a Child-Oriented Approach to Data Processing available here

[5] VoCO (Verification of Children Online) is a child online safety research project that responds to the challenge of knowing which online users are children, available here

[6] 2022 CIPL Protecting Children's Data Privacy Policy Paper I: International Issues and Compliance Challenges available here

[7] Most recently we held a roundtable on Age Assurance and Age Verification Tools. Key Takeaways are available here

II.   General Comments

CIPL recommends clarifying the recipients of the Guidance and its intended outcomes in the introduction. This would provide reassurance to those organisations that are not the intended targets and give a clear warning to those that are of concern to the ICO.

We agree that the starting point should be to reinforce the obligation on all ISS providers to make an assessment of: a) whether their site is likely to be accessed by children and b) if it is not likely, but it remains possible for a child to access it, whether the site should apply age assurance restrictions, or adopt risk mitigation measures. As the Code notes, in many cases, this will be simply answered by an assessment of a site's nature, content and presentation[8]. This reasoning is appropriately reflected in the Case Studies.

However, the list of factors to consider when carrying out the assessment will not always be relevant for *all* ISS providers. We find the list provided useful (market research, current evidence of user bases of similar services etc.), but only appropriate in a case where the initial assessment of the site on nature, content or presentation leaves the question of likelihood of access by children open. Requiring ISS providers to assess these factors in *all* cases would be disproportionate and impose an unwarranted burden on ISS providers. This would certainly be the case for providers of "essential ISS" (i.e. required for participation of an individual in society, irrespective of being an adult or child) that might be potentially covered.

As noted in the Impact Assessment[9], the ICO's concern rests on the possibility of its Code's success "*being undermined by organisations claiming that they are not in scope of the Code, as they are not likely to be accessed by a significant number of children*"[10]. The case studies provided relate to online dating, pornography, games and social media sites. These considerations make apparent that the draft Guidance is primarily targeted at ISS providers who are providing services which are prima facie likely to attract children, and which pose some potential element of risk to children, but are not meeting the requirements of the Code because they are asserting that they are outside the Code. However, the Guidance is currently presented as applying to all providers of ISS.

CIPL suggests reproducing the Code section *When are services likely to be accessed by children?[11]* in the body of the Guidance. This would clarify the relevant ages to consider, set out the Parliamentary background and reinforce the position that a purposive approach should be taken to the term "likely to be accessed by children".

We also recommend adding an additional indicator to exclude providers of "essential ISS" (e.g. financial institutions, healthcare, food & hospitality, travelling, including service providers of these acting on their behalf).

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[8] ICO Age appropriate design: a Code of practice for online services chapter Services covered by this Code *When are services 'likely to be accessed by children'*? available [here](#)
[9] ICO *A summary of the 'likely to be accessed' Guidance impact assessment* available [here](#)
[10] Idem 2: Rationale for intervention
[11] idem

Finally, as the Code applies to the organisation/controller with a direct relationship to the end user, the ICO should clarify whether *service providers of such organisations can ultimately rely on assessments made by their customers/controllers.*

III. Questions

Section 1: FAQs and List of Factors

Q1. *To what extent do you agree that the FAQs provide helpful Guidance for providers of ISS to assess whether children are likely to access their service? If you think that it is not helpful, please explain why specifically and what you think we should change.*

FAQ 1[12] refers to the Code's instruction to assess the "nature, content or presentation" of a service to determine the likelihood of children using it, which is certainly a sensible starting point. In many cases, a review of its site by an ISS provider may be sufficient to establish whether the site is likely to be accessed by children. For example, a review of the nature, content and presentation of the website of CIPL would likely be sufficient to establish that the site is not likely to be accessed by children.

As a next step, we consider it key to complete a <u>risk assessment</u>: the ISS should consider whether, if children are likely to access the site, there is any likelihood of any detriment to their best interests. If no potential detriment is identified, children should not be excluded, and restrictions limited in accordance with the risk assessed. For example, in the case of the CIPL site, an older child might wish to access information on privacy debates in connection with a school or college project without any discernible risk.

As a basic discipline, we suggest ISS should be encouraged to carry out an assessment of their service and document that assessment, whether the content might be attractive to children, or more likely of little to no interest to children and the impact of the presentation of the site.

Q2. *To what extent do you think that the list of non-exhaustive factors would be practical for providers of ISS to consider when they are assessing whether children will access their service? If you think that the list of factors is not practical, please explain why specifically and what you think we should change.*

As discussed above, the listed factors will be useful and relevant in cases where an initial assessment reveals some ambiguity in relation to potential child access or reveals any risk of detriment to a child accessing the site. Requiring **all** ISS providers to assess these factors will, on the other hand, impose a disproportionate burden.

Nonetheless, there are some aspects of the list that could be improved: for instance, as some factors can be hard to operationalise, it could be helpful to contextualise and clarify the interplay among them. Furthermore, with regard to the determination of users, it could be helpful to address how companies without direct end user connection should know "*the number of child users of your service, and the proportion of total UK users or total UK children that this represents*" (Factor example 1) and if companies with direct customer relationship are required to inform their service providers on the UK end user numbers (and vice versa).

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[12] What does the Code say about when services are likely to be accessed by children?

Q3. *Are there any other considerations that you think should be added to the list of factors? If yes, please explain what factors you think should be included*.

Spikes in access to specific sites by children can be driven by users' posts on social media. This can mean that a service is "likely to be accessed" only in certain circumstances or even during specific times: a site may have access spikes by children within certain time parameters only i.e. outside school hours, at weekends or in school holidays. This can be an additional factor to take into consideration.

Q4. *To what extent do you agree that the definition of a 'significant number of children' helps to clarify its meaning? If you think that it is not helpful, please explain why specifically and what you think we should change*.

The initial premise is that "significant" does not mean a large number or that children must be a substantial proportion of users, but it means more than de minimis or an insignificant number. This is clear and understandable.

However, in the list of factors the test of whether the number of child uses is significant has been set out as involving three separate assessments: a) the number being significant in absolute terms; b) the number being significant in relation to the proportion of the total users of the service and c) the number being significant as a proportion of the number of children in the UK. It is unclear whether these are meant to be separate tests to be applied in all cases or alternatives to be applied depending on the facts.

We note the following inconsistencies:
- Case Studies 1 and 2 on online dating appear to apply the proportionality test.
- In Case Study 1 on pornography no numbers are given so it remains unclear which test is being applied (possibly test a).
- Case Study 2 on pornography appears to be an absolute number test rather than the proportion of those refused access as a proportion of users.
- Case Study 1 on games appears to use a general assessment of the likelihood of children accessing with no specific reference to actual numbers.
- Case Study 1 on social media appears to again apply the proportionality test.

To provide useful examples, we recommend further clarifying which test or part of the test was applied in the individual case studies.

Finally, as general consideration, we find it unlikely that, apart from the most popular sites, the number as a proportion of the total number of children in the UK would be relevant to this assessment.

Summary of CIPL's suggestions:

- Clarify the recipients of the Guidance and its intended outcomes in the introduction. This would provide reassurance to those organisations who are not the intended targets and give a clear warning to those that are of concern to the ICO;

- Replicate the Code section *When are services likely to be accessed by children?*: in the body of the Guidance. This would clarify the relevant ages to consider, set out the Parliamentary background and reinforce the position that a purposive approach should be taken to the term "likely to be accessed by children";

- Add an additional indicator to exclude providers of "essential ISS" (e.g. financial institutions, healthcare, food & hospitality, travelling, including service providers of these acting on their behalf);

- As the Code applies to the organisation/controller with a direct relationship to the end user, the ICO should clarify whether *service providers of such organisations can ultimately rely on assessments made by their customers/controllers*.

- Improve the list of factors by:

  o Further contextualising the factors and the interplay among them;

  o Addressing how a service without direct end user connection should know "*the number of child users of your service, and the proportion of total UK users or total UK children that this represents*" (Factor example 1) and if companies with direct customer relationship are required to inform their service providers on the UK end user numbers (and vice versa);

  o Clarifying if the test of whether the number of child users is significant (which requires considering a) the number being significant in absolute terms; b) the number being significant in relation to the proportion of the total users of the service and c) the number being significant as a proportion of the number of children in the UK) should be carried out by assessing these elements separately and in all cases, or alternatively and depending on the circumstances.

If you would like to discuss any of the comments in this paper or require additional information, please contact Bojana Bellamy bbellamy@huntonAK.com, Natascha Gerlach NGerlach@huntonak.com, or Camilla Ravazzolo cravazzolo@huntonak.com