



May 19, 2023

BSA | The Software Alliance

Submission to UK Information Commissioner Office on Consultation on Draft Guidance for 'Likely to be Accessed' in the Context of the Children's Code

BSA | The Software Alliance (BSA),¹ the leading advocate for the global software industry, welcomes the opportunity to provide feedback to the UK Information Commissioner's Office (ICO) on your consultation on the draft guidance for 'Likely to be Accessed' in the context of the Children's Code. Our members create the technology products and services that power other companies, including cloud storage services, customer relationship management software, identity management services, and workplace collaboration software. Our companies are in the business of providing privacy-protective technology products. BSA members recognize that they must earn consumers' trust and act responsibly with their personal data.

We appreciate efforts by the ICO to recognize the practical ways in which high standards of data protection may be maintained while encouraging the responsible development of technologies, including in the context of services likely to be accessed by children.

Our comments focus on ensuring that the ICO's new FAQs and case studies on the 'likely to be accessed' standard reflect that the Code is intended to apply to consumer-facing companies and should not be inadvertently read to apply to business-to-business companies that handle data on behalf of a consumer-facing company.

Specifically, we recommend the ICO amend the case studies and FAQ in the draft guidance to expressly recognize that the Code does not apply to business-to-business providers (e.g., data processors). The Code itself, the definition of information society services subject to the Code, and the current case studies in the draft guidance all appear to recognize this implicitly, by focusing on consumer-facing services. For example, the current case studies address online dating sites, pornography sites, video game publishers, and social media platforms. This aligns with the Code's focus on consumer-facing companies, which decide how to collect and use children's data and design their products and services accordingly. The Code's requirements for companies to consider the best interests of a child when designing and developing online services, to provide consumer-facing transparency about their activities, and to minimize the

¹ BSA's members include: Adobe, Akamai, Alteryx, Atlassian, Autodesk, Bentley Systems, BlackBerry, Box, Cisco, Cloudflare, CNC/Mastercam, Databricks, DocuSign, Dropbox, Graphisoft, IBM, Informatica, Intuit, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trellix, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

amount of data they collect and use, among other obligations, appear to be designed for — and are best implemented by — consumer-facing companies that interact with individuals and decide how and why to collect and use their information. We strongly recommend revising the case studies in the draft guidance and the FAQs to recognize that business-to-business providers handling data on behalf of consumer-facing services are not themselves subject to the Code.

For example, each case study could add a sentence at the end to recognize that the Code's obligations apply to the consumer-facing company highlighted in that case study (e.g., the dating site, video game publisher, social media platform) but do not apply to business-to-business providers (e.g., data processors) working on behalf of that consumer-facing company. Alternatively, instead of revising each case study, the draft guidance could instead be revised to add a sentence at the beginning or the end of the case study section recognizing the Code applies to consumer-facing products and services, rather than to business-to-business providers (e.g., data processors) that process data on behalf of consumer-facing companies. This change could also be made in discussing the scope of ISS providers subject to the Code. In addition, we encourage the ICO to revise the draft FAQs to expressly state that the Code applies to consumer-facing services, but not to business-to-business providers.

These changes would reflect the fact that the Code's obligations are designed for companies that decide how and why to collect consumers' personal data — because those companies are positioned to access and assess evidence about the users of their services. Those decision-making companies are also the companies best positioned to protect children, by taking steps to implement changes to products or services likely to be accessed by children. In contrast, many business-to-business providers acting as data processors have limited access to personal information they process on behalf of a consumer-facing company, including the information that would be needed to apply the factors in the draft guidance. For instance, a cloud storage provider is often prohibited from accessing information it stores on behalf of its business customers, so it would lack access to information needed to understand if children are likely to access the services offered by its business customers to consumers. Even more fundamentally, the cloud service provider is simply not positioned to take steps to change products or services offered by its business customers in light of the Code's requirements.

BSA appreciates the opportunity to provide these comments and we would welcome the opportunity to engage further with the ICO on these issues. We are also attaching a separate document with our comments in the survey format requested by the ICO.

For further information please contact:

Thomas Boué, Director General, Policy – EMEA
thomasb@bsa.org or +32.2.274.1315