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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION
 11

12 **NETCHOICE, LLC d/b/a NetChoice,**
 13 **Plaintiff,**
 14 **v.**
 15 **ROB BONTA, ATTORNEY GENERAL OF**
 16 **THE STATE OF CALIFORNIA, in his**
 17 **official capacity,**
 18 **Defendant.**

5:22-cv-08861

**DECLARATION OF EMILY KEANEY,
 DEPUTY COMMISSIONER OF
 REGULATORY POLICY FOR THE
 INFORMATION COMMISSIONER'S
 OFFICE IN SUPPORT OF
 DEFENDANT'S OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION**

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1 I, Emily Keaney, declare and state as follows:

2 1. I am Deputy Commissioner (Regulatory Policy) for the Information Commissioner's
3 Office. The Information Commissioner's head office is Wycliffe House, Water Lane, Wilmslow,
4 Cheshire, United Kingdom SK9 5AF. I am responsible for overseeing the ICO's policy work
5 programme, both domestically and internationally. I provide oversight for the work of the
6 Information Commissioner's Office economic analysis directorate and oversee work in
7 responding to and preparing for major legislative change. I am providing this declaration in
8 support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction to explain the
9 basis on which the ICO adopted the Age Appropriate Design Code (commonly referred to as the
10 "Children's Code") in the UK and how it has been implemented in practice. I make this
11 declaration from personal knowledge and a review of the Information Commissioner's Office's
12 records kept in the ordinary course of business.

13 **BACKGROUND ON THE INFORMATION COMMISSIONER'S OFFICE**

14 2. The role of the Information Commissioner is that of a corporation sole¹ and is
15 currently occupied by John Edwards, who was appointed in January 2022. The Information
16 Commissioner's Office is a non-governmental public body which is made up of officers and staff
17 appointed by the Commissioner². All formal powers and duties rest with the Commissioner. For
18 the purposes of this statement, where I reference the ICO, this will include reference to the
19 Information Commissioner and the Information Commissioner's Office.

20 3. The ICO is the regulator for data protection³, e-privacy⁴, freedom of information⁵ and
21 a number of other digital regulatory areas⁶.

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23 ¹ Data Protection Act 2018, Schedule 12, para 1(1)

24 ² Data Protection Act 2018, Schedule 12, para 5

25 ³ Data Protection Act 2018 and The United Kingdom General Data Protection Regulation
(UK GDPR)

26 ⁴ The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR)

27 ⁵ The Freedom of Information Act 2000 (FOI)

28 ⁶ The ICO has additional duties and powers in respect of the following: The
Environmental Information Regulations 2004, INSPIRE Regulations 2009, Regulation (EU) No
910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic
identification and trust services for electronic transactions in the internal market and repealing

1 4. Whilst the ICO is an independent regulator, it is accountable to the UK Parliament
2 and the public for the outcomes it achieves. The Department for Science, Innovation and
3 Technology is the ICO's sponsoring department within the UK Government.

4 **THE DATA PROTECTION REGIME IN THE UK**

5 5. The Data Protection Act 2018 (DPA2018), the United Kingdom General Data
6 Protection Regulation (UKGDPR) and the Privacy and Electronic Communications Regulations
7 2003 (PECR) form the key data protection legislation within the UK.

8 6. The UK GDPR is derived from European Union (EU) law, having been retained⁷ and
9 amended⁸ in UK law during the process of the UK leaving the EU, commonly known as "Brexit".
10 The DPA2018 (DPA), which sits alongside the UK GDPR, sets out the regulatory regime for data
11 protection within law enforcement⁹ and intelligence services¹⁰. The DPA2018 also builds upon
12 the obligations under the UK GDPR, which provides the Information Commissioner with specific
13 information gathering and enforcement powers to carry out his role, and sets out the process
14 under which the Commissioner is appointed as the UK data protection regulator¹¹.

15 7. PECR sets out legal requirements covering a number of areas, as follows:

- 16 • Marketing by electronic means, including marketing calls, texts, emails and faxes.
17 • The use of cookies or similar technologies.
18 • Security of public electronic communications services.
19 • Privacy of customers using communications networks or services as regards traffic
20 and location data, itemised billing, line identification services (eg caller ID and
21 call return), and directory listings.

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25 Directive 1999/93/EC (eIDAS), the Re-use of Public Sector Information Regulations 2015, The
26 Network and Information Systems Regulations 2018, and the Investigatory Powers Act 2016

27 ⁷ The European Union (Withdrawal) Act 2018, s2

28 ⁸ The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU
Exit) Regulations 2019

⁹ The Data Protection Act 2018, Part 3

¹⁰ The Data Protection Act 2018, Part 4

¹¹ The Data Protection Act Part 5, s114 and Schedule 12

1 8. In order to understand how the Children’s Code operates and its status under UK law,
2 it is important to explain the underlying law on which it is based. In that regard, the UK GDPR
3 sets out the main substantive provisions of data protection law that applies in the UK. The UK
4 GDPR applies to the processing of personal data in two ways:

- 5 • personal data processed wholly or partly by automated means (that is, information
6 in electronic form); and
- 7 • personal data processed in a non-automated manner which forms part of, or is
8 intended to form part of, a ‘filing system’ (that is, manual information in a filing
9 system).¹²

10 9. The UK GDPR does not apply to certain activities including processing covered by
11 the Law Enforcement Directive, processing for national security purposes and processing carried
12 out by individuals purely for personal/household activities.¹³

13 10. [Article 5\(1\)](#) of the UK GDPR sets out ‘data protection principles’ to ensure that
14 personal data is:

- 15 • used fairly, lawfully and transparently
- 16 • used for specified, explicit purposes
- 17 • used in a way that is adequate, relevant and limited to only what is necessary
- 18 • accurate and, where necessary, kept up to date
- 19 • kept for no longer than is necessary
- 20 • handled in a way that ensures appropriate security, including protection against
21 unlawful or unauthorised processing, access, loss, destruction or damage

22 Under Article 5(2) of the UK GDPR it is for the data controller to demonstrate compliance with
23 the above principles and this is called the accountability principle.

24 11. [Chapter III](#) of the UK GDPR also gives rights to individuals in respect of their
25 personal data. These include the right for individuals to:

- 26 • be informed about how their data is being used

27 ¹² Art 2(1) UK GDPR

28 ¹³ Art 2(2) UK GDPR

- 1 • access their personal data
- 2 • have incorrect data updated
- 3 • have their personal data erased
- 4 • stop or restrict the processing of their personal data
- 5 • data portability (allowing individuals to obtain and reuse their personal data for
- 6 different services)
- 7 • object to how their data is processed in certain circumstances

8 12. The UK GDPR also sets out rights for individuals when an organisation is using
9 personal data for automated decision-making processes (without human involvement) and
10 profiling ([Article 22](#)).¹⁴

11 13. Under the UK GDPR children warrant special protection in how their personal data is
12 used. This reflects Recital 38 of the UKGDPR, which states:

13 “Children merit specific protection with regard to their personal data, as they may be less
14 aware of the risks, consequences and safeguards concerned and their rights in relation to
15 the processing of personal data. Such specific protection should, in particular, apply to the
16 use of personal data of children for the purposes of marketing or creating personality or
17 user profiles and the collection of personal data with regard to children when using
18 services offered directly to a child. The consent of the holder of parental responsibility
19 should not be necessary in the context of preventive or counselling services offered
20 directly to a child.”

21 14. The ICO enforces the UK GDPR, DPA 2018 and PECR through a variety of
22 regulatory interventions. These range from providing guidance and tools to signal clear
23 expectations and to empower responsible personal data use, through to issuing enforcement
24 notices and monetary penalties, where it is necessary to do so. The ICO’s interventions aim to
25 create a fairer playing field for compliant organisations and to protect individuals. Further details

26 ¹⁴ ‘Profiling’ is defined in Article 4(4) UK GDPR as “any form of automated processing
27 of personal data consisting of the use of personal data to evaluate certain personal aspects relating
28 to a natural person, in particular to analyse or predict aspects concerning that natural person’s
performance at work, economic situation, health, personal preferences, interests, reliability,
behaviour, location or movements”.

1 relating to the way in which the ICO uses enforcement powers can be found in the ICO’s
2 [Regulatory Action Policy](#).

3 **Territorial scope of the UK GDPR**

4 15. [Article 3](#) of the UK GDPR sets out the territorial scope of the UK GDPR. The UK
5 GDPR applies to organisations which have an establishment in the UK and also to organisations
6 based outside the UK if their processing activities relate to:

- 7 • offering goods or services to individuals in the UK (irrespective of whether
8 a payment is required); or
- 9 • monitoring the behaviour of individuals so far as that behaviour takes place
10 in the UK.

11 **THE CREATION & APPLICABILITY OF THE CHILDREN’S CODE**

12 **Section 123 of the Data Protection Act of 2018**

13 16. Under [s123](#)(1) of the DPA 2018, the ICO is required to produce a code of practice
14 “on standards of age appropriate design of relevant Information Society Services which are likely
15 to be accessed by children”.

16 17. Under s123(7) DPA 2018 the following definitions apply:

- 17 • “age-appropriate design” means the design of services so that they are appropriate
18 for use by, and meet the development needs of, children;
- 19 • “information society services” has the same meaning as in the UK GDPR, but does
20 not include preventive or counselling services;
- 21 • “relevant information society services” means information society services which
22 involve the processing of personal data to which the UK GDPR applies;
- 23 • “standards of age-appropriate design of relevant information society services”
24 means such standards of age-appropriate design of such services as appear to the
25 Commissioner to be desirable having regard to the best interests of children.

26 **The Applicability of the Children’s Code to Information Society Services**

27 18. An information society service (ISS) is defined in the UK GDPR by reference to
28 the definition under EU law and means any service:

- 1 • normally provided for remuneration;
- 2 • at a distance;
- 3 • by electronic means; and
- 4 • at the individual request of a recipient of services.¹⁵

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6 19. The Children’s Code is clear that this is a broad definition, meaning that most
7 online services are [ISS and fall within the scope of the Children’s Code. This](#) includes apps,
8 programs and many websites, such as search engines, social media platforms, online messaging
9 or internet based voice telephony services, online marketplaces, content streaming services,
10 online games, news or educational websites, and any websites offering other goods or services to
11 users over the internet. Electronic services for controlling connected toys or other devices are also
12 ISS.¹⁶

13 20. Services that are outside the scope of the Children’s Code include some services
14 provided by public authorities, so long as these services are not typically offered on a commercial
15 basis. Websites that only provide information about a real-world business but do not allow
16 customers to buy products are also out of scope of the Children’s Code. Traditional voice
17 telephony and general broadcast services, such as scheduled television and radio transmissions
18 aired to a general audience are not relevant ISS, although if a service offers both general
19 broadcast and on demand services then the latter will be covered by the Children’s Code. Finally,
20 the Children’s Code does not apply to websites or apps offering online counselling or preventive
21 services to children.¹⁷

22 21. The Children’s Code will only apply where the provision of the ISS involves the
23 processing of personal data to which UK GDPR applies.

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25 ¹⁵ See Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the
26 Council laying down a procedure for the provision of information in the field of technical
27 regulations and of rules on Information Society services, 9 September 2015.

28 ¹⁶ Information Commissioner’s Office. Age appropriate design code: services covered by
the code, 2 September 2020, p.16.

¹⁷ Information Commissioner’s Office. Age appropriate design code: services covered by
the code, 2 September 2020, p.16 and 17.

1 22. When the Children’s Code refers to services that are “likely to be accessed by
2 children”, this means services that are:

- 3 • intended for use by children; **or**
4 • not specifically aimed or targeted at children, but are nonetheless likely to be used
5 by under 18s.¹⁸

6 23. Even if an ISS states in its terms of service that under 18s should not access the
7 service, the site will still fall within scope of the Children’s Code if children access it in
8 practice.¹⁹

9 **The Definition of “Children” under the Children’s Code**

10 24. In preparing the Children’s Code, the Commissioner was required to consider the
11 UK’s obligations under the United Nations Convention on the Rights of the Child (UNCRC), and
12 the fact that children have different needs at different ages.²⁰ A child is defined in the UNCRC
13 and for the purposes of this code as a person under 18 years of age.

14 25. In particular, the Children’s Code aims to ensure that online services use children’s
15 data in ways that support the rights of the child to:

- 16 • freedom of expression;
17 • freedom of thought, conscience and religion;
18 • freedom of association;
19 • privacy;
20 • access information from the media (with appropriate protection from information
21 and material injurious to their well-being);
22 • play and engage in recreational activities appropriate to their age; and
23 • protection from economic, sexual or other forms of exploitation.²¹

24 **The Legal Status of the Children’s Code**

25 ¹⁸ Information Commissioner’s Office, Age Appropriate Design Code: Services covered
26 by the code, 2 September 2020, p.17.

27 ¹⁹ [ICO consultation on the draft guidance for ‘Likely to be accessed’ in the context of the
28 Children’s Code | ICO](#), 24 March 2023.

29 ²⁰ The Data Protection Act 2018, s123(4)

30 ²¹ Information Commissioner’s Office. Age appropriate design code: standard 1 best
31 interest of the child, 2 September 2020, p.24.

1 26. The Children’s Code is a statutory code of practice; it was laid before Parliament
2 on 11 June 2020 and issued on 12 August 2020 under section 125 of the DPA 2018. It came into
3 force on 2 September 2020, with a 12 month transition period, meaning organisations were given
4 12 months to bring their services into compliance.

5 27. The Children’s Code does not constitute new law and does not itself impose any
6 legal obligations. Instead it explains how relevant organisations should apply the existing
7 requirements set out in the UKGDPR, the DPA 2018 and PECR. In that regard, it should be noted
8 that the DPA 2018 is clear that “A failure by a person to act in accordance with a provision” of
9 the Children’s Code “does not of itself make that person liable to legal proceedings in a [UK]
10 court or tribunal.”²²

11 28. However, the Children’s Code does have some legal force. Under section 127 of
12 the DPA 2018, the Commissioner must take the Children’s Code into account when considering
13 whether an online service has complied with its data protection obligations under the UK GDPR,
14 DPA 2018 or PECR. The Children’s Code is clear that the “Commissioner will take the
15 Children’s Code into account when considering questions of fairness, lawfulness, transparency
16 and accountability”²³ under the UK GDPR.

17 29. Furthermore, in respect of any proceedings before the UK courts or tribunal, the
18 provisions of the Children’s Code must be taken into account by the court or tribunal where
19 relevant “in determining a question arising in the proceedings”²⁴.

20 30. It should be noted that the DPA 2018 is clear that “A failure by a person to act in
21 accordance with a provision” of the Children’s Code “does not of itself make that person liable to
22 legal proceedings in a court or tribunal.”²⁵ Therefore enforcement action will only occur where
23 there is underlying infringement or breach of the UKGDPR, the DPA 2018 or PECR.

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26 ²² S127(1) DPA 2018

27 ²³ Information Commissioner’s Office. Age appropriate design code: standard 1 best
interest of the child, 2 September 2020, p.12.

28 ²⁴ S127(4) DPA 2018

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is appropriate to the risks to the rights and freedoms of children that arise from your data processing, or apply the standards in this code to all your users instead.

- 4. **Transparency:** The privacy information you provide to users, and other published terms, policies and community standards, must be concise, prominent and in clear language suited to the age of the child. Provide additional specific ‘bite-sized’ explanations about how you use personal data at the point that use is activated.
- 5. **Detrimental use of data:** Do not use children’s personal data in ways that have been shown to be detrimental to their wellbeing, or that go against industry codes of practice, other regulatory provisions or UK Government advice.
- 6. **Policies and community standards:** Uphold your own published terms, policies and community standards (including but not limited to privacy policies, age restriction, behaviour rules and content policies).
- 7. **Default settings:** Settings must be ‘high privacy’ by default (unless you can demonstrate a compelling reason for a different default setting, taking account of the best interests of the child).
- 8. **Data minimisation:** Collect and retain only the minimum amount of personal data you need to provide the elements of your service in which a child is actively and knowingly engaged. Give children separate choices over which elements they wish to activate.
- 9. **Data sharing:** Do not disclose children’s data unless you can demonstrate a compelling reason to do so, taking account of the best interests of the child.
- 10. **Geolocation:** Switch geolocation options off by default (unless you can demonstrate a compelling reason for geolocation to be switched on by default, taking account of the best interests of the child). Provide

1 an obvious sign for children when location tracking is active. Options
2 which make a child’s location visible to others must default back to ‘off’ at
3 the end of each session.

4 **11. Parental controls:** If you provide parental controls, give the child
5 age appropriate information about this. If your online service allows a
6 parent or carer to monitor their child’s online activity or track their
7 location, provide an obvious sign to the child when they are being
8 monitored.

9 **12. Profiling:** Switch options which use profiling ‘off’ by default (unless
10 you can demonstrate a compelling reason for profiling to be on by
11 default, taking account of the best interests of the child). Only allow
12 profiling if you have appropriate measures in place to protect the child
13 from any harmful effects (in particular, being fed content that is
14 detrimental to their health or wellbeing).

15 **13. Nudge techniques:** Do not use nudge techniques to lead or
16 encourage children to provide unnecessary personal data or weaken or turn
17 off their privacy protections.

18 **14. Connected toys and devices:** If you provide a connected toy or
19 device ensure you include effective tools to enable conformance to this
20 code.

21 **15. Online tools:** Provide prominent and accessible tools to help
22 children exercise their data protection rights and report concerns.²⁸

23
24 33. The Children’s Code takes a [privacy by design approach](#), consistent with [Article](#)
25 [25](#) of the UKGDPR, and is reflective of the data protection principles in UK GDPR. It provides
26 guidance on the areas that ISS must consider to ensure their services comply with the legislation.
27 The Children’s Code states: ‘If you don’t conform to the standards in this code, you are likely to

28 ²⁸ Information Commissioner’s Office. Age appropriate design code: code standards, 2
September 2020, p.6.

1 find it more difficult to demonstrate that your processing is fair and complies with the GDPR and
2 PECR. If you process a child’s personal data in breach of the GDPR or PECR, we can take action
3 against you.’²⁹

4 34. When devising the Children’s Code the ICO undertook a public consultation with
5 a wide range of stakeholders, including industry bodies, online services, child advocacy groups
6 and civil society organisations and, importantly, children and parents themselves. The ICO
7 published a summary and response to the consultation³⁰ and the final version of the Children’s
8 Code reflected significant changes to clarify a range of areas, including age assurance.

9 **SUPPORTING BUSINESSES TO CONFORM WITH THE CHILDREN’S CODE**

10 35. The ICO has published a range of guidance and tools to support organisations in
11 complying with the Children’s Code and the underlying data protection legislation. The guidance
12 is designed to improve regulatory certainty and support businesses to implement privacy by
13 design practices.

14 36. Although the standards in the Children’s Code are themselves a ‘how to’ guide,
15 this is also supplemented by detailed guidance on the ICO’s Children’s code hub page.³¹ ISS can
16 then link to guidance available on the wider ICO website to address core data protection
17 principles³² and more detailed guidance such as our data sharing code of practice³³ and guidance
18 on creating Data Protection Impact Assessments (DPIAs).³⁴

19 **The Commissioner’s Opinion on Age Assurance**

20 37. Standard 3 of the Children’s Code relates to age appropriate application:

21 “Standard 3: Take a risk-based approach to recognising the age of individual users
22 and ensure you effectively apply the standards in this code to child users. Either

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24 ²⁹ Information Commissioner’s Office. Age appropriate design code: about this code, 2
September 2020, p.12.

25 ³⁰ Information Commissioner’s Office. Consultation on Age appropriate design: a code of
practice for online services Summary of responses, 17 January 2021

26 <<https://ico.org.uk/media/about-the-ico/consultations/aadc/2616996/summary-of-responses.pdf>>

27 ³¹ [Children's Code: additional resources | ICO](#)

28 ³² [Guide to the UK General Data Protection Regulation \(UK GDPR\) | ICO](#)

³³ [Data sharing information hub | ICO](#)

³⁴ [Data protection impact assessments | ICO](#)

1 establish age with a level of certainty that is appropriate to the risks to the rights and
 2 freedoms of children that arise from your data processing, or apply the standards in
 3 this code to all your users instead.”³⁵

4 38. During the transition period for the Children’s Code, stakeholders requested more
 5 clarity from the ICO on the approach to age assurance in relation to Standard 3. In 2021, the
 6 Commissioner’s Opinion on age assurance was published which set out expectations for
 7 complying with standard 3.³⁶ This Opinion explains how age assurance can form part of an
 8 appropriate and proportionate approach to reducing or eliminating risks and complying to the
 9 Children’s Code.

10 39. Since publishing the opinion, the ICO has continued to engage with industry to
 11 further support the adoption of appropriate, accurate and efficient approaches to age assurance,
 12 including:

- 13 • Research to develop the ICO’s understanding of the risks to children across
 14 different types of ISS, their varying functionality and their processing of personal
 15 data³⁷.
- 16 • Developing the ICO’s understanding of how ISS are currently assessing these
 17 risks, and identify good practice and opportunities for improvement.³⁸
- 18 • Developing the ICO’s understanding of the available and appropriate mitigations
 19 to respond to these risks, and specifically when and what kind of age assurance is
 20 likely to be appropriate and proportionate.
- 21 • Supporting the development of international age assurance standards through
 22 IEEE³⁹ and ISO⁴⁰ standards.

23 **Children’s Code Guidance Products**

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 25 ³⁵ [3. Age appropriate application | ICO](#)

26 ³⁶ ICO (2021) Information Commissioner’s opinion: age assurance for the Children’s
 Code. Available at: [https://ico.org.uk/media/about-the-ico/documents/4018659/age-assurance-
 opinion-202110.pdf](https://ico.org.uk/media/about-the-ico/documents/4018659/age-assurance-opinion-202110.pdf) (Accessed: 21 February 2023).

27 ³⁷ Findings from two research reports are available at: [Age Assurance research | ICO](#)

28 ³⁸ See [Children’s Code Self-Assessment Risk Tool | ICO](#)

³⁹ [IEEE SA - Children's Data Governance](#)

⁴⁰ [Standards for Age Verification | AVPA \(avpassociation.com\)](#)

1 40. The ICO has produced guidance products that sit alongside the Children’s Code to
2 assist organisations in their compliance with the Children’s Code. Details of these products are
3 provided below.

4 41. Any further reading or other resources which are mentioned in or linked from the
5 Children’s Code do not form part of the Children’s Code. There is no statutory obligation under
6 the DPA 2018 for the ICO or courts to take the guidance into account (unless it is another
7 separate statutory code of practice).⁴¹

8 42. To support the adoption of privacy by design practices that protect children’s data,
9 the ICO developed Children’s Code [design guidance](#) targeted at businesses’ user experience
10 design teams. This was well received by the intended audience and won the Design for Good
11 award 2022 from the Institute of Designers Ireland⁴². A [conformance testing tool](#) has also been
12 created to allow designers to test their product ideas against the Children’s Code.

13 43. The ICO received feedback from industry that the principle of the ‘best interest of
14 the child’ was new to some business, which might lead to uncertainty in how to comply with
15 Standard 1 of the Children’s Code. The ICO developed a [best interest framework](#) to help business
16 conduct a balancing test on risks and opportunities of their online service to determine if they are
17 in compliance with the best interest standard and children’s rights under the UN Convention on
18 the Rights of a Child.

19 44. The ICO has developed a Children's Code [self-assessment tool](#) for industry to help
20 them carry out their own risk assessment of their online service in the context of the UK GDPR
21 and the Children's Code. This toolkit provides them with examples of the practical steps that can
22 be taken to ensure the best approach is adopted to safeguard children's privacy and ensure
23 compliance to the 15 standards of the code.

24 45. Standard 3 of the Children’s Code states that services targeted at children, or
25 which feature high risk processing, must complete a DPIA. To support industry to comply with
26 this standard, the ICO has developed [tools for completing DPIAs](#), and three sample DPIAs for

27 ⁴¹ Information Commissioner’s Office. Age appropriate design code: about this code, 2
28 September 2020, p.13

⁴² [ICO - Children's Code design guidance - IDI Awards](#)

1 providers of mobile games or apps, online retail services and connected toys (attached as Exhibits
2 B1, B2, and B3, respectively).

3 46. The Children’s Code is focused on the ICO’s regulatory remit of data protection
4 and e-privacy. Standard 5 of the Children’s Code states that businesses should not use data to
5 deliver content that is detrimental to children. However, the ICO is not a content regulator and
6 therefore the guidance in the Children’s Code focuses on established UK government or industry
7 guidance and standards (e.g. advertising standards) about what is considered to be detrimental to
8 children. The ICO is focused on how the content is delivered through the processing of personal
9 data, not the nature of the content. The ICO has produced [guidance](#) that collates sources of
10 guidance from other organisations about protecting children’s wellbeing to support ISS in
11 assessing if they are processing data in a way that could detrimentally impact children.

12 47. The ICO has produced sector specific [guidance for the games industry](#) and
13 [providers of educational technology](#) addressing compliance questions that specifically arise in the
14 context of these sectors.

15 48. In addition to these guidance products that relate specifically to the Children’s
16 Code, the ICO also has other statutory codes of practice and a wide range of other guidance that
17 helps businesses comply with UK data protection legislation. This guidance covers a range of
18 related topics, including:

- 19 • Overview of Data Protection [Harms](#) and the ICO’s Taxonomy
- 20 • [Examples of processing ‘likely to result in high risk’](#)
- 21 • [Data sharing code of practice](#)
- 22 • [Privacy notice templates](#)
- 23 • [Direct marketing guidance](#)
- 24 • [Data protection impact assessments](#)

25 **Certification Schemes**

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1 take regulatory action against an organisation, the ICO takes account of a range of factors,
2 including the size and resources of the organisation concerned, the availability of technological
3 solutions in the marketplace, and the risks to children that are inherent in the processing. The ICO
4 takes a proportionate and responsible approach, focusing on areas with the potential for most
5 harm and selecting the most suitable regulatory tool.⁴⁶

6 55. The ICO has identified three sectors where children access services in large
7 numbers, and where there is likely to be the greatest risks of harm to children. These are online
8 games, social media, and streaming services.

9 56. Having identified these sectors as priorities for supervision, the ICO asked over 50
10 organisations to respond to questions about the steps they had taken to implement the Children's
11 Code. The responses received provided an insight into the steps taken and to what extent the
12 organisations had started to build compliance with the Children's Code into the operation of their
13 businesses.

14 57. Based on this work, the ICO considers that the provisions of the UK GDPR that
15 are the most likely to be infringed as a result of non-compliance with the Children's Code
16 include:

- 17 • Article 5(1) UK GDPR, which requires personal data to be processed lawfully,
18 fairly and in a transparent manner.
- 19 • Article 8 UK GDPR, which requires that where an ISS is offering a service
20 directly to a child under the age of 13 and seeks to rely on consent as the lawful
21 basis for processing, this consent must be provided by a parent.
- 22 • Articles 5(1)(c) and (f) UK GDPR, which respectively relate to data minimisation
23 and data security.

24 **ICO Children's Code Audits**

25 58. The ICO has conducted ten audits of organisations under the Children's Code. As
26 set out in the ICO's guidance, Children's Code audits typically assess the organisation's
27 procedures, systems, records and activities in order to:

28 ⁴⁶ [Regulatory Action Policy \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-work/childrens-code/regulatory-action-policy), pg.3

- 1 • ensure that appropriate policies and procedures are in place;
- 2 • verify that those policies and procedures are being followed;
- 3 • test the adequacy of controls in place;
- 4 • detect breaches or potential breaches of compliance; and
- 5 • recommend any required changes in control, policy and procedure.⁴⁷

6 59. The scope of the Children’s Code audits carried out by the ICO to date covered
7 some of the following areas:

- 8 • governance, transparency and rights;
- 9 • diligence and DPIAs;
- 10 • minimisation and sharing;
- 11 • age assurance;
- 12 • detrimental use;
- 13 • privacy settings and parental controls;
- 14 • geolocation;
- 15 • profiling and cookies;
- 16 • nudge techniques;
- 17 • connected toys and devices; and
- 18 • AI & online services.⁴⁸

19 60. Following the audit, the organisation that has been audited is provided with a
20 report setting out the findings of the audit. A non-confidential summary of the audit is also
21 published on the ICO’s website.⁴⁹ To date, summaries of six Children’s Code audits have been
22 published. These summaries provide similar organisations with an insight into the ICO’s
23 expectations regarding compliance with the Children’s Code.

24 61. Following audits of video game design companies, the ICO has produced “top
25 tips” for assisting game designers in complying with the Children’s Code.⁵⁰

26 _____
27 ⁴⁷ See [a-guide-to-audits-for-the-age-appropriate-design-code.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-audits-for-the-age-appropriate-design-code.pdf)

28 ⁴⁸ Note that each audit covered three to four of these areas.

⁴⁹ See [Audits and overview reports | ICO](#) for Children’s Code related audit reports.

⁵⁰ [Top tips for games designers – how to comply with the Children’s Code | ICO](#)

1 **Engagement**

2 62. The ICO regularly engages with ISS to support their compliance with the
3 Children’s Code. Informal feedback to businesses has involved explaining best practice about
4 how organisations handle children’s data, including through the use of additional prompts and
5 reminders to users, increased parental controls, and the implementation of family management
6 tools.

7 63. The ICO also undertook a number of workshops which ISS could apply to attend –
8 these have taken place between 2020 and 2022 and provided an introduction to the Children’s
9 Code, with some workshops focussing on “best interests of the child”, “risk assessment” and
10 “likely to be accessed guidance”.

11 64. In April 2021 the ICO issued a “[transparency champions open call](#)” where
12 participants in the open call were invited to submit ideas and examples of privacy information
13 designs that meet the vision of the Children’s Code transparency standard. In June 2021 the ICO
14 issued [Insights from the Children’s Code transparency champions open call](#), outlining the
15 findings of the review highlighting thematic areas of good practice.

16 **IMPACT OF THE CHILDREN’S CODE**

17 65. The Children’s Code has had a significant impact on how ISS process and protect
18 children’s data, with changes already announced by large digital economy companies. For
19 example:

- 20 • Google pledged to turn location history off for all users under the age of 18
21 globally, without the option to turn it on⁵¹.
- 22 • Google produced resources to help children, young people and their parents to help
23 them better understand its data practices⁵².
- 24 • Meta has limited personalised advertising to age and location for users under 18⁵³.

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27 ⁵¹ [Giving kids and teens a safer experience online \(blog.google\)](#)

28 ⁵² [Giving kids and teens a safer experience online \(blog.google\)](#)

⁵³ [Age appropriate ads for teens - Meta](#)

- 1 • Meta has introduced privacy by default settings for teen users of Facebook and
2 Instagram. It is also developing online tools to safeguard teen users⁵⁴.
- 3 • Meta is [testing ways to verify the ages of users on Instagram](#) in situations where
4 users attempt to edit their age from under the age of 18 to over the age of 18.
5 Options currently being tested include ID verification and video selfie
6 verification.⁵⁵
- 7 • Snap has launched a digital literacy programme aimed at educating users about
8 data, privacy and online safety; it has removed browsable public profiles for under
9 18s; and has set default chat functions to friends only.⁵⁶
- 10 • Snap has launched a 'Family Centre Hub' which includes parental control
11 features.⁵⁷
- 12 • TikTok has removed messaging for users under 16⁵⁸.
- 13 • Twitter [now requires users to enter their date of birth](#). Previously, Twitter grouped
14 adults and children in the same categories for targeted advertising purposes.
- 15 • Epic Games has introduced improved parental control tools and “Cabined
16 Accounts”⁵⁹ so that children under the age of 13 do not have their personal data
17 processed until verifiable parental consents⁶⁰ have been obtained.
- 18 • Epic has partnered with LEGO⁶¹ to create safe digital play spaces and has
19 committed to safeguard children’s privacy by putting children’s best interests first.
- 20 • Roblox has introduced improved parental control tools and simplified transparency
21 information⁶².

23 ⁵⁴ [Protecting teens and their privacy on Facebook and Instagram - Meta](#)

24 ⁵⁵ [New ways to verify age on Instagram - Meta](#)

24 ⁵⁶ <https://values.snap.com/en-GB/news/data-privacy-day-supporting-the-privacy-and-wellbeing-of-snapchatters>

25 ⁵⁷ [Family Centre - Parental Control For Teens | Snapchat Safety](#)

26 ⁵⁸ [TikTok: Under 16s can no longer use direct messaging - BBC Newsround](#)

26 ⁵⁹ [Introducing Epic Games cabined accounts](#)

27 ⁶⁰ [Parental controls - Epic Games](#)

27 ⁶¹ [The LEGO Group and Epic Games Team Up to Build a Place for Kids to Play in the Metaverse - Epic Games](#)

28 ⁶² [Age Appropriate Design Code FAQs – Roblox Support](#)

1 66. The ICO conducted three rounds of research with ISS in scope of the Children’s
2 Code covering the 2020-2022 period to track the impact of the Children’s Code. The last round of
3 research was conducted in the autumn of 2022, one year after the Children’s Code entered into its
4 supervision phase (results attached as Exhibit C). Key findings related to business include:

- 5 • Businesses felt the overall impact of the Children’s Code would be positive for
6 wider stakeholders. Around three quarters (77%) of businesses (2022 wave)
7 thought there would be a positive impact on parents/guardians and 71% thought it
8 would be beneficial for children. Two thirds (66%) thought it would be positive
9 for their organisation and 63% felt it would have a positive impact on their sector
10 (there was no notable difference in this figure across sectors).
- 11 • Three quarters of businesses understand the theory within the Children’s Code
12 (72%) and understand what conformance with the Children’s Code requires (74%).
- 13 • Fewer businesses reported that they incurred costs because of the Children’s code
14 in 2022 than in 2021 (29% compared with 35%). As in previous years, smaller
15 companies were less likely to have incurred costs from the Children’s Code (6%
16 sole trader, 14% micro, 19% small, 45% medium, 33% large), which was driven
17 by a lower proportion thinking that they are in scope.
- 18 • The proportion of businesses that recently incurred costs has also fallen because
19 changes had already been made as businesses move towards conformance over
20 time.
- 21 • As in autumn 2021, businesses were more likely to think that they were in scope
22 prior to hearing a definition of the Children’s Code, something that was consistent
23 in 2022. Although fewer businesses thought they were in scope in 2022 than in
24 2021 (81% vs 84%) and slightly more thought they were after the definition (73%
25 vs 68%) these differences were fairly minor.
- 26 • Between 2021 and 2022 there was no significant change in the proportion of
27 businesses that consider themselves fully conformant with the Children’s Code:
28 44% of businesses reported this in 2021 and 46% in 2022.

- 1 • Ease of being conformant remains consistent with 2021, with just over a fifth
2 (21%) of businesses finding it difficult to be conformant with the Children’s Code,
3 but micro business were far less likely to find this (9%) and medium sized
4 businesses were more likely to find it difficult (42% reported this).
- 5 • Businesses were generally more likely to have made these changes regardless of
6 the Children’s Code. For example, 52% made changes in designing and
7 implementing changes to aspects of the service's user experience independently of
8 the Children’s Code compared with 35% who made the change as a direct result of
9 the Children’s Code.
- 10 • Very few businesses find it difficult to conform with the Children’s Code, it tends
11 to be perceived as integrated into the general data protection conformance of the
12 business. Challenges were more often faced by smaller businesses than large
13 businesses.
- 14 • While more businesses reported incurring costs in the highest bracket compared to
15 2021, only a minority stated the costs were directly related to the Children’s Code.
16 In general, the number of businesses experiencing costs had fallen, showing no
17 detrimental impact to businesses.

18 67. In September 2022, John Edwards confirmed that the ICO has “seen real changes
19 since the Children’s Code came into force a year ago. These changes come as a result of the
20 ICO’s action enforcing the Children’s Code, making clear to industry the changes that are
21 required.”⁶³ The ICO continues to work with industry, civil society groups, parents and children
22 to build upon compliance with the Children’s Code and the underlying data protection legislation.

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28 ⁶³ [“Children are better protected online in 2022 than they were in 2021” - ICO marks anniversary of Children’s Code | ICO](#)

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 19th April 2023, at London, United Kingdom.



Emily Keaney
Deputy Commissioner (Regulatory Policy)
Information Commissioner's Office