

Information Commissioner's Office

11 March 2022

Dear Stephen Bonner

**Re: the application of the Age Appropriate Design Code (“the code”) to EdTech products and services**

We commend the ICO for its introduction of the code and its efforts to uphold children’s rights and ensure effective data protection. The Digital Futures Commission is researching [beneficial uses of education data](#), including the governance of children’s data relating to uses of EdTech products and services in UK state schools. We write to clarify the conditions under which the code applies to EdTech, noting that [there is confusion about whether the code applies to EdTech](#) used *in* schools.

Your flowchart of services covered by the code [in Annex A](#) suggests that the code does apply to EdTech, but other ICO statements appear to conflict with this. Below we make three recommendations to the ICO.

**1. Clarify which EdTech products and services meet the criteria for an ISS**

The [scope of code application](#) depends on whether EdTech products and services are [Information Society Service \(ISS\) likely to be accessed by children](#), based on three criteria:

- The products and services are provided “at a distance”
- The products and services are offered through “electronic means”
- The products and services are “provided through the transmission of data on individual request”.

While the first two criteria apply to all EdTech, the third one is confused by statements in [the FAQs](#):

“The Children’s code does not apply to schools”

“The code applies to edtech services that are likely to be accessed by children on a direct-to-consumer basis”

“The code also applies to edtech services in another scenario. This is where an edtech service is provided to children through a school, and the edtech provider influences the nature and purpose of children’s data processing.”

“Examples of where this is likely to apply include:

- schools procuring “off-the-shelf”, pre-defined, edtech products,
- edtech providers processing children’s data for product development or research - where the research isn’t the core service procured by a school,
- edtech providers processing children’s data marketing and advertising, or their own commercial purposes.”

There is no clear definition of “[off-the-shelf](#)”, “[pre-defined](#)” and these terms encompass diverse products and services; clarity is needed regarding which of them fall within scope of the code. We propose that, ***if EdTech products and services procured by schools require students to create an account or log in to use the service, then they are ISS***, for this involves an “*individual request*” for

data to be transmitted, via “*electronic means*” and “*at a distance*.” Examples include Google Classroom and ClassDojo.

We also suggest that individually interacting with a service, for instance, by clicking the YouTube icon when using a school device to access curricula resources, including at the request of teachers or automated recommendations from other non-core services (e.g., YouTube), constitutes making an individual request for data to be transmitted.

## **2. Clarify whether the application scope of the code depends on the data controller-processor relationship**

The second and third bullets in the above FAQs suggest that the code applies if the EdTech provider is the data controller but not if it is a data processor. It is unclear why this distinction is relevant to the application of the code, and we invite your explanation.

*If* this distinction is relevant, then we draw your attention to the considerable practical difficulties faced by schools in determining whether providers use children’s data beyond the service contracted with the school, given their asymmetric relationship with often powerful and opaque platforms. We are finding that some EdTech companies define themselves contractually as data processors when in actual fact they act as controllers or joint controllers. If this has the consequence of allowing them to escape the application of the code, this will contradict the spirit of the law.

## **3. Clarify why the application scope of the code excludes EdTech providers operating as data processors for products and services provided to children by their school**

Seemingly contradicting the above reference to “*off-the-shelf*”, *pre-defined*, *edtech products*’ to which the code does apply, you also state [in your FAQs](#) that:

- “The code does not apply to edtech providers where all the following criteria are met:
- The edtech service is provided to children via an intermediary such as a school
  - The service only processes children’s data to fulfil the school’s public tasks and educational functions
  - The edtech provider acts solely on the instruction of the school, and does not process children’s data in any other form beyond these instructions”.

The second and third conditions seem to imply that the application scope of the code excludes EdTech products and services offered to children via the school where the EdTech company acts as a data processor not controller. Beyond the points made above, we invite your clarification of the first condition. Although the language of “directly offered to a child” is in Recital 38, we question why some EdTech products or services that meet the requirements for ISS (as above) are in your view excluded from the application of the code given that these services procured by schools for children’s individual use are precisely delivered directly to children “on individual request.”

We also question your reference to [case law](#) that, if all three criteria are met, “*The edtech service is [therefore] a digital extension of the school’s offline activities*,” and “*should not be considered an ISS*”.<sup>1</sup> Surely the identification of ISS to determine the application scope of the code in the context

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<sup>1</sup> This case law concerns disputes over a transportation service, not an education service – specifically the CJEU decisions regarding whether *Uber* (and [Airbnb](#)) is an ISS. Further, and these decisions *were not* based on control over the processing of data as data controllers but on the ‘[control](#)’ the companies had over the

of EdTech used in schools must be based on the actual **control over data processing** which dictates the controller-processor relationship. However, if this reference to case law aims to establish that EdTech used by schools to provide publicly funded education is not a “service” under Article 50 of the [Treaty establishing the European Community](#) and therefore not an ISS, then the EdTech providers must comply with the limits of processing solely for public task and educational functions, which in our view is almost impossible to ensure.

We concur with the findings of the Dutch DPIAs and the Attorney General of the State of New Mexico that Google **controls the data processing activities** in the Workspace for Education and G-Suite for Education used in schools.<sup>2</sup> Our interviews with experts, including school staff and DPOs, indicate that a similar arrangement likely applies to other EdTech services that require children to log in or interact with the services.

We offer a re-draft of the FAQ as follows:

- i) A school is not of itself an ISS
- ii) EdTech provided directly to a child and/or parent for the child is an ISS and the code applies.
- iii) The code applies to EdTech provided to a child by their school and used via an individual account or log in (i.e., that meets the criteria for an ISS) unless:
  - a) The EdTech company is not a data controller, **and**
  - b) The **only** basis on which the EdTech provider processes data from children is to fulfil the school’s public tasks and educational functions (including research requested by the school), **and**
  - c) The EdTech provider acts solely on the instructions of the school (as a matter of operational fact irrespective of the contract)
- iv) The code applies to EdTech provided to a child by their school where the EdTech provider is:
  - a) The data controller or joint controller, **or**
  - b) Processes children’s data for product development or research (where the research isn’t the core service procured by a school) or for children’s data marketing and advertising, or their own commercial purposes.

Yours sincerely,



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conditions of the transportation service (Uber) and accommodation service (Airbnb) offered by the companies and mediated by electronic applications.

<sup>2</sup>The recent Dutch Data Protection Impact Assessment determined that Google [does not qualify as a data processor](#) in its processing of personal data through the uses of Workspace for Education (Google Classroom) due to the lack of transparency and purpose limitation. Second, as determined by [the Attorney General of the State of New Mexico](#), Google was collecting data through ‘Google G-Suite for Education’ for its own commercial purposes.