



e-consumer protection

response to a consultation
by the Office of Fair Trading

Children's Charities' Coalition on
Internet Safety





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Introduction

The Children's Charities' Coalition on Internet Safety (CHIS) brings together the UK's largest independent, charitable child welfare and child protection agencies. The charities share a common determination to ensure that all children and young people everywhere have an equal opportunity to enjoy safe access to the internet in order to benefit from the many advantages it provides across a broad spectrum of social, educational, commercial and cultural activities.

CHIS welcomes this opportunity to respond to the consultation on e-consumer protection initiated by the Office of Fair Trading (OFT) in July. The huge shift to online commerce in recent years, and in particular the shift to online retailing, has created several new challenges in terms of child welfare and child protection. Against that background the consultation is particularly timely.

Paragraph 1.5 of the consultation document argues the UK could build on its established record of success in relation to the growth of its internet economy by

“...developing sustainable confidence in UK consumers, particularly amongst the most vulnerable...”

CHIS entirely endorses that objective and our submission very directly addresses it.

CHIS would like to record its thanks to Professor Agnes Nairn of the EMLyon Business School for her invaluable advice and comments when preparing this paper although CHIS alone is responsible for the final contents.

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Executive Summary

Policy challenge

1. Children and young people are a substantial and persistent body of internet users. Arguably they constitute the largest single group of vulnerable users on the internet.
2. Children and young people are major economic actors. They constitute a significant target market for a range of commercial concerns. This is well understood in the offline world. It should now be explicitly recognized in the online space and policy should be constructed accordingly.
3. The emergence of the internet as a major force in online commerce, particularly in retailing, has created a number of tensions, anomalies and misalignments in policy. These create market distortions leading to unfair competition within retail markets. Some can also put children and young people at risk.

Age restricted goods and services

4. The online sale of age restricted goods and services is a singular example of how laws which were created for the analogue world have, with limited exceptions, hitherto proved to be largely ineffective in the digital world.
5. Following sustained efforts by trading standards officers, High Street shops in most areas are consistently found to have a high rate of compliance with the laws on the sale of age restricted

goods and services. The opposite is true in relation to their online counterparts. This unfairly undermines the longer-term viability of companies trading principally on the High Street.

Data collection and online advertising

6. Online advertising increasingly is intimately linked to online data collection which, in turn, is or should be linked to a person's capacity to give informed consent to such data collection. There is a continuing suspicion many online companies are failing to discharge properly their obligations in this respect in relation to adults, leading to grave doubts that they are doing so at all satisfactorily in relation to children and young people where the burden is heavier.
7. High Street or other companies that fastidiously observe the rules about advertising age restricted goods and services only in offline media which are predominantly used by adults and firms that rigorously observe established principles of data collection in relation to minors, are seeing their position unfairly undermined by companies that advertise or collect data on or from web sites that are either indifferent to or are incapable of reliably determining the age of their customers, users or web site visitors.
8. Far from having an incentive to discover the true ages of their

customers, users or web site visitors
very many web sites have a material
interest in not knowing the real ages.

9. The foregoing observations are particularly true in relation to the so-called “free internet” i.e. services provided at no cost at the point of use, financed largely through advertising.
10. The use of the term “free internet” is in any event deceptive. It simply describes a different business model i.e. a model which uses alternative ways of generating revenues.
11. Nonetheless it is acknowledged some latitude should be allowed to sites which provide services free at the point of use, but there ought to be a broader discussion about the limits of such latitude.
12. Many online companies claim not to target children and young people with advertising but there is some evidence to suggest it may be happening in any event, whether intentionally or not. The emergence of a new breed of internet based location aware applications and services is likely to create new anxieties in this regard.

Sustainable confidence and trust

13. It will not be possible for the internet to become widely accepted as a trusted medium for commerce if it continues to be seen as a source of avoidable risk or harm to children.
14. To build sustainable trust in the internet as a medium for commerce it is essential that the tensions, anomalies and misalignments in policy which this submission discusses are satisfactorily resolved.

Policy proposals

15. As part of the backdrop to further policy development the OFT should commission research into the full spectrum of vulnerable internet users, giving particular attention to children’s and young people’s engagement with the commercial aspects of the internet.
16. The OFT should bring together or initiate a discussion with all of the relevant stakeholders with an interest in online commerce and its associated practices to focus specifically on the position of children and young people in relation to online commerce.
17. Consideration should be given to requiring all companies to perform a “child safety audit” prior to the release of any new product or service on to the internet, particularly if it is going to be made available on the free internet. On the free internet it is well established that children and young people can have unrestricted access, there are few if any audit trails or other checks on possible misuse and the service to be provided typically will depend for its financial viability on advertising which, in turn, rests upon data collection . The OFT, OFCOM or another appropriate agency should have the power to call in and inspect the audits either on their own volition or following a complaint.
18. Acknowledging that children and young people are major economic actors targeted online by commercial concerns, media literacy initiatives need to be encouraged which should, inter alia, focus on this dimension to the internet, underlining the key role of data collection and advertising.

19. A definition and method of determining what constitutes a children's web site needs to be agreed and specific or particular rules governing advertising and data collection on or from such sites may need to be developed.
20. The position in UK law, which seems to require companies to engage in a subjective assessment of each child's level of comprehension of every proposed data transaction is a counsel of perfection which is unlikely to be workable in the online world in the foreseeable future, or indeed ever. It may be better to follow the example of Spain and the USA and prescribe a definite lower age limit which would apply solely in the context of the internet or other remote environments.
21. The fact that the gambling industry has been able to introduce successfully a system which keeps children off their sites proves that, at least so far as the sale of products and services rated 18 and above are concerned, scalable working solutions are available now. They are simply not being taken up. They should be.
22. Consideration should be given to establishing a licensing system similar to that which exists within the gambling industry i.e. in order to sell any age restricted product or service online a licence would be required and this would only be issued if the vendor could show they had put in place a robust age verification system which works at the point of sale.
23. Whilst not opposed to the idea of making age related checks at the point of delivery, in some cases perhaps they should be required, as a general proposition their practicality is very dubious. The most obvious example concerns items which are paid for online and wholly consumed online. Real world checks can never be a complete alternative to online age verification at the point of sale.
24. It is acknowledged that devising systems to ensure compliance with laws and regulations affecting the sale of goods and services which are restricted to persons under the age of 18 e.g. certain computer games and films, requires more focused attention to devise scalable solutions. However, the technology to make such a system work is there. What has been lacking hitherto is any obvious determination on the part of major online retailers or the financial institutions, or both, to resolve the problem of how to originate, authenticate and keep secure the primary or initial data. Each sector seems to think it is the other's responsibility. In reality they have a shared responsibility. The OFT should consider pressing for a joint initiative to take this forward within an acceptable timeframe.

I ntroduction

Definition of a child

In this document, except where the context provides otherwise, a child or young person is defined as someone who has not yet reached the age of majority, which in all parts of the UK is 18¹.

This does not mean CHIS takes the view that a typical child of three or four should in all respects and in every circumstance be treated the same way as a typical young person of 16 or 17. However, the principal focus of this submission is children and young people as economic actors. For most purposes in commerce 18 is a key point of departure.

The general law

In England, Wales and Northern Ireland a person under the age of 18 does not have the capacity to form a legally binding contract for the purchase or supply of goods or services other than those which are for “necessities”.

It is acknowledged that what constitutes a “necessity” can change over time but none of the products or services which are discussed here could fall within any reasonable definition of that term.

In Scotland young people acquire elements of full contractual status at 16².

The importance of age

The emergence of the internet as a major force in online commerce, particularly in retailing, has created a number of tensions, anomalies and misalignments in policy. These create market distortions leading to unfair competition within retail markets. Some can also put children and young people at risk. In terms of the matters raised by the OFT consultation, for children and young people these tensions,

anomalies or misalignments turn principally on how commercial companies approach the question of age in the online environment.

The issues come most sharply into focus in relation to the sale over the internet of age restricted goods and services and in relation to the collection of data containing personally identifiable information which is used by advertisers.

Online sales

Having said that 18 is a key point of departure in commerce, it is not the only one. Over the years laws have been passed and regulations have been promulgated to restrict the sale of a number of goods and services to persons of various ages below that of 18. These laws are honoured more in the breach than in the observance.

Appendix 1 contains a list of the different goods and services to which a legally-defined age limit applies.

The list of items that are age restricted and the ages applied to them are identical in all four nations that make up the UK, except that for Scotland a few extra items need to be added.

Data collection and advertising

The collection and exploitation of personal information about existing or potential customers, users, members or web site visitors is core to the way many aspects of the internet work, particularly online advertising. Informed consent given freely and deliberately is essential to those processes.

No one can give true informed consent if they do not know about or do not understand key elements of the proposition being put to them. Persistent doubts remain about whether a great many companies are doing enough to ensure people are aware of their data collection and data usage practices, including how to

terminate or change their engagement with them. And in this context we are usually talking about adults. How much larger is the gap, how much greater is the burden falling on companies in relation to children and young people?

This submission will therefore also discuss areas of legal uncertainty in relation to the capacity of children and young people to give informed consent to commercial concerns to collect personal data about themselves. By the same token it questions the legal capacity of commercial concerns to solicit or otherwise obtain store or process personal data from minors.

A new legal obligation?

Following her major investigation into Facebook, the Canadian Data Privacy Commissioner, Jennifer Stoddart, expressed the hope that

...in the future, more due diligence in the area of privacy will be done by global technology firms.³

That is a view CHIS endorses and would like to develop a little further.

CHIS takes the view that every company that operates over the internet should be under an all-embracing explicit legal obligation to carry out due diligence in respect of online child safety. It might be called a “child safety audit” which has to be completed prior to the launch of any new product or service which they propose to release on to the internet, particularly (but not exclusively) where it is proposed to supply it free to the end user. This is because, from experience, it is known that, at least for now, on the free internet there is a high probability that children and young people will be able to access and use the product. There are currently potentially only very weak to non-existent audit trails to act as a brake on misuse.

The OFT, OFCOM or some other appropriate agency should be given a power to call in and inspect these child safety audits either on their own volition or following a complaint.

There is no suggestion that the product or service cannot be released until it has “passed” a Government approved child safety test but establishing a rule of this kind would force companies to think more carefully. It mirrors commonly accepted obligations to perform a range of safety checks and evaluations prior to launching new products in the offline world.

In particular it should not be possible for any company to launch a new service or product and walk away from, avoid or reduce any potential liability by the trivial expedient of cutting and pasting a notice saying “This service is only available to persons over the age of 13” or “This service is only available to persons over the age of 18” if they know perfectly well they will make no serious attempt to police or enforce, or are incapable of policing or enforcing such an age related rule. Some companies do make serious attempts, but few are required to do so which means most do not. That is no longer acceptable.

Chapter 1

Policy overview

Public policy

It has been the policy of successive UK Governments to encourage widespread take up of the internet.

It now seems commonly accepted that higher levels of internet usage produce direct benefits to the economy⁴. To the extent that more use is made of the internet to order goods which are delivered by multi-drop off vans, it also produces environmental and other advantages.

Children and young people online

Children and young people fall within the OFT's definition of a "vulnerable group". Indeed arguably they make up the largest single vulnerable group⁵ in the UK.

In any discussion about children, young people and the internet it is very important not to fall prey to stereotyping or misplaced assumptions. It is true that a great many children and young people have been eager, easy and early adopters of the new technologies, but not all have been. This really should not be a surprise. Not all children and young people are the same. They will not all experience the internet in an identical way. They will not all always feel equally comfortable around any and every new technology⁶.

In her pioneering work LSE's Professor Sonia Livingstone showed, inter alia, the popular idea that every child and young person was ranging far and wide on the internet, exploring every virtual nook and cranny is a myth. On the contrary Livingstone found

The internet is not yet used to its full potential.

Many children and young people are not yet taking up the full potential of the internet, for example visiting a narrow range of sites or not interacting with sites.

Perhaps of particular importance to the OFT consultation, in the same study Livingstone also found

Children lack key skills in evaluating online content:

38% of pupils aged 9-19 trust most of the information on the internet, and only 33% of 9-19 year olds daily and weekly users have been taught how to judge the reliability of online information.⁷

Livingstone's observations underline the importance of improving children's and young people's media literacy both generally but also specifically in relation to online commerce.

Children and young people, defined for these purposes as persons between the ages of 4 and 17, constitute a very large and persistent group of internet users⁸, as indeed they do throughout the EU27⁹ and further afield. In that context it is a matter of regret that the statistical analysis commissioned by the OFT as part of the backdrop to this consultation, "Attitudes to Online Markets, Report by FDS International" (FDS Report)¹⁰, stopped at and took 16 as its lower age limit. In mid-2009 there were nearly 8.5 million people in the UK between the ages of 4 and 15¹¹, the great majority of whom are regular internet users both at school and at home.

As part of the backdrop to further policy development the OFT should commission research into the full spectrum of vulnerable internet users, giving particular

attention to children's and young people's engagement with the commercial aspects of the internet.

Schools have been key to establishing large scale take up among children and young people. Teaching has undergone a series of radical changes to make greater use of the richer learning environments that the internet can provide.

Children and young people without convenient internet access at home are now acknowledged to be both at a social and at an educational disadvantage¹². For that reason the last Government promoted a scheme, the "Home Access Initiative"¹³, aimed at ensuring every child of school age in England¹⁴ had a computer and an internet connection at home, irrespective of their parents' ability to pay. The new Government has said it will preserve elements of the scheme.¹⁵

Whilst Home Access was primarily grounded in educational policy¹⁶, the appeal to parents was based in part on the economic and other advantages being online brought to the whole family.

A new perspective on the internet

In 2010 the internet has become many different things to many different people but part of it is unquestionably a consumer commodity. Internet connectivity packages are often sold as part of a deal linked to offerings from cable TV or telephone companies. "Toys R Us" sells wireless routers and laptops. It is therefore important to stop thinking about the internet as if it were, essentially, still primarily an adult or business medium for which special (usually meaning "irritating") provisions need to be made to take account of the fact that children and young people will use it occasionally for homework or some other "fleeting or trifling" purpose. Children's and young people's substantial and constant presence online has to become central to thinking

about how policy evolves across the whole space.

Addressing online child protection and related issues requires the engagement of all many stakeholders: Governments, schools, industry, law enforcement, NGOs, parents and of course children and young people themselves. No one group or sectional interest can do it all on their own. No one is exempt.

Many people in industry have been heard to say that there would be no problem at all with children's and young people's use of the internet if only parents supervised them properly. CHIS is very much in favour of encouraging greater parental involvement in all aspects of their children's lives and upbringing, but the fact that this might sometimes breakdown does not mean that, for example, online retailers are therefore freed of any obligation to obey the law. If a child turns up in a supermarket and asks for a bottle of whisky this does not give the company permission to hand it over. It should be exactly the same in cyberspace.

The internet is now more akin to a modern city. In the modern city there are planning, zoning and other laws to govern who can do what, and where and when they can do it. Much more effort needs to be put into developing cyber equivalents. The internet needs to be embraced wholeheartedly as a social place, populated and used by many different interests of which families with children are one, and not the least one. It is pointless and dispiriting for internet company executives and Government officials to continue repeating the mantra about how what is legal in the real world is legal in the online world, and what is illegal in one is equally illegal in the other when so very obviously the rhetoric does not match the reality.

Tensions, anomalies and misalignments

CHIS argues in this paper that the arrival of the internet as a major force in online retailing has created a number of glaring tensions, anomalies and misalignments in policy which in earlier times did not exist at all or mattered a great deal less.

The tensions, anomalies and misalignments to which CHIS refers create market distortions and generate unfair competition. These, in turn, can be a source of risk of harm to children and young people.

In the longer run it will not be possible to achieve the OFT's objective of building "sustainable confidence" in the internet as a medium for commerce, or anything else for that matter, if it continues to be seen as a cause or facilitator of avoidable risk to children and young people. Addressing the identified tensions, anomalies and misalignments in policy is therefore not only a worthy purpose in its own right, because it will reduce the risk of harm to children and young people, it will also help build a broader basis of trust in the internet on a wider basis¹⁷.

Analysing online commerce

When looking at the online world it becomes very hard to separate out in any sort of neat or easily intelligible way the interplay of a range of different laws, regulations and self-regulatory codes on the practice of advertising, marketing, sales, data collection and privacy. It gets even harder to do this when it comes to children's and young people's usage. Nonetheless to facilitate some sort of contained analysis CHIS below suggests a possible line of demarcation, though it is undoubtedly imperfect and could be improved upon:

1. The "free" internet

Services such as social networking sites typically are provided at no cost to the end user at the point of use but they are highly commercial in nature. One of the principal challenges which arise in the context of these free sites concerns the capacity of a child or young person to give informed consent to some or all of the data collection processes that are associated with or are ancillary to how the sites operate.

Issues also arise in relation to the status or legal significance of stipulations made by sites about the age at which a person can become a member or a user of the free site.

2. The "pay as you go" internet.

Here issues arise in respect of the online sale of goods and services which are legally restricted according to the age of the person wishing to buy them. In these cases the question of the child's or young person's capacity to consent does not arise. No one can consent to committing a crime or aiding and abetting one.

The economic dimension

The recent growth in online retailing has been dramatic. An ever larger share of retail activity is expected to continue to shift to online environments¹⁸. In August 2010 UK shoppers spent £4.4 billion online, up 15% on August 2009.¹⁹

The level of economic activity which in one way or another is tied to children and young people is sizeable.

In 2006 children and young people in the UK up to the age of 19 spent £12 billion from their own pocket money or earnings derived from part-time jobs. When the amounts spent by parents on their children, over which in varying degrees children

and young people have some influence, are added to the equation, in the same year the total value of the market increased to almost £100 billion²⁰. In February 2010 it was estimated that on average it costs a family in excess of £200,000 to see each child through to their 21st birthday²¹.

This loosely defined but large children's and young persons' market is therefore of major economic significance, not just to individual firms competing for parts of it, but also for the UK's economy. The size of the market also helps explain why so many companies are interested in it.

Direct evidence of the importance attached by internet companies to children and young people as actors in the economic space emerged in a recent article in the "Wall Street Journal"²².

Advertising – a key building block

The Journal's investigation focused on the use of "cookies", "beacons" and other tracking technologies. These collect information about the web sites a person visits and the kinds of things they do when they are on them.

Your browsing habits say a lot about you and your tastes. This is precisely why these data are so valuable and so sought after by advertisers. As the Journal observed, the data can cover

age, tastes, hobbies, shopping habits, race, likelihood to post comments and general location, such as city.

It is because of tracking technologies, or in some cases information derived directly or expressly from the individual, that when they go online and fire up a web browser they straight away find ads served up to them which mirror their recent online activity.

The companies collecting the data maintain that they separate them from anything that would allow an internet user to be traced or identified by any process of reverse engineering but that view does not go uncontested²³.

Some companies collect this type of data and sell it. Others such as Google and Facebook collect these data and retain them. They form the basis of their offer to advertisers. The Journal discovered one list available for sale to advertisers from one of the former type of companies went under the sobriquet "Teen Boppers".

Children's web sites and data

The Journal's investigation revealed that

popular children's websites install more tracking technologies on personal computers than do the top websites aimed at adults

The article looked at 50 sites that were popular with American teenagers. Media giant Viacom owned eight of the 50 sites. The sites in question were all associated with Nickleodeon TV, a channel aimed squarely at younger children. They also looked at 50 of the most popular US sites which were principally aimed at adults.

The children's sites had placed 4,123 tracking devices on to the computers which had accessed them. This was 30% more than were found on the adults' sites. Google seems to be the single most active company in relation to placing tracking tools on sites principally used by children.

A specific example cited in the Journal article concerned a 10 year old child who reported that Google consistently presented her with ads for "pets...' virtual worlds' and 'online goodies' such as little animated graphics to decorate a website".

Many companies say they make no attempt to collect data which is *solely*

about or of interest to children, moreover the constraints imposed by the rules about advertising to children still apply, or ought to²⁴. Accepting in good faith that in the above illustration Google did not knowingly target the child, did not engage in intentional behavioural advertising aimed at children or did not deliberately collect data which was only likely to be of interest to a child, it has to be said that they might as well have done. The end result was the same.

The fact that companies go to such lengths to obtain the kind of data discussed here from web sites most commonly frequented by children and young people is very telling. It shows beyond any shadow of a doubt that children and young people are economic targets on the internet, just as they are in the real world. The Internet Advertising Bureaus (IAB) rules²⁵, prescribe 13 as the minimum age for which “segments” of “OBA” (online behavioural advertising) can be created. It is not entirely clear whether or how this aligns with comparable or analogous rules issued by the Advertising Standards Authority (ASA) and the Direct Marketing Association (DMA).

In the FDS Report, at para 9.16 it is revealed that 37% of the sample were either “very concerned” or “somewhat concerned” about cookies. That is a big number. If the same survey question was asked again but it was preceded by an explanation of how cookies work in relation to children and young people it must at least be a possibility that the percentage would come out even higher.

It is true that it is always possible to block cookies and beacons or to get rid of them, and the IAB rules, for instance, expressly say that adherents to their code must provide a

clear and unambiguous notice to users that it collects data for the purposes of OBA. This notice shall include information about what types of data are collected, how these data are being used and how users can decline OBA...

However, companies that use these technologies vary enormously in the effectiveness of their efforts in this regard, in the amount of time, energy and resources they devote to ensuring their customers, users, members or web site visitors are fully briefed in the way the IAB rules clearly intend.

The fact that children and young people are economic actors and economic targets on the internet, as they are in the offline world, ought to be explicitly recognized and incorporated into future policy making both generally but also specifically in relation to policy around tracking technologies.

Leaving aside issues of data collection it may not anyway be wholly satisfactory to have one set of rules governing all types of web sites.

A definition of what constitutes a children’s web site needs to be agreed and specific or particular rules governing advertising and data collection on or from such sites may need to be developed.

For example, a growing number of virtual worlds aimed at very young children now exist. These seem to rely for their financial viability on a combination of monthly subscriptions and the sale or promotion of branded virtual products through “advertorials” or games which, in some cases, can be won more easily or more rapidly if the child, typically through a parent, buys one or more of the weapons or tools on offer. Alternatively a child is encouraged to buy virtual furniture or

decorations to improve the appearance of their personal site. Are these types of situations adequately accounted for and covered in the codes of the principal bodies with an interest?

One of the largest of these virtual worlds is “Club Penguin”. When Disney acquired the business in 2007 they were reported to have paid US\$700 million for it, again underlining that large commercial concerns are very interested in this area of economic activity²⁶.

Regulatory concerns

For these reasons and others the UK’s Office of the Information Commissioner, the Commission of the European Union, a number of national Governments both in Europe and elsewhere, the Article 29 Working Party²⁷, as well as regulators from other areas or disciplines continue express numerous concerns about the use of cookies and trackers, any advertising based on them and other forms of online selling or commercial activity.

In the UK the ASA, the DMA as well as the IAB have all recently been seeking to address some of the issues discussed here but it is still far too early to say whether or not they have succeeded in allaying all of the concerns that have been expressed to them, including by the OFT. At the time of writing some of the provisions of the revised codes are not yet operative. In fact it is not even clear that important elements of the internet industry regard several of the new provisions in the codes as being entirely settled and accepted²⁸.

Chapter 2

Market distortions and unfair competition – the “pay as you go” internet

Age restricted goods and services

A major part of this submission addresses concerns about the sale over the internet of age restricted goods and services.

Appendix 1 shows that there are around 20 such items. It is acknowledged that there is room for more than one view as to whether or not in every single case the right age levels have been chosen but that is a different argument and a little beside the point. The UK is very unlikely to abandon the idea of having legally defined age restrictions of any kind or to proclaim that it has given up on seeking to enforce them, either online or off. Thus wherever the new age limits might be set issues of compliance or non-compliance would continue to arise.

A journey to adulthood

Children and young people are on a journey towards adulthood. Their bodies may not be suited to the consumption of certain products e.g. alcohol, or it is thought they lack the necessary judgment to be able to handle a range of items safely e.g. larger knives. Alternatively legislators have taken a view that some activities e.g. gambling should only be available to adults or they have decided that particular types of material e.g. pornographic videos

or violent computer games should only be sold to adults.

Young people down the ages have always sought to challenge conventions and test boundaries. Risk-taking, rebelling against or seeking to manipulate “the rules” is in varying degrees a perfectly normal part of the process of growing up²⁹. The fact that the rules are sometimes broken, or it is difficult to make them work always wholly as intended, is no reason for abandoning them altogether, or for giving up on the attempt to enforce them when necessary.

Rules, particularly rules backed up by laws, are a reflection of societal norms and values. They shape and influence behaviour and expectations, even in the breach. Equally the absence of rules implies permission, endorsement, consent or acquiescence of some kind.

In the case of age restricted goods and services available online the internet provides an easy way of evading the legally required visual age checks that are standard on the High Street. With the notable exception of the gambling industry, referred to in more detail below³⁰, it appears that the great majority of online retailers, active in many different markets, make no serious efforts to determine the actual age of any persons attempting to buy age restricted products or services from them. This means they are regularly breaking the law and they must or ought to know it. Their acts of omission are putting children at risk.

Examples of compliance failures

Persons below the age of 18 are not allowed to buy knives which might be used as an offensive weapon. In practice this is generally taken to cover any knife with a blade longer than three inches. In July 2009 trading standards officers in the London Boroughs of Lambeth and Southwark published the results of a

survey they had carried out into the sale of knives online. A summary of their findings is attached as Appendix 2. The survey revealed that whereas in previous tests carried out on the High Street 19% of attempts by minors to buy knives illegally succeeded, online 93% of attempts made by minors were successful.

Under the terms of the original research that was carried out neither Southwark nor Lambeth would disclose the names of the companies that had supplied the knives to under age persons but it is understood that several household names were implicated.

The London Borough of Greenwich trading standards officers carried out a similar examination of under age sales made online. They covered a broader range of products, but they also included knives. Greenwich gave no undertakings about not disclosing the names of the companies that had provided goods to persons not legally qualified to buy them. The results of their study were published in May 2009 and are provided in Appendix 3. Several very well-known companies are named as law breakers e.g. Marks & Spencer, Argos, Amazon and Oddbins. Most of these also have High Street stores but it is seriously doubted that there would have been anything like the same “success rate” in relation to under age persons obtaining similar items from them in their bricks and mortar establishments.

There are other examples which could be produced following similar investigations into online retailers carried out by trading standards officers in Cardiff, Salford and Staffordshire. These show that this problem exists across the UK, not only within London.

Nonetheless CHIS makes no claims that it has evidence of large scale law-breaking in relation to the online sale of age restricted goods and services but then CHIS knows of no one who has undertaken any large

scale research into the matter. The few systematic studies that have been published have been carried out by overstretched trading standards officers. Almost by definition such studies are going to be small scale and very local in nature but every time anyone looks a similar picture emerges. Things are not getting better.

It will be observed that in the press statements made by the London Boroughs³¹ there were some companies that did manage to prevent illegal sales from happening online, and as we shall see later in this report the gambling industry has achieved a very substantial degree of success. If some companies can do it, why is it not possible for all of them to do it?

The Daily Mail picked up on the story about the illegal sale of knives online. In their edition of 1st July, 2009³², James Roper, Chief Executive of the Interactive Media in Retailing Group (IMRG), a leading e-retail industry body, is quoted:

We take the important issue of age-restricted sales online very seriously indeed.

We have formed an 'Age Verification Online' working party to collectively address the issue in order to protect the rights of consumers to legitimately purchase products and services.

We are working towards creating an industry standard so that both online retailers and customers can be assured that we're doing everything possible to ensure that age-restricted products are sold responsibly.

At the time of writing there is no news of a final outcome from this working party but through correspondence it is clear they are seized of the importance of the issue.

In the same edition of the Daily Mail a spokesperson for the British Retail Consortium (BRC) is quoted as follows

Our members are totally committed to using their experience of successfully preventing under 18s buying alcohol to stopping them buying knives.

In the immediate aftermath of the story appearing a number of larger companies announced that they were going to stop selling knives online altogether³³. The BRC has an internal working party, the Distance Selling Policy Action Group actively considering these issues across the full spectrum of age restricted products and services. The results of the group's deliberations are awaited with great interest. CHIS will be responding to a recent invitation to contribute to its work.

Could get worse

More and more High Street stores are adopting a policy whereby, if the person looks like they may be under 21 or under 25, they are nonetheless being asked to produce proof of age. Some of these young adults may well decide to buy age restricted items online rather than suffer the potential embarrassment or inconvenience of having to produce proof of age at the checkout.

Either way the more efficiently the laws on age restrictions are enforced on the High Street, the greater is the likelihood that there will be perhaps an accelerated drift to online sales and, unless things change, the greater will be the legitimate outcry from law-abiding High Street vendors who see their position being undermined.

For some vendors that operate both offline and online a drift from High Street sales to online sales may be a matter of little immediate or urgent concern from a purely business perspective. To the extent that online trading is more profitable than High

Street trading it may even produce an increase in their turnover and an increase in profitability. However, for those stores who are confined solely to the High Street or who have little or no online presence, the sense of grievance will be that much greater and that much more justified.

Compliance success – gambling

The challenge of underage gambling has been around for very many years. In a recent survey 2% of adolescents – 60,000 12-15 year olds – were classified as “problem gamblers”³⁴.

Starting in about 2002 a number of CHIS members began to receive phone calls from parents about their children developing problematic gambling habits through online gambling web sites. Children were going online, ticking a box to claim they were over 18 then using their legitimately acquired debit cards to spend all of their pocket money on the horses. In a small number of cases it was clear that some had become addicted and were engaging in theft or deception to sustain their addiction.

In 2004 the children's charity NCH³⁵ initiated a piece of research. It did this working closely with Citizencard³⁶ and GamCare³⁷.

NCH targeted 37 UK focused gambling web sites. It first wrote to each of them asking if they were satisfied with the arrangements they had put in place to detect or deter under age persons from using their site. Irrespective of their replies, two months later, each site was visited. 30 of the sites were unable to detect a 16 year old coming to their site to gamble. She simply ticked a box to affirm she was 18 and got through.

Enforcement was weak

In the case of gambling, then as now, there was no doubt about the law. Under 18s were not and still are not allowed to gamble³⁸. All the gambling companies spoken to in the course of NCH's research said they were aware of the problem of children improperly using their web sites and lying about their age. They all said they were "very concerned" about it. Nothing happened. The necessary powers to act were in place but it was quite clear that uncertainty about jurisdictional issues and the overall scale of non-compliance meant that, in effect, no one felt capable of ensuring the law was being observed.

No more complaints

The Government and Parliament decided to intervene. They did this via the Gambling Act, 2005. This made installing a robust online age verification system a condition of obtaining a license to operate a gambling web site³⁹. Several new companies sprang up in order to provide the technology and the service to enable online age verification to take place.

The idea is very simple: to gamble online a person must first open an account. To do that the individual must fill in an online form with their personal details. The gambling site makes clear that because it is supplying an age restricted service it must check and confirm that the applicant is 18 or above. In effect it asks your permission to carry out the checks⁴⁰. In practice what this means is that the gambling web site sends the would-be gambler's information to an intermediary that checks it against any of several online databases to which they have access. The largest of these are those held by credit reference agencies. If all the data matches and confirms the age is 18+ then the process is complete and the individual is able to gamble. The process can be completed in a matter of seconds and the cost is carried by the site.

It is understood that approximately 95% of all adults in the UK are on one or other of the online databases to which the intermediaries have access. For the 5% who are not⁴¹, or for those who object to being verified in this way, alternative paper-based systems are available although, obviously, these will take a little time to complete so the person will not be able to gamble online straight away.

The age verification law and associated procedures do not appear to have had any negative effects either on the overall profitability or the performance of gambling companies.

Since the regulations came into effect in September 2007, the children's charities are not aware of a single instance where the rules have been breached by a child⁴².

It is true that no system is ever going to be entirely foolproof but the example of gambling appears to show that some can work to a very high level of efficiency. If such systems are good enough for gambling they ought to be good enough for alcohol, knives and any other products that have an 18+ label.

However, what is also noteworthy about the gambling case study is that the great majority of the gambling firms only moved when they were all forced to do so. The 2005 Act created a level playing field. Everyone had to do it consequently no one could gain an advantage by refusing to do it or by delaying unduly.

Verifying sub-18s

From the example of the gambling industry we can see that where a product is limited to adults, systems already exist which appear to be working satisfactorily.

The same cannot be said in relation to the position of sub-18s. To develop a scalable

system for verifying the ages of persons below the age of majority is acknowledged to be a substantial undertaking.

The current climate is not the most propitious for discussing initiatives of this type. A major backlash against “the database state” is underway. Yet a trustworthy scheme is essential if the UK’s age related laws are to continue to have any relevance in the internet age.

The first and major challenge is to devise a means of obtaining reliable, verifiable data on children’s and young people’s ages which can form the basis of whatever technology is applied to its deployment over the internet in relation to commercial web sites. There are several possibilities.

A system which mirrors that used for issuing passports or the real world “PASS” cards⁴³ would be one way of gathering in the data⁴⁴.

Alternatively schools could be enlisted to the cause. Every child attending a school in the UK is given a log in of some kind when they enrol. This enables them to use their school’s computers and access the internet. Would it take much extra effort to extend that into a secure system which could also be used externally?

The banks are one of the most obvious potential sources of a solution. When a child, or indeed anyone, opens an account with them they go to considerable lengths, as required by the anti-money laundering rules, to establish the true personal attributes and identity of the would-be account holder.

By whatever means the initial data is collected the relevant part of it e.g. the bit confirming the person’s age, then needs to be converted into a form where it can be rendered to online vendors. Again there is more than one way in which this could be achieved.

One method could be for the verified person to be given a “digital token” of some kind, probably based on a form of public key encryption or incorporated into a dongle, or both. This would be provided to any web site selling an age restricted product or service. By asking for and receiving this type of proof at the point of sale the vendor would discharge their legal obligation to take reasonable steps to check the would-be buyer’s age.

Arguably such a system could provide a higher level of personal security for individuals. Instead of having to render all of their personal data to every commercial web site, such a system could allow the person to produce a token confirming they had been verified as 18 or above and the vendor would need to know no more.

Clearly no one should be compelled to have an age verified ID. Individuals could always choose to buy their restricted goods in the real world. But failing to develop a system that can be used online for under 18s is tantamount to abandoning the laws altogether. That is not acceptable.

Real world age checks

As already noted a very obvious key difference between online and offline retailing is that in the real world it is comparatively easy to carry out on the spot visual age checks. Such checks in an online environment are not a realistic possibility for the foreseeable future.

Could real world checks made at the point of delivery be a substitute?

In 2009 CHIS carried out some research prior to submitting its evidence to a Home Office review of the sale of alcohol. The review had a specific section within it on remote sales⁴⁵.

It is not suggested that this research was large scale enough to be wholly representative of online retailing and some

information was provided to CHIS on the basis that the companies would not be publicly identified. However, the results did marry with other evidence that is available in the public domain e.g. the investigations carried out by trading standards officers in the London Boroughs of Greenwich, Southwark and Lambeth referred to above.

In the research some online retailers said they did use age checks at the point of delivery. CHIS is perfectly happy for age checks to be carried out at the point of delivery, and perhaps in some cases they should be explicitly required. However, given the immense practical difficulties or, in some cases the impossibility of doing them e.g. where the product is bought and consumed entirely online, checks at the point of delivery can never be an acceptable or complete alternative to carrying out online age checks at the point of sale.

In discussions with companies it emerged there were starkly contrasting views as to what the law currently required. There were broadly three views:

1. A very small number of companies said that for some products, not all, they thought they had an obligation to check online at the point of sale *and* at the point of delivery. It was not always easy to get them to provide any additional information about which products they believed fell into this category.
2. Other companies accepted that they have a clear obligation to do an age check at the point of sale, whether the sale is made online or offline. The check needs to determine that the person whose card is being used to pay is over the age of 18.

However, according to this view, once the online age verification of the card owner has been carried out, neither the vendor nor its agents e.g. the delivery company, had any further obligations to do any kind of age checks on anyone when the goods are delivered.

It was acknowledged that, in a remote environment, there was no way of being sure that the person using the card to make the purchase was in fact its real owner. A parent or other adult might knowingly lend a child their credit or debit card. If the child does not already have it, the adult may also give them any additional information that might be necessary to complete the sale e.g. details of the address where the card is registered. For all practical purposes it is impossible to detect this sort of behaviour, but it also raises different issues. It is not a reason for refusing to do anything.

3. A third group of companies took the view that with online sales they had no legal obligation to check the age of the purchaser at the point of sale. They insisted their *only* responsibility was to ensure an age verification check happened at the point of delivery.

Companies that took this view accepted that the requirement to do the age verification check at the point of delivery applied whether the delivery was made directly by them or was made by agents, typically external couriers. However, there was then a further sub-division of opinion:

- a) Some companies in this group thought the purpose of the age check at the point of delivery was *only* to determine that a person aged 18 or above was present when the delivery was

made. That person's relationship to the person whose payment card had been used to make the purchase of the goods being delivered was thought to be immaterial.

- b) Another view was that whoever made the delivery had to determine that the person whose payment card had been used was verifiably over 18 *and* was also present.

Who delivers?

Typically once goods have been ordered online they will be delivered in one of two ways: either the vendor company will have use of or own a fleet of trucks, normally carrying their own livery using their own directly employed drivers or the delivery work will be contracted out.

FedEx, UPS, DHL, and Royal Mail

Where the delivery of age restricted goods is contracted out, for all that a number of vendors had told CHIS they accepted that a check at the point of delivery is a legal necessity, at the time of making the submission to the Home Office review in 2009 there was nothing on any of the web sites of, for example, FedEx, UPS, DHL, or the Royal Mail which indicated they had any special procedures in place.

To confirm this CHIS spoke to each company. They all said more or less the same thing:

We have a list of prohibited items that we will not deliver at all or will not deliver without special arrangements being made... Our charges are based largely on weight, size, distance and speed. Once we have accepted the box from the customer we put it on the van then hand it over to whoever

answers the door at the delivery address. We do not check the age of the person accepting delivery, neither do we check anything else about them, other than to ask their name when they sign for the goods, but actually we do not ask for any proof of that either.

What should be checked?

If a check were to be done at the point of delivery what would the check need to establish? Should it establish that the adult vouching for or taking receipt of the goods is the actual purchaser, or that he or she is another adult expressly authorised to act on the original adult purchaser's behalf? Quite how a driver would establish either of these things is another matter, but it is unlikely to be satisfactory to say that the only obligation is to determine that someone, anyone, over the age of 18 is present.

What if the person has no idea what is in the box being delivered? The driver may not know either. It may not be obvious from the external appearance of the container.

Should the person accepting delivery insist on the box first being opened so they can confirm that they are not being unwittingly dragged into a scheme to supply alcohol or some other restricted items to minors? What happens if the box is opened, the third-party sees what it is and refuses to take responsibility? Is the box then to be re-sealed and put back on the van?

Van drivers in court?

Whether the goods are delivered by a courier company or by the company's own employees, CHIS is not sure how satisfactory it is to make legal compliance in this area hang solely on the performance of the driver. What would the consequences be for the driver if it turns

out an error had been made and alcohol or some other age restricted items had been handed over to a minor or to someone intent on passing them on to a minor? Would drivers start getting dragged into court as witnesses or as the accused?

Pressure to deliver

Once goods have been paid for online and are handed over to an in-house driver or a courier company all the pressure within the system is to get the goods delivered, not brought back.

The driver may well be on a bonus for finishing their round quickly or for coming back empty-handed, or both. Some may be penalised or lose bonuses if they fail to complete their round within a given timeframe. Maybe the driver will be anxious about being parked illegally or about blocking or restricting other traffic while being compelled to park inconveniently in order to make a delivery. Entirely understandably the driver will not be keen to hang about on a doorstep while someone in the house finds a document to prove who they are or how old they are, let alone what relationship they are to the owner of the card that was used to make the purchase.

Some companies specifically allow online customers to say in advance that the goods can be left at another house, usually a neighbour's, or secreted in a particular part of the garden. It is unclear how checks would work in these circumstances.

Trade union perspective

More particularly, and this point was made with some force by Unite, the trade union (which contains the former Transport & General Workers Union), if drivers get embroiled in age verification on the doorstep, there may be a substantial risk of them also getting involved in arguments about a person's true age or identity, and

that would carry with it the risk of violence, or considerable additional stress. After all, as far as the would be recipient is concerned they have already paid for the goods. The goods are theirs. The driver is simply dropping them off, not adjudicating on the purchaser's right to take delivery.

Licensed to sell age restricted goods?

No retailer is compelled to sell anything online but if they are going to choose to sell age restricted goods then they should only do so if they are in a position to demonstrate that they are doing it legally. It is quite wrong for retailers, essentially, to take a calculated decision to delay taking action knowing that the weak nature of the enforcement regime, the trivial nature of the fines and continuing lack of media attention means they have little or nothing to fear.

Unless online retailers show they are making a determined effort to resolve this problem within a reasonably expeditious timeframe then, as with gambling, the Government and Parliament should step in to establish a licensing regime⁴⁶.

Companies should only be allowed to sell any age restricted goods and services online if they can demonstrate they have a robust age verification system in place. There would be no need for a complicated enforcement action to be brought against them. The licence would be the key. Trading without one would on its own and without more constitute an offence. A hefty fine, or worse, would act as a major incentive for companies to comply.

When selling an age restricted product or service a company should not be allowed only to ask the person seeking to buy it to confirm their age by ticking a box on an internet page. However, having made serious, good faith efforts to verify a

person's age e.g. by using systems such as gambling companies deploy, if a company is still deceived and sells or supplies a product or service to someone below the legal age, the company should not be liable either in civil or criminal law.

Comparisons within retailing

In the preceding section specific examples were provided showing that the laws on the sale of age restricted goods and services were being observed by a small number of companies but were being broken by many more. The next sections analyze how market distortions and anomalies manifest themselves at a general or strategic level as between different types of firms competing against each other across a wide range of online and offline markets.

High Street v Cyberspace

An individual can obtain goods or services either on the High Street from a bricks and mortar establishment, or remotely, now typically over the internet.

In the case of the High Street, vendors are expected to be aware of any restrictions which apply to the sale of the products on their shelves. They will also normally know at least three further things:

1. They have a responsibility to satisfy themselves that anyone attempting to buy any age restricted goods or services in their shops meets the minimum age requirement. As previously noted, they are required to do this by carrying out a visual inspection of the person making the purchase and in the event of there being any doubt they must ask for proof of age. If satisfactory proof is not forthcoming they must refuse to sell the product or provide the service. Any culpable failure can have severe consequences for the vendor. In the case of the sale of alcohol the sanctions

can include the forfeiture of one's license, a fine, jail, or all three. In large supermarkets and other chain stores training programmes and computer systems have been put in place to allow the vendor to demonstrate that they are taking all reasonable steps to discharge their legal obligations.

2. The law and regulations apply at the point of sale, right there in the shop. They may also apply elsewhere and there may also be consequences further up the supply line but that is a different and an additional matter.
3. Local authority trading standards officers periodically do test purchases. Vendors always have to be on their guard. Members of the public can also observe plainly illegal behaviour and report it without difficulty.

The first and most obvious anomaly is therefore clear. Even though, as CHIS contends, the law is exactly the same for both online and offline worlds, except in the case of gambling there is no equivalent or comparable enforcement, monitoring or reporting regime in place in respect of goods and services sold online.

Cyberspace v Cyberspace

Similar arguments apply equally where companies are competing against each other entirely online.

Some companies have made the investment to ensure that when they are trading online they are complying with the law, others have not. The ones that have not may obtain a competitive advantage in two different ways: by failing to make the investment in developing an age verification system they are conserving their cash, perhaps to deploy in other ways. They are also reducing their potential involvement in, as they see it, any off putting or time consuming processes that are a necessary part of

carrying out an age check. These could put customers off and drive them elsewhere⁴⁷.

This sets up a situation where all the economic incentives point towards not complying with the law, when it should be the other way around. “Brand damage” through adverse publicity has clearly not yet been sufficient to persuade many Boards of Directors that they should put these matters right. Perhaps the Directors and the journalists who cover these matters both erroneously believe there is nothing that can be done.

Domestic v Domestic

Some firms pointed out that where a company’s operations are comparatively self-contained within a specific local authority area they are more likely to be the subject of compliance actions by trading standards officers simply because there will normally be fewer agencies that need to become engaged in order to commence or complete an enforcement action. By contrast, it has been suggested that where a supply chain is highly decentralized, as typically they are in the online world, it can sometimes be harder to determine the locus of the offence or it becomes more difficult to contact and engage with all of the relevant agencies that might have an interest in or might need to agree on a given course of action.

On a related point, where a vendor is a major employer within a particular local authority area there is a sense that the trading standards officers in that area will sometimes be more sympathetic to the company’s position.

In one Northern city a particular company informed CHIS that their local authority trading standards officers had given them specific advice on an issue connected to online age verification. When it was put to this company that no other trading standards officers appeared to share that

view, they simply grinned and shrugged their shoulders.

The report on “Better Regulation of Age Restricted Products: A Retail View”, published in August 2010 by the Local Better Regulation Office⁴⁸, suggested there was a need for aspects of the enforcement of regulations and laws in this area to be harmonized and simplified. Whilst not necessarily agreeing with all of the report’s recommendations the case for this at least seems unanswerable. Curiously, this report makes almost no mention of the online aspects of the sale of age restricted goods and services. Correspondence with its authors has shed no light on the reasons why that was the case.

Physical v Virtual Goods

Most of the comments made up to this point are only of relevance where what is at issue is the sale of physical goods which are going to be delivered to a specific real world address. There are, however, a range of goods and services which can be bought and consumed entirely online. The most obvious examples are downloadable age restricted games or streamed videos. In these cases the only practical way of age verifying has to be online⁴⁹.

Domestic v International

CHIS encountered a view among some UK-based online vendors which suggests they appear to believe they are at a disadvantage selling age restricted goods or services when compared with other online vendors operating from foreign jurisdictions where, they believe, regulation is either a great deal lighter or non-existent.

Cross border shopping online is still comparatively unusual and UK residents are among the least likely to buy physical goods from anywhere outside the country⁵⁰. Price advantages can quickly be eroded by additional transportation costs

and if the item originates outside the EU it might also attract levies or duties. But even so it is simply not the case that the UK is the only country which has or tries to enforce regulations about different kinds of online sales.

However, there does appear to be some real confusion or uncertainty about UK retailers' responsibilities to verify the age of persons placing orders from abroad for age restricted items, particularly where the item is to be delivered to an address outside the UK. What if the product is either not age restricted in the purchaser's country or the age restriction is lower than it is in the UK? Does the online retailer have any kind of obligation to find out about and apply the law applicable in the buyer's country or the country where the item is to be delivered if that is not the same?

Similarly what does the law say about a UK resident buying an age restricted product on the internet from outside of the United Kingdom, either from a jurisdiction where there is no age restriction at all or from one where the restriction is lower than that which prevails in the UK?

Added complexity

In relation to the online sale of goods and services the situation in the UK has undeniably been complicated by the recent emergence of "pre-paid credit cards" and other forms of stored value cards⁵¹.

The emergence of pre-paid cards

There was a time when it was widely, if wrongly, thought that if an online vendor insisted on payment with a credit card this was the same as saying they would only deal with persons aged 18 or above. Today this position is no longer even remotely tenable.

A plethora of prepaid cards using the Mastercard, Visa, Maestro, Amex and

other networks have recently become available. There are also gift cards which work in a similar way. They can be tied to particular shops e.g. Debenhams, or to a specific online provider e.g. eBay.

The cards are on sale in supermarkets, corner shops and petrol stations. Whilst some say they should only be sold to persons over the age of 18 that is not the case with all of them and anyway there is no law requiring this. Enforcement of that provision is thought to be, for all practical purposes, non-existent. However, that aside, all or most of the cards expressly say they can be used either by persons of any age or by persons aged 13 or above.

FSA regulatory oversight does not extend to some of the cards in question because they are promoted by financial institutions based overseas. Alternatively even where the FSA's writ would otherwise run, full "Customer Due Diligence" measures only have to be applied where the product is a non-re-loadable e-money product *and*

- the purse limit is greater than €150, or
- the purse limit is greater than £650 or
- the customer wishes to redeem more than £100, or
- the issuer suspects money laundering or terrorist financing

Where the product is a re-loadable pre-paid card there seems to be less scope for misrepresenting the person's age because it has to be tied to an existing bank account or credit card, but non-reloadable cards can be bought for cash and there are few if any constraints or checks.

The non-reloadable cards can, in effect, be bought for cash and used anonymously and where the product or service being bought is downloadable or is consumed

online there is not even the possibility of a secondary check at the point of delivery.

To some observers the upper cash limits of these cards may seem comparatively small, but for many purposes the limits are quite substantial. It is important also to remember that more than one card can be bought and used at the same time or in combination.

Pre-paid cards featured in the London trading standards investigations referred to earlier. Debit cards were also used. Debit cards are now routinely issued to children as young as 11 by some of the High Street banks as well as other financial institutions.

Many members of the public will surely find it a little odd that financial products or services, particularly financial products or services sporting household names such as Visa and Mastercard, can be sold in shops on the High Streets in the UK yet not be the subject of regulation or control by the FSA simply because the companies promoting them are based overseas.

Visa, Mastercard and the other card franchises are doing a lot to try to stamp out the improper use of their online payments facilities generally, but the fact that they have allowed these new types of prepaid cards to emerge in the way that they have does rather run in the opposite direction and begs several questions.

Some of the prepaid card issuers have taken steps to block their use on certain types of web sites e.g. sites which are specific to particular age restricted products or services such as gambling or alcohol, but not all of them have done this and many age restricted items are on sale through generic sites e.g. supermarket websites, where it seems such restrictions cannot easily be applied.

The banks and financial institutions quite properly point out that, where the sale of an age restricted product or service arises, under the current law it is the retailer's responsibility to determine the age of the person doing the buying, in the online world as it is in the real world. There is no doubt that is true but one cannot help but feel some sympathy for the retailers as the financial institutions promoting these prepaid cards have certainly not made their job easier.

It should not be possible for any method of payment to be used online to facilitate an illegal purchase of an age related product or service, but those pre-paid cards which can be bought for cash and used without any effective form of authentication of the user, seem almost to have been customised to facilitate illegal trade of one kind or another.

If these cards are to continue to be issued the only way to resolve the problems they have created is to break the link between the method of payment used and the mechanism for verifying a person's age.

On their web site the BRC say

One challenge facing retailers that sell age restricted products is the increased prevalence of pre-paid credit cards. Currently there is no way of identifying the age of the owner of one of these cards. We believe Government should ensure that the card industry provides a way for retailers to be able to identify pre-paid credit cards so they can then exclude them from being able to make purchases of age restricted products.⁵²

CHIS entirely understands the BRC's point of view. However, if an independent age verification system were in place the link between the method of payment and

the proof of age would be separated and the BRC's point would become redundant.

This scenario would also greatly expand the number of ways companies could transact with individuals for the sale of age restricted products or services. A visit to major gambling web sites will today reveal that they are capable of taking punters' money in all the usual ways e.g. via Visa, Mastercard, Maestro, but also via several more obscure or exotic channels e.g. "U Kash", "Neteller", "Western Union", "Click and Buy", and "Moneybookers".

In terms of making progress on solving this problem, there seems to be an element of "buck-passing" between the retail and financial services industries. Insiders speculate that this is partly to do with concerns on the part of the financial industry both about potential liabilities which could arise from them having any part to play in authentication processes which are primarily intended to benefit third parties and about who would bear the cost of developing a system. On the other hand the retail industry appear to feel they should not have to bear the cost of "putting right" the banks' and other institutions' original thoughtlessness.

The truth is that whereas the retailers have a clear legal requirement to act, the banks and financial institutions have an equally clear moral obligation to play a full part in resolving this problem.

The present stalemate is unhelpful. A joint initiative should be developed but for this to occur it requires some large players to decide that they want it to happen.

Chapter 3

Market distortions and unfair competition – the “free” internet

The Facebook generation

The principal form of commercial online services provided free at the point of use that are of major relevance to children and young people are those clustered around social networking sites, of which Facebook is the prime example. However, there are many others e.g. music sites such as Spotify.

Much of the media coverage of child safety issues and social networking focuses on the way in which children and young people expose too much personal information about themselves or have accepted too many people as “friends” whom, in reality, they do not know at all. Addressing these types of questions is somewhat outside the scope of a submission of this type but they most certainly do intersect at different points with concerns about how informed consent is obtained to join a site and, closely related to that, how privacy settings are explained and presented.

The problem of data collection

Earlier CHIS commented on questions of data collection and informed consent in relation to tracking technologies. These questions arise on both the pay as you go and the free internet but on the free sites there are additional questions which are peculiar to them.

It is accepted that the larger social networking sites do not knowingly advertise, market or promote age inappropriate items to children and young people, neither do they deliberately target advertisements at children and young people⁵³. However, since none of the sites seek to verify the declared ages of their users or members there is a disjuncture here which perhaps ought to be considered in terms of it being an unfair trading practice.

For example if High Street companies carefully ensure they only advertise adult oriented products or services in media or places which are restricted to or are normally only used by adults, this being anyway a requirement of the ASA and other regulators⁵⁴ yet their online competitors regularly advertise on internet sites which fail to observe or are incapable of observing the same or similar rules, the whole purpose and value of the real world rules are undermined or eroded. It is also very obviously unfair.

Following some egregious examples of inappropriate advertising and data collection practices aimed at or affecting children⁵⁵, as previously noted, the ASA and the DMA have both recently taken a series of steps to reshape advertising and marketing policies to try to ensure that contemporary practice in their respective areas of concern meet current legal, ethical and other expectations⁵⁶.

CHIS very much welcomes the changes that the ASA and DMA have made. Perhaps this will help kick start a wider discussion about age and the internet because, otherwise, the changes may well turn out to be based on a chimera.

If sites do not know, and in effect refuse to know, the real ages of their members or users then in what sense can they be said

to be seriously concerned about ensuring that age inappropriate advertisements are never served up to children and young people or that they are properly obtaining informed consent from children and young people in relation to the associated data collection practices in which they engage?

Many social networking and similar free sites decided that children can become members only if they are aged 13 or above⁵⁷. There is no legal basis for this in UK law. It is simply a reflection of US Federal law⁵⁸. The same Federal law bestows legal immunity on sites for breach of the age rules providing only that the company does not have actual knowledge that a person is under 13. This law has had a chilling effect on innovation. It means these sites have no legal incentive at all to establish whether or not a given individual is under the age of 13. On the contrary they have every reason not to find out.

There is an argument which says that social networking sites should abandon all age limits or make clear that their limits are purely advisory. Indeed some smaller sites have never had age limits. There have also been suggestions that the big sites e.g. Facebook, should create specific areas for pre-teens. These are all interesting ideas which CHIS would happily discuss further but certainly in the Anglophone countries CHIS can see no immediate prospect of the current situation changing. Thus for the time being the debate will be constrained by and take place within the context of existing laws and practice.

Free sites know, or ought to know, that they have very large numbers of children and young people as members or users who have misrepresented their age solely to gain access or become members⁵⁹.

In the UK OFCOM has shown that 20% of all persons aged between 8 and 12 are members of one or other social networking

site which specifies 13 as its minimum age. In certain categories this rises to 25% of all persons aged between 8 and 12. In the USA studies have shown even higher levels of underage usage.⁶⁰

Even if these sites were to raise their minimum age level to 30 it would make no difference at all if they still refuse to verify or are incapable of verifying the age of anyone joining them.

A major debate took place in the USA in 2008-9 in which 49 States' Attorneys General banded together to try to get large social networking sites to introduce age verification for all users.

Because there was no commercial transaction involved in joining the site in the first place there were immense practical difficulties associated with this idea. However, many of the Attorneys had promoted the concept primarily as a way of ensuring that the sites would be able to keep out sexually predatory adults who might prey on children. A distinguished panel of experts, ably assisted by the University of Harvard⁶¹, showed how age verification could never guarantee such an outcome and the proposal has since withered on the vine.

CHIS agreed with the experts' and Harvard's view. Age verification has a very narrow, specific role and value in the online space. It ought not to be overburdened with expectations it can never hope to fulfil.

Is "free" too high a price to pay?

In the end the so-called free services are almost invariably supported by advertising which, in turn, depends on actual sales being made somewhere along the line. The use of the word "free" is therefore in some sense deceptive.

“Free” creates, or tries to create, the impression that there is at some level a philanthropic or altruistic mission underpinning the service being provided. Perhaps there was at an early point in a given company’s history but, as the annual sales revenues and market capitalization of some of the enterprises concerned demonstrate, that long since ceased to be the case. These firms are very successful businesses. They have simply found another way of bringing in the revenues. However, there is another point of wider significance tied up in this notion of “free”. The companies that provide so-called free services consistently promote the view that precisely because their services are free they are entitled to be judged by standards which differ from those that are applied to companies which obtain their revenues in other ways e.g. through collecting a monthly or other subscription or through the direct sales of products or services.

In the first adjudication following her investigation of Facebook, the Canadian Privacy Commissioner acknowledged

We have accepted that a certain amount of advertising is something users have to agree to since use of the site is free and the company needs to generate revenue.

However, the Commissioner went on to say that the issue of consent still remains⁶².

Undoubtedly some latitude ought to be allowed for services which continue to be made available free at the point of use, but the reality is the currency being used is not cash but something else. It is personal information i.e. information about people’s tastes and interests that is likely to be of value to advertisers⁶³.

Should economic regulators start to insist that companies that operate over the internet and utilise the free model spell out

more clearly the commercial nature of their exploitation of the data rendered to them? This would certainly help those sites which genuinely are philanthropic or altruistic and who make absolutely no commercial or other use of a person’s data.

Alternatively would there anyway be any public benefit in promoting a wider discussion of exactly what scope or relaxation of the rules ought to be accorded to commercial enterprises which use free as their route to market?

As previously noted, data protection commissioners around the world have started to rein in some of the companies that have exploited the free model where issues around privacy and consent to use personal data have arisen⁶⁴. Might it now be timely for economic regulators with their responsibility for examining the operation of markets from the perspective of the wider public interest, to join or collaborate more fully or more wholeheartedly with data protection and privacy regulators and communities? Many of the issues are simply different sides of the same public interest coin.

The original predictions about commerce on the internet were that it would let “a thousand flowers bloom” i.e. each and every internet user would become a potential internet entrepreneur who would be in an identical position to everyone else vis-à-vis every potential market or customer. In the early days of the internet examples were cited of people making surf boards in Cornwall and selling them online to people living in Australia. In fact the internet’s “network effect” appears to have accelerated trends towards monopoly.

A comparatively small number of companies now dominate several important markets, not just in their own home territories but also globally. Google, and Facebook are perhaps the best known examples in their respective spaces.

Microsoft's wider dominance of the software market has been reinforced by the free provision of Internet Explorer. Google and Facebook in particular have achieved their degree of market dominance by using the free model as their "selling point". Moreover it seems possible that several online companies have deliberately made their terms of services extremely lengthy and difficult to understand, have made the controls they provide on their sites equally complicated or obscure, in order to encourage people, as with cookies, through consumer fatigue or perplexed frustration to opt for the default settings. These default settings typically are calculated to maximise the company's revenues. Using complexity to bamboozle consumers is common in many markets, but it is inexcusable in all of them.

The emergence of some new applications e.g. location based services suggests that addressing these issues is becoming urgent, particularly for children and young people⁶⁵.

Many of the companies that exploit the free model correctly point out that nobody compels anyone to use their services. However, in truth their businesses have established new paradigms. As their market dominance has grown so it has become entirely unrealistic to speak of anyone having a real choice about accepting their terms of service, much less seek to amend them.

The same companies point out that they would not succeed if they were not in some way or another meeting a real and proven need. This is also true, but only up to a point.

For one thing it is ridiculous to suggest these internet giants are passive in this process. They do not simply respond to signals from the market, although of course they do that as well. Through their own inventiveness, their own marketing

and advertising, their own investment decisions, they can establish new products and shape the expectations and norms which develop around them. In some schools the network effect operates to make it more or less impossible for any child or young person *not* to be on the same social networking site as everyone else in the school.

Moreover if a company with, say, 600 million users worldwide finds that everything is working well for 575 million of its customers it will probably think it is doing a great job and not feel under any great pressure to address the needs of the minority of 25 million who may be losing out or who may be putting themselves at risk in some way by using their service. Because it is very likely that this 25 million is spread all over the world, it is possible that in no single country will the numbers be large enough to attract a sufficiently large head of steam to claim the attention of national Governments or local regulators. Only the company has access to the global data about what is happening on their network. There is no global regulator or world governance body to whom they could be said to be truly accountable. No one outside the company need ever find out anything, or at least not for a long time. Yet it is very likely that within that notional 25 million will be persons drawn from any of several potentially vulnerable groups.

More added complexity

With social networking sites no payment is required to gain admittance or gain access to the key services being provided. As a result it is not possible to look at the question of children's and young people's use of free sites in the same way as one can where the sale of an age restricted product or service is at issue. The child or young person is not buying anything as such. Yet with social networking and other free sites unquestionably children and

young people are moving into commercial environments.

In the UK there is no law which defines a minimum age when a child can lawfully act on his or her own behalf in terms of providing personal information about themselves to commercial and certain other kinds of third parties without reference to their parents or guardians.

Information Commissioner's Office

In the "Data Protection Guide" issued by the Information Commissioner's Office (ICO) it simply says

Consent must...be appropriate to the age and capacity of the individual and to the particular circumstances of the case.

In the "Personal Information online code of practice" the ICO develops the point⁶⁶

Age and understanding

Assessing understanding, rather than merely determining age, is the key to ensuring that personal data about children is collected and used fairly. Some form of parental consent would normally be required before collecting personal data from children under 12. You will need to look at the appropriate form for obtaining consent based on any risk posed to the child. You may even decide to obtain parental consent for children aged over 12 where there is greater risk. This has to be determined on a case by case basis.

The ICO has broadly stated what has long been considered to be best practice in the world of child protection and child welfare i.e. that determining the child's actual level of understanding is the key test in a

great many situations. It is a subjective test which should be applied case by case, child by child. However:

- i) By referring to the age of 12 in the way it appears in the text the ICO has in effect established 12 as the minimum age for the UK. "Spotify" uses 12 as its minimum age in the UK. In the new ASA and DMA Codes 12 remains the minimum age referred to for the collection of data without "first obtaining the consent of the child's parent or guardian". However within the IAB code 13 is specified as the minimum age for which online behavioural advertising is considered appropriate⁶⁷. The collection of data and advertising are not co-terminus but it looks a little odd that a company seemingly can collect data from 12 year olds without parental permission but cannot then target advertising towards them until they are a year older. What are they doing with the data in that case?
- ii) The ICO is giving a counsel of perfection that is of no practical help at all on the internet. CHIS is not aware of a single company or organization of any kind anywhere in the world where, over the internet, subjective assessments are routinely made of an individual's capacity to understand the nature of a transaction being put to them as a prelude to determining whether or not to engage with that person or provide them with a product or service.

Other countries

By contrast in some countries, Spain⁶⁸ and the USA⁶⁹ for example, laws have been passed which create a much clearer

position in some important respects. These laws say that in a number of settings, including all commercial ones operating over the internet, third parties cannot knowingly solicit, collect or store any personal information from a child below the ages of 14 and 13 respectively without first obtaining verified consent from the child's parent or guardian.

Whatever their original intention, as with 12 in the UK, the laws in Spain and the USA seem to have been interpreted as establishing a minimum age at which children can act on their own behalf when engaging in a very wide range of online activities. *Mutatis mutandis* they have also become woven into the closely related debates about children's and young people's online privacy and safety, their exposure to advertising and the world of commerce more generally. Perhaps there are clear lines of demarcation which can be drawn between these admittedly conceptually quite distinct concerns but the argument seems almost theological in nature. Better to have a consistent and clear standard that works seamlessly. The alternative, complexity, invites loopholes into which many will jump.

Blunt and crude though it may be, in relation to the internet, CHIS can therefore see no alternative but to follow the example of the USA and Spain. A minimum age should be specified and given the force of law in the UK. Exactly what that age should be ought to be the subject of consultation and, if necessary research⁷⁰. It may turn out to be somewhere around 12 – 14. On the other hand, as previously noted, in the context of some practices the ASA has chosen 16 and the DMA has designated 18⁷¹.

There is no suggestion that changing or creating a law for the purposes of the internet or other remote environments need have any impact at all or change the law in

any situation where the child is visible to and in the presence of the vendor of a product or would be provider of a service. In those instances the current rules would still apply.

Either way, in matters such as these companies need clarity and consistency. The current state of the law in the UK is anything but that in relation to the internet.

However, notwithstanding any decision that might be taken about the appropriate minimum age at which children and young people can act on their own behalf in data transactions of different kinds, without a means of verifying it online the outcome may not change much in practice.

A number of countries have developed large scale systems which are used to verify age online e.g. Germany and Belgium. These and others are discussed more fully in a paper prepared for the Spanish Data Protection Agency although in that paper there appears to be little or no focus on issues connected to the sale of age restricted goods and services⁷².

It is respectfully suggested that if the online sale of age restricted goods and services were to be resolved in a timely manner, it may generate insights or options which could be helpful in other, non-commercial environments or more widely on the free internet.

Chapter 4 Conclusions

Cumulative effects

It seems likely that the negative effects of the tensions, anomalies and misalignments of policy which have been highlighted in this submission will increase over time, further distorting markets or further promoting unfair competition, while continuing to put children and young people at risk. Both quantitatively and qualitatively the risks may even change or increase unless corrective action is taken.

Regulation and the internet

In a landmark study of “The Impact of the Commercial World on Children’s Wellbeing”, Professor David Buckingham and his associates found that

New media and marketing techniques raise some ethical concerns about potential deception and threats to privacy: the public is not currently well-informed about this area, and existing regulation is insufficient in some respects.⁷³

This is a view CHIS shares.

Industry has assiduously promoted the idea that it is very difficult to regulate the internet and that because of its highly devolved nature there is little or nothing that can be done anyway. That may have been true once, but it is far from being the case today.

A person living in the UK who hears of a new product announcement in, say, the USA or Japan may find they are not able to order it over the internet. Typically the vendor’s servers will detect the person’s IP address, realise immediately that they are physically located outside the territorial

borders of the USA or Japan and automatically put a block on completing the transaction.

Alternatively, in the case of certain physical goods, this will happen when the person provides details of where the product is to be delivered. The internet can be borderless, but only if you want it to be.

As the internet began to take off in the consumer space in the mid to late 1990s few Governments or regulators really wanted to jump in with strict or close regulation for fear of choking off growth in the new world economy that was rapidly opening up. Fewer still felt confident enough to challenge the powerful, rich companies and their highly technically literate spokespeople and lobbyists who were marketing the internet as a democratic agent of liberation, a symbol of modernity, an endless source of fun and games, culture, knowledge, even wisdom. The internet was the ultimate in “cool”. Doubters and critical questioners were dismissed or marginalized as fuddy duddy Luddites or spoilsports who “just didn’t get it”.

Today many aspects of how the internet works are more settled, even if innovation around the edges continues apace.

Certainly there are now lots more people, particularly in the public policy space, who can disentangle the hype from the reality, who understand or know enough about the technology and are more ready to query the claims and the business practices of internet companies, just as they would do any other industrial or commercial sector.

Up until now, around most parts of the developed world the notion of self-regulation of the internet has been the dominant idea. The advantages of self-regulation are self-evident⁷⁴ but what matters most to CHIS is obtaining the right result for children and young people,

rather than the mechanics of how that result is obtained.

In relation to many of the issues discussed here, up until now self-regulation has manifestly failed to deliver. For these reasons CHIS commends to the OFT the range of proposals made throughout this submission. The principal ones have been brought together and summarized in the section headed “Policy Proposals” in the last part of the Executive Summary.

In particular CHIS would like to draw attention to items 14 and 15 of the Executive Summary. There is a need for more research but perhaps more than anything there is a need for key institutions to engage.

The OFT should bring together or initiate a discussion with all of the relevant stakeholders with an interest in online commerce and its associated practices to focus specifically on the position of children and young people in relation to online commerce. These stakeholders are likely to include the Office of the Information Commissioner, Financial Services Authority, Advertising Standards Authority, Direct Marketing Association, Internet Advertising Bureau, Interactive Media in Retailing Group, British Retail Consortium, Trading Standards Institute, Association of Payments and Clearance Services, appropriate Government Departments, relevant academics and children’s organizations. It is also likely to be useful to involve appropriate EU institutions at an early stage as a prelude to evolving a wider strategy for engaging with a range of commercial and regulatory interests some of which are likely to be based or have their head offices in countries outside of the EU 27.

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Endnotes

¹18 is also the legal definition used in the UN Convention on the Rights of the Child, which is the cornerstone of international law in these matters.

²Age of Legal Capacity (Scotland) Act 1991 http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1991/cukpga_19910050_en_1. This allows, inter alia, for agreements made by 16 and 17 year olds to be set aside if they are “prejudicial transactions”.

³http://www.priv.gc.ca/speech/2009/sp-d_20090827_e.cfm

⁴See “Manifesto for a Networked Nation”, <http://raceonline2012.org/manifesto/1>

⁵The population of children and young people between the ages of 4 and 17 in mid-2009 was approximately 10 million. As such they constituted over 16% of the entire population of the UK. The numbers of persons aged 65 or above was about the same but only a proportion of those are likely to be classed as “vulnerable” within the commonly understood meaning of the word. <http://www.statistics.gov.uk/statbase/Product.asp?vlnk=15106>

⁶ These are also reasons for not taking too seriously the idea that contemporary concerns about children’s and young people’s use of the internet will eventually disappear as the current generation of youngsters become parents. The argument runs that today’s internet users will all be so aware of how the internet works they will all be able to provide a much greater level of support to their children as that future generation, in turn, starts to become internet users. Doubtless this will be true for some of today’s parents of the future, perhaps many. It is unlikely to be true for everyone and no one can know how the proportions will split. Technology changes but more importantly what is at issue here is not always or necessarily how much technical knowledge or internet experience a parent has, but what insights that parent has into their own or other people’s children’s and young people’s uses of the technology and also how good they are, as a parent, at communicating those insights in a useful and productive way.

⁷ http://www.lse.ac.uk/collections/children-go-online/UKCGO_Final_report.pdf

⁸http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ukchildrensml/
The use of the internet at school is now essentially universal. The use of the internet at home is upwards of 75% depending on the age of child or young person.

⁹http://ec.europa.eu/information_society/activities/sip/surveys/quantitative/index_en.htm

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http://www.oft.gov.uk/shared_ofst/consultations/eprotection/oft1253

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<http://www.statistics.gov.uk/statbase/Product.asp?vlnk=15106>

¹²“Benefits of home access to technology”, Kate Blewett, BECTa, October, 2009; A research study into the social effects of lack of internet access on socially disadvantaged children and families, ‘Ofcom: Children and the internet (2007)’ is available at Ofcom’s website www.ofcomconsumerpanel.org.uk/information/documents: A research project, ‘Digital Inclusion: A Discussion of the Evidence Base (July 2007)’ undertaken by FreshMinds for UK online centres www.ukonlinecentres.co.uk/downloads

¹³ <http://www.homeaccess.org.uk/>

¹⁴Scotland, Wales and Northern Ireland closely monitored the roll out and impact of this policy and are considering how it might be adopted in their education systems.

¹⁵For children with special needs

¹⁶ The social aspect was also always key. Children and young people without internet connections at home are easily identified and stigmatised in the playground as “the poor kids” or the “weird kids”. They are effectively excluded from a significant part of the social life of the school because they are not able conveniently or easily to make use of or engage with the social networking and other online services that almost everyone else is using in the evenings and at weekends.

¹⁷ In the FDS Report, page 30, section 4, it discusses attitudes and barriers to internet usage. Only 1% of non-users referred to fears about security and 7% to “not feeling confident”. 8% is significant when viewed in a national context, but of equal interest are the internet users who do engage in e-commerce. Table 5.1 shows very high levels of concerns about internet security, cons, viruses and so on. This suggests a degree of fragility in terms of a commitment to continuing to use the internet for e-commerce. The table also reminds us that, perhaps because of force of circumstances, a person can be a regular participant in e-commerce but nevertheless be a nervy or grudging one. This can also hold back the development of e-commerce. Finally there are some things which, for practical purposes, can now only be done on the internet e.g. booking low cost flights and holidays. A person might do that and nothing else. Good news for the travel industry but it does not necessarily betoken any wide growth in or engagement with e-commerce.

¹⁸<http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>

¹⁹IMRG/CapGemini Sales Index, September 2010, see <http://bit.ly/qzYHb>

²⁰ ¹“Consumer Kids”, Ed Mayo & Agnes Nairn, Constable & Robinson Ltd, London 2009, at pages 5 and 18.

²¹ <http://bit.ly/di9s5c>

²²<http://online.wsj.com/article/SB10001424052748703904304575497903523187146.html>

²³See “Myths and Fallacies of “Personally Identifiable Information”, Narayanan and Shmatikov, June, 2010, http://unescoprivadesa.urv.cat/media/_pdf/shmat_cacm10.pdf

²⁴ Owners of web sites visited by children and young people also point out that many of the trackers being used are installed on children’s and young people’s computers by third parties, not directly by themselves, implying they have little or no responsibility for them and not all trackers collect or provide information that would be of interest to advertisers.

²⁵ <http://www.youronlinechoices.com/wp-content/uploads/2010/07/IAB-UK-Good-Practice-Principles-for-Online-Behavioural-Advertising.pdf> at section 3.

²⁶

<http://www.virtualworldsnews.com/2007/08/disney-acquires.html>

²⁷http://ec.europa.eu/justice/policies/privacy/workinggroup/index_en.htm

²⁸ At the beginning of October, 2010, the IAB issued a draft code saying that cookies should automatically expire after 48 hours where a visitor to a web site had not actually made a purchase. The code was itself withdrawn within 48 hours. http://www.theregister.co.uk/2010/10/04/iab_cookie_advice/

²⁹ The Byron Review, 2008, page 20, para 1.21

³⁰ At page 15

³¹ See Appendices 2 & 3

³² <http://bit.ly/OhIEx>

³³ This was an understandable response, but it was nonetheless a knee-jerk. Some people e.g. persons with mobility problems or who live in remote areas, have come to depend upon the internet as a means of obtaining various goods and services and having them delivered to their door. If proper age verification systems were in place it would not have been necessary to stop selling these items online.

³⁴ “Beating the Odds”, Gamcare, September 2010

³⁵ Recently renamed “Action for Children”

³⁶ CitizenCard provides an age verification product

³⁷ Gamcare is a charity which helps individuals with problematic gambling behaviour such as addiction.

³⁸ With the exception of the National Lottery where the age is 16.

³⁹ The operation of the anti-money laundering rules also plays into the same space, reinforcing the need for gambling companies to carry out identity checks.

⁴⁰A copy of William Hill's policy statement is included as Appendix 4

⁴¹These are likely to be people who have just moved to the UK or persons with no credit history.

⁴² CHIS is aware of cases where children have "borrowed" a parent's credit card and created gambling accounts on which they have then spent their parent's money, but in these instances they have in effect been presenting themselves as their parent, and there is little or nothing any legislation can ever do about that. This is an example of a parent's carelessness or wilfulness allowing their identity to be abused or in effect aiding and abetting a crime. However, since the Gambling Act, 2005, what seems to have completely vanished from online gambling is the simple ruse of creating a false ID with a false age simply in order to get into a position where a child can place a bet.

⁴³ <http://www.brc.org.uk/pass/default.asp>

⁴⁴Indeed some companies already do this.

⁴⁵ <http://www.chis.org.uk/2009/08/15/evidence-to-home-office-review-on-the-sale-of-alcohol>

⁴⁶ In early 2010 Baroness Massey piloted a Private Member's Bill on online age verification through the House of Lords. It passed with all-Party support but in the end failed for want of time in the House of Commons.

⁴⁷ In fact some systems can complete the checks in about two seconds, or less.

⁴⁸ <http://www.lbro.org.uk/docs/age-restricted-products-report.pdf>

⁴⁹ Although an alternative would be to require people to call in at the shop first or some other real world environment to complete an authentication process which could later be used online.

⁵⁰ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/980&format=HTML&aged=0&language=EN&guiLanguage=en>

⁵¹There are also other forms of remote payment mechanisms available which could similarly be

exploited to facilitate illegal sales but a discussion of them is outside the scope of this submission.

⁵² <http://www.brc.org.uk/policymaster04.asp?id=541&sPolicy=DISTANCE+SELLING>

⁵³But see the research published by the Wall Street Journal, reported above on page 10.

⁵⁴For example those administered by Phonepay+
⁵⁵ "Fair Game", report of Childnet International and the National Consumer Council, 2007, <http://www.childnet-int.org/downloads/fair-game-final.pdf>

⁵⁶See <http://www.bbc.co.uk/news/technology-11140676> and <http://www.dma.org.uk/membership/mem-code.asp>

⁵⁷Or 12 in the UK in the case of Spotify.

⁵⁸Children's Online Privacy Protection Act of 1998(COPPA)

⁵⁹ (2009). European Online Safety Survey [online]. Available: <http://www.microsoft.com/Ofcom> (2009b). UK Children's Media Literacy: 2009 Interim Report. London: Ofcom [online]. Available:

http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/uk_childrensm/full_report.pdf [17 November, 2009].

Lloyd, K. and Devine, P. (2009). The Net Generation (Research Update No 62). Londonderry: Access Research Knowledge [online]. Available: <http://www.ark.ac.uk/publications/updates/update62.pdf> [28 October, 2009]. and http://safekids.com/mcafee_harris.pdf

⁶⁰ http://safekids.com/mcafee_harris.pdf

⁶¹ <http://cyber.law.harvard.edu/research/isttf>

⁶²Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc., page 7, para 14. http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm

⁶³See above WSJ article, page 10

⁶⁴ http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm#summary

⁶⁵ New apps which can pinpoint an individual's physical location are starting to emerge. Location is an aspect of behaviour and therefore will present new advertising and other opportunities to companies minded to exploit them. Typically the location apps work with mobile phones and these are extensively used by children and young people.

⁶⁶<http://bit.ly/9asP30>

See pages 15 - 17

⁶⁷ <http://www.youronlinechoices.com/wp-content/uploads/2010/07/IAB-UK-Good-Practice-Principles-for-Online-Behavioural-Advertising.pdf>
see section 3 "Sensitive Segments"

⁶⁸ Spanish Data Protection Authority, Agencia Espanola de Proteccion de Datos (AEPD) Handbook;
http://www.ibls.com/internet_law_news_portal_vjew.aspx?s=sa&id=1426

⁶⁹ Children's Online Privacy Protection Act of 1998 (COPPA): a law which was primarily aimed at protecting children from certain kinds of advertising but which, over time, became the de facto privacy standard which was adopted more widely.

⁷⁰ The ICO has no clear explanation as to why it chose 12 in the first place. It seems to have been inherited from the former Data Protection Authority (DPA). It is thought the DPA adopted 12 as a standard based on earlier experience with "special offers" that were frequently mounted by breakfast cereal companies. These required a child to cut a coupon out of the box, fill it in and send it back in return for receiving, say, a plastic soldier or an animal. Basing policy on this leisurely model from the 1950s may not be appropriate for age of rapid mouse clicks ushered in by the internet age.

⁷¹ http://bcap.org.uk/The-Codes/CAP-Code/CAP-Code-Item.aspx?q=CAP+Code+new_General+Sections_10+Database+practice_Rules_Children paras 10.15 and 10.16 and
http://www.dma.org.uk/attachments/resources/45_S4.pdf paras 2.17, 8.25, 19.30 and 19.31

⁷² "Online Age Verification for Our Children", Jules Polonetsky, [http://www.futureofprivacy.org/wp-](http://www.futureofprivacy.org/wp-content/uploads/2009/11/madrid-presentation-online-verification1.pdf)

[content/uploads/2009/11/madrid-presentation-online-verification1.pdf](http://www.futureofprivacy.org/wp-content/uploads/2009/11/madrid-presentation-online-verification1.pdf)

⁷³ <http://bit.ly/bTyNjQ>, at page 3

⁷⁴ Self-regulation has worked extremely well in the UK in relation to controlling access to known URLs containing child abuse images. According to OFCOM 98.6% of all UK domestic broadband users belong to an ISP which deploys a blocking list which has been produced by the Internet Watch Foundation.

Appendix 1

List of age restricted goods and services

The list given below is based on an extract from “Better Regulation of Age Restricted Products: A Retail View” a report prepared by the Business Reference Panel of the Local Better Regulation Office and published on 25th August, 2010¹.

Alcohol	18	Tobacco	18
Aerosol spray paints	16	Knives	18
Caps	16	Fireworks	18
Solvents	16	Butane gas lighter refills	18
National Lottery	16	Petrol	16
Video tapes & DVDs	12, 15 & 18	Party poppers	16
Air guns & imitation firearms	18	Pets	16
Cracker snaps	16	Crossbows	17

The report was prepared by retailers and therefore focuses on physical products on sale in their shops. For a complete picture it would be necessary to add on firearms, gambling and other items e.g. premium rate services supplied over mobile phone networks, where there is a regulatory requirement to comply with specified age limits.

Computer games can also be rated 18 but following a recent change in the law some will also be given legal limits of 12 and 15, thus bringing them into line with films sold on video tapes and DVDs

In Scotland allowing the sale, hire or use of sun beds or other electrically powered UV tanning equipment is limited to persons over the age of 18, and skin piercing is limited to persons aged 16 or above unless written permission is provided by a parent or guardian or a parent or guardian is present. In Scotland there also seems to be scope for local authorities to extend the range of products or services which may not be sold to minors. See for example the Angus Age Restricted Products code² which includes, for example, catapults, accessories to smoking, amyl nitrate, adult magazines, adult CDs with parental warnings.

¹ <http://www.lbro.org.uk/docs/age-restricted-products-report.pdf>

² http://www.angus.gov.uk/services/View_Service_Detail.cfm?serviceid=1398

Appendix 2

Press release

Online underage knife sales - project results released

Southwark Trading Standards is a top performer in underage sales enforcement and has been commended for its innovative Knife Charter for retailers. We now have one of the best compliance rates for underage sales of knives in the capital and were shortlisted for a Public Protection Achievement Award in the 2009 Municipal Journal Awards.

In light of these successes we joined efforts with Lambeth Trading Standards to win a bid for funding to carry out a project investigating the underage sale of knives on the internet. The project was supported by LoTSA (London Trading Standards Authorities), the Home Office and GOL (Government Office for London). The project results were released in July 2009.

Results

Out of 44 UK based online retailers tested over a three month period, 41 sold and delivered knives to our underage volunteer test purchasers - a non compliance rate of 93 percent. This contrasts sharply with the results of 829 underage test purchases carried out in shops across the capital by London trading standards authorities. These resulted in 113 sales - a non-compliance rate of 19 percent.

Although other trading standards authorities have previously attempted to purchase knives on-line using under 18s, it had never before been attempted to buy from such a wide range of online sellers throughout the country.

Key features of the project

Each attempted purchase involved a young person aged either 14 or 15 being overseen by a parent and a Trading Standards Officer.

They used prepaid cards which they had registered by submitting their true names and ages.

The transaction of selecting and ordering a knife was recorded electronically.

The young people did not misrepresent themselves during the transactions other than to check boxes confirming that they were over 18 or, if required during the order process, by stating an age which indicated they were over 18.

Methods used by the three companies who refused to sell consisted of a phone call or email requesting proof of age. In one instance this was prompted by an initial electoral register check.

In one case, even though evidence was requested, the sale proceeded even though the proof of age was not supplied.

The cards used in this project were available to anyone over the age of 13 and obtained using the applicant's true identity and age. At the outset of this project it was anticipated that many sales would not be processed because the card would flag up the age of the purchaser. This only happened in one of the 44 transactions attempted.

Report conclusions

It is particularly difficult to ensure compliance with proof-of-age laws when sales are made across the internet and face to face contact is lost.

Whilst the majority of traders had age warnings on their site, only 3 out of 44 carried out positive age checks that prevented the sale from taking place.

Appropriate age checks can be made by on-line traders for as little as 50p per transaction using readily available software.

Many of the retailers tested have stated that they were unaware that the pre-payment card used was available to under 18s and awareness needs to be raised in this area.

As it is becoming harder for young people to buy knives from retail premises they may turn to online sales as an easier option where controls are less stringent and there is a wider and more "impressive" choice.

Continuous trader advice and test purchasing at high street retailers has seen a dramatic fall in the underage sale of knives from such outlets. If online retailers adopt appropriate age checking mechanisms they could almost eliminate under age sales from taking place.

Next steps

The online retailers that made illegal sales have now all received informal warnings and advice. Further test purchases may be undertaken and if sales re-occur they could be prosecuted.

The report findings have now been passed to the Home Office with a view to working with stakeholders to tackle the issues raised.

Appendix 3

Embargoed to Friday 8 May 2009

Greenwich operation spotlights weakness in online protection for children
Lax measures by companies selling age-restricted goods online could be putting children at risk, Greenwich Council has discovered.

In a shocking revelation of the weaknesses in current protection measures, Greenwich discovered how easy it was for a 16-year-old to buy knives, adult-rated DVDs, violent computer games and alcohol.

In an operation supervised by Council trading standards officers, the 16-year-old volunteer went online and successfully purchased the following items:

- Knives from Debenhams, Amazon, Choice and Tchibo
- Age-restricted games for PS2 and PCs from HMV, Play.com and Game
- Age-restricted DVDs from Argos and Play.com
- Alcoholic drinks from Drinksdirect, M&S, Oddbins, Laithwaites

He made the purchases having bought a prepaid Splash maestro card and a MasterCard gift card from local retailers. Both cards were registered with his real date of birth and address. He then went online to buy the age-restricted goods.

Website capturing software was used to record the purchase of these age restricted products. 13 out of 16 (81%) of the online retailers in the Council's operation sold to the young person with no further checks at the point of delivery. The others made pre-delivery calls to the home and the council did not test whether an age restriction.

Only three of the online retailers asked the young volunteer to confirm his age at the time of making the online purchase – and he simply got round the system by giving false information, with no requirement to provide documentary proof of his age. Other sites merely declared that buying the goods was taken as a declaration that the person purchasing was 18 years or over.

Cllr Maureen O'Mara, Greenwich Council's cabinet member for neighbourhood services, said, "This operation seems to show the danger to which young people can be exposed on the internet. Many companies appear to be doing little or nothing to determine whether or not the people they are selling to meet the minimum age requirement."

Greenwich Council has written to all those firms who sold the restricted goods. The Council does not plan further action in relation to these offences.

ENDS

Appendix 4

William Hill's policy statement, copied from their web site.

"It is illegal for someone who is under 18 years of age to gamble.

In order to avoid unlawful betting, William Hill reserves the right to carry out checks to verify the information provided. We may undertake a search with a third party for the purpose of verifying that you are 18 or over.

Where these checks are unable to verify any customer is 18 or over, William Hill reserves the right to ask for proof of age. Customer accounts may be suspended and funds withheld until satisfactory proof of age is provided. The legal gambling age varies according to country, we advise you to carry out local research.

To prevent potential misuse if young people have access to a computer with Internet access please keep your account number, user name and password confidential.

For more detailed information on William Hill's Age Verification measures, please [click here](#)."