

Consultation on the sexual portrayal of under-18s in advertising

Committee of Advertising Practice and Broadcast Committee of Advertising Practice's proposals for new rules

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1. Executive summary

The Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) and the Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (the BCAP Code), are consulting on proposals to introduce rules prohibiting the sexual portrayal or sexual representation of under-18s (or those who appear to be under 18¹) in advertising.

CAP and BCAP consider that premature sexualisation and its links to harm, when considered alongside national and international measures prohibiting certain types of sexual depiction of under-18s, mean that the new rules are a necessary and proportionate strengthening of existing rules to protect the welfare of under-18s. CAP and BCAP's proposal is about the potential for some adults to view under-18s in general as sexual beings or the potential for under-18s to be pressurised to view themselves as sexual beings. The proposal is also concerned with the protection of the individual models featured in advertising.

The Advertising Standards Authority (the ASA), which enforces the CAP and BCAP Codes, already has the interpretive power to deal with inappropriate and sexual images of 16 and 17-year-olds, but without a specific age-related prohibition, advertisers have no explicit signal not to include such imagery and no certainty as to what images are likely to be acceptable. The proposed rules will allow CAP and BCAP to provide adequate protection to vulnerable people while ensuring that advertisers have greater certainty on the types of imagery that they may include in their advertising without running the risk of regulatory intervention. An exemption for ads promoting the welfare of under-18s or aimed at preventing harm to them has also been proposed to allow the ASA the discretion to ensure that responsible advertising does not fall foul of the rules. An example of this type of ad would be an ad that sought to promote sexual health in 16 or 17-year-olds.

This document sets out the following:

- the role of CAP, BCAP and the ASA in UK advertising regulation;
- CAP and BCAP's policy objectives, particularly those concerning the protection of under-18s;
- the existing regulation of sexualised imagery in advertising;
- the reasons for CAP and BCAP's decision to consult;
- the proposed amendments to the CAP and BCAP Code; and
- the process by which CAP and BCAP will conduct this consultation.

¹ For the sake of brevity, expressions such as "under 18, or seem to be under 18" have been shortened to "under 18". The proposals relate to both the age of those featured in ads and their apparent age.

Finally, respondents are asked to indicate whether they agree with CAP and BCAP's proposed rules and to provide any evidence or reasoning in support of this.

The consultation will close at **5pm on 19 January 2017**. For more information on the next steps, please see section 7 and, for full details of how to respond to the consultation, please see Annex 2.

2. Introduction to UK advertising regulation

2.1 The Committee of Advertising Practice (CAP)

CAP is the self-regulatory body that creates, revises and enforces the [CAP Code](#). The CAP Code covers non-broadcast marketing communications, which include those placed in traditional and new media, promotional marketing, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from rulings by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those organisations agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained.

By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including [Directive 2005/29/EC](#) (on misleading advertising). Self-regulation is accepted by the Department for Business, Energy and Industrial Strategy and the courts as a first line of control in protecting consumers and the industry.

Further information about CAP is available at www.cap.org.uk.

2.2 The Broadcast Committee of Advertising Practice (BCAP)

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising ([the BCAP Code](#)) under agreement with the [Office of Communications](#) (Ofcom). Ofcom has a statutory duty, under the [Communications Act 2003](#), to maintain standards in TV and radio advertisements. In 2004, Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in recognition of CAP and the ASA's successful regulation of non-broadcast marketing for over 40 years, and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to adhere to the standards set out in the BCAP Code.

BCAP members include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). Under Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule-making is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Further information about BCAP and the AAC is available at www.cap.org.uk.

2.3 The Advertising Standards Authority (ASA)

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertising is legal, decent, honest and truthful.

The ASA assesses complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the [ASA's website](http://www.asa.org.uk) and made available to the media. If the ASA Council upholds a complaint about an ad, it must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions.

Information about the ASA is available at www.asa.org.uk.

2.4 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The [Communications Act 2003](#) (the Act) sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this consultation are:

[319\(2\)\(a\)](#) that persons under the age of eighteen are protected;

[319\(2\)\(h\)](#) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The Act requires Ofcom to set and, from time to time, review and revise, a Code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#).

Ofcom has contracted out the setting of advertising standards to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and Specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and agreement of Ofcom.

3.2 Audio-Visual Media Services Directive (AVMS)

[AVMS](#) revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only, whereas AVMS has extended the Directive's application to some on-demand services. Article 9(g) provides, under "*Provisions applicable to all Audiovisual Media Services*" that (emphasis added):

*(g) **audiovisual commercial communications shall not cause physical or moral detriment to minors.** Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.*

4. Policy background

4.1 General policy objectives

CAP and BCAP's general policy objective is to set standards to ensure that all advertisements are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility. Additionally, BCAP's general policy objectives accord with those of the Communications Act 2003 noted in 3.1 (above).

CAP and BCAP intend their Codes to be based on the enduring principles that advertisements should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. They seek to maintain an environment in which responsible advertising can flourish. The rules are intended to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.

4.2 Sexual portrayal under the CAP and BCAP Codes

BCAP rule 5.5 provides that:

Advertisements must not portray or represent children in a sexual way.

Under section 5 of the BCAP Code (and III.i. of the Introduction to the CAP Code), "a child is anyone under 16". There is no equivalent CAP Code rule to BCAP rule 5.5. BCAP rule 5.5 is a legacy provision which pre-dates the regulation of broadcast advertising by the ASA/BCAP; CAP and BCAP are not aware of any available information which sets out the policy rationale for the rule's introduction. However, CAP and BCAP consider it is reasonable to infer that the ban on portraying under-16s in a sexual way might have derived from the fact that portraying under-16s in a sexual way is likely to be objectionable to prevailing standards in society and might be depicting unlawful activity

The CAP Code and the BCAP Code offer a range of protections for individuals of various age-related groups which ensure that marketing communications do not do anything that is likely to result in harm. The Codes recognise in several sections that protections are afforded to people at different ages as their credulity, experience and vulnerability changes. However, in areas where there is not a specific rule but the ASA nonetheless considers that a marketing communication is irresponsible or harmful to an individual of any age, it currently has the freedom to uphold under BCAP rule 1.2 and CAP rule 1.3 which require marketers to prepare their marketing communications with a sense of responsibility to society. So, it is open to the ASA to uphold complaints about advertising which portrays over-15s in a sexual way but such advertising would not *automatically* breach the Codes; similarly, it is open to the ASA to uphold complaints about non-broadcast advertising that portrays under-16s in a sexual way, despite there being no express rule to this effect.

For non-broadcast ads, the ASA is not obliged to uphold complaints about sexual portrayal purely on the basis of the age of the people featured in the ads. The ASA would look at the degree of sexualisation and other factors: a youthful appearance

would be one factor that would be taken into account in assessing the overall impression of the ad; other factors, such as a vulnerable appearance or suggestion of coercion to be in a certain pose or act in a certain way, would be taken into account. For broadcast ads, the same approach would be taken except in cases where the person featured was, or appeared to be, under 16: such ads would automatically breach BCAP rule 5.5.

The proposed rules would mean that in cases where the people featured were under 18, and portrayed in a sexual way, the degree of sexualisation or any aggravating factors, such as vulnerability or coercion would not be assessed: any sexual portrayal – however mild – of someone under 18 would automatically breach the Codes. Similarly, the proposed rules would not allow for mitigating factors to be taken into account. Such factors might include sexual imagery in a broadcast ad being fleetingly shown or being tangential to the main narrative of the ad; or in a non-broadcast ad, sexual imagery not being a significant feature.

4.3 ASA casework on sexual portrayal

The majority of ASA casework involving sexual imagery is concerned with children seeing sexualised images that are inappropriate for them to see, owing to the level of sexualisation of the image, as opposed to the age of those featured in the advertising. The ASA receives very few complaints about sexualised imagery based solely on the age of the person featured in the ad.

In March 2016 the ASA Council considered complaints about two online ads featuring a young female model; it [upheld](#) both complaints under the harm and offence and social responsibility rules, because the ads “portrayed a model who appeared to be a child in a way that was sexually suggestive and could be perceived as vulnerable”. The images featured a model aged 21, but presented, arguably, as looking younger. The ASA Council considered whether the images and poses in the ads were sexually suggestive and thereby sexualised someone who appeared to be under 16. The upheld ruling turned on 3 factors:

- whether or not the images were sexualised, or sexually suggestive;
- the *actual* age of the model; and
- the *apparent* age of the model (regardless of actual age).

CAP and BCAP are not aware of examples of complaints received relating to the age of the person being portrayed in a sexual way where the age, or apparent age, of that person was 16 or 17 or that they appeared to be 16 or 17. The few complaints received about sexualisation on grounds of age will either refer to “children” or to the person featured being “young” or “too young”. In assessing these complaints, age will be one factor considered alongside other factors, as set out in section 4.2.

Given that there is no set definition of “sexual imagery”, the ASA takes decisions on a case-by-case basis. In doing that, it will consider complaints about sexual imagery

in light of any new evidence it has received about the public's views, seeking to reflect the opinions of society rather than create its own standards².

Annex 1 sets out the approach the ASA takes to determining whether imagery is sexual in nature and some examples of the sort of imagery that might prompt closer examination. These guidelines were drafted in relation to sexualised imagery in outdoor advertising but provide a useful indication of how the ASA might assess material that engages the new rules proposed by CAP and BCAP.

² See for example the ASA's *Public perceptions of harm and offence in UK advertising 2012*, conducted by Ipsos Mori, which examined respondents' views on, amongst other things, sexual content: <https://www.asa.org.uk/~media/Files/ASA/Misc/ASAHarmOffenceReport.ashx>

5. CAP and BCAP's decision to consult

5.1 Introduction

CAP and BCAP consider that premature sexualisation and its links to harm (including findings by two significant Government-commissioned independent reviews³), when considered alongside national and international measures prohibiting certain types of sexual depiction of under-18s mean that the new rules are a necessary and proportionate strengthening of existing rules to protect the welfare of under-18s. CAP and BCAP's proposal is about the potential for some adults to view under-18s in general as sexual beings or the potential for under-18s to be pressurised to view themselves as sexual beings. The proposal is also concerned with the protection of the individual models featured in advertising.

The ASA already has the interpretive power to deal with inappropriate and sexualised images of 16 and 17-year-olds, but without a specific age-related prohibition, advertisers have no explicit signal not to do this and no certainty as to what images are likely to be acceptable. The proposed rules will allow CAP and BCAP to provide adequate protection to vulnerable people while ensuring that advertisers have greater certainty on the types of imagery that they may include in their advertising without running the risk of regulatory intervention. An exemption for ads promoting the welfare of under-18s or aimed at preventing harm to them has also been proposed to allow the ASA the discretion to ensure that responsible advertising does not fall foul of the rules. An example of this type of ad would be an ad that seeks to promote sexual health in 16 or 17-year-olds.

5.2 Research into premature sexualisation

Premature sexualisation is a subject to which researchers perennially return. The Bailey Review⁴ noted that a significant contributor factor in pressurising children to grow up was the pressure to take part in a sexualised life before they were ready to do so; it found that advertising played a role in this.

5.3 Legal context

There are several relevant legal provisions which relate to the protection of under-18s, some concerning harm connected to sexualisation or sexual activity.

³ Reg Bailey's *Letting Children Be Children, Report of an Independent Review of the Commercialisation and Sexualisation of Childhood 2011* (the Bailey Review) and Linda Papadopoulos's *Sexualisation of Young People Review 2010* (the Papadopoulos Review)

⁴ See above footnote

Section 45 of the Sexual Offences Act 2003 contains an offence of taking or making an indecent⁵ photograph of a 16 or 17-year-old; it raised the definition of “child” that appeared in the Protection of Children Act 1978 from under 16 to under 18. This provision expressly provides additional protection for young people aged 16 and 17 from having indecent imagery taken of them and distributed; although it is directed at a more serious degree of harm than the sexual portrayal in advertising, the harm falls into the category of premature sexualisation.

The Government premised its case for the additional protection provided by section 45 on the existence of international instruments which afforded certain protection to children at the higher age. During the debates on the Sexual Offences Bill 2003, as it then was, there was “almost universal consensus”⁶ that 18 was the more appropriate level. Dominic Grieve MP, the then shadow Home Secretary stated:

I do not find anything philosophically wrong in providing restrictions on what is permissible with a child under eighteen, even though I may be perfectly content and comfortable with the idea that sixteen is the age of consent. [These] two things are very different⁷.

CAP and BCAP share this view, and consider that the age of consent – currently set at 16⁸ – governs private acts between individuals and should not be determinative of the age at which CAP and BCAP prohibit the sexual portrayal of children to the public through advertising. The changes resulting from section 45 of the Sexual Offences Act 2003 (largely unopposed during their passage through Parliament) show that Parliament does not consider the age of consent to be determinative in matters involving the sexual portrayal of children. While acknowledging the law’s focus on indecency, CAP and BCAP consider that introducing express protection for 16 and 17-year-olds from sexual portrayal in advertising mirrors the law in this area more closely than if they were to provide express protection for under-16s only.

Directive 2011/92/EU (on combating the sexual abuse and sexual exploitation of children and child pornography) and the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse both define a child as “any person below the age of 18 years”. Again, both provisions look at a more serious form of harm but, nonetheless, one involving the sexualisation of under-18s; both demonstrate further the difference in treatment between the age at which people can consent to sexual intercourse and the age at which they can be depicted in a sexual way.

⁵ The word “indecent” is not defined but associated Home Office guidance refers to imagery that would be grossly offensive, obscene, or show genitalia or a person under 18 involved in a sex act for the purpose of sexual arousal.

⁶ Gillespie, A. 2011 London: Routledge. *Child Pornography: Law and Policy*. p.43

⁷ Hansard, Standing Cttee B Debates, 18 September 2003, col. 248

⁸ Section 9 of the Sexual Offences Act 2003 sets the general age of consent for sexual intercourse at 16. However, it should be noted that this is subject to an exception relating to individuals who are in a position of trust towards a person aged 16 or 17: it is illegal for them to have a sexual relationship with the younger party.

6. Proposed new rules

6.1 CAP Code

CAP proposes to include a new rule in Section 4 (“Harm and offence”):

4.6 Marketing communications must not portray or represent anyone who is, or seems to be, under 18 in a sexual way. However, this rule does not apply to marketing communications whose principal function is to promote the welfare of, or to prevent harm to, under-18s, provided any sexual portrayal or representation is not excessive.

6.2 BCAP Code

BCAP proposes to re-locate rule 5.5 to Section 4 (“Harm and offence”) and amend it in the following way:

4.4 Advertisements must not portray or represent ~~children~~ anyone who is, or seems to be, under 18 in a sexual way. However, this rule does not apply to advertisements whose principal function is to promote the welfare of, or to prevent harm to, under-18s, provided any sexual portrayal or representation is not excessive.

Questions:

1. Do you agree or disagree with the introduction of CAP rule 4.6 and BCAP rule 4.4? Please provide any relevant evidence or reasoning in support of your answer.
2. If you do not agree with the introduction of these rules, do you agree with the introduction of rule in the CAP Code to prevent the sexual portrayal or representation of under-16s? Please provide any relevant evidence or reasoning in support of your answer.

7. Next steps

CAP and BCAP are committed to considering all responses carefully and with an open mind.

CAP and BCAP would particularly welcome responses from stakeholders with an interest or expertise in the protection of children. Responses have been invited from a cross-section of interested parties representing both consumers, industry and charities.

The following summarises the consultation process and subsequent stages of CAP and BCAP's consideration of the proposed changes to the Code:

- the consultation will run for X weeks, closing at **5pm on 19 January 2017**
- CAP and BCAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions they make; and
- the evaluation will be published on the CAP website when the outcome of the consultation is announced.

Annex 1: The ASA's approach to sexual imagery

The following sets out a non-exhaustive description of how the ASA will determine whether images used in advertising are sexual in nature. This provides a useful reference point for the types of material that might be affected CAP and BCAP's proposal.

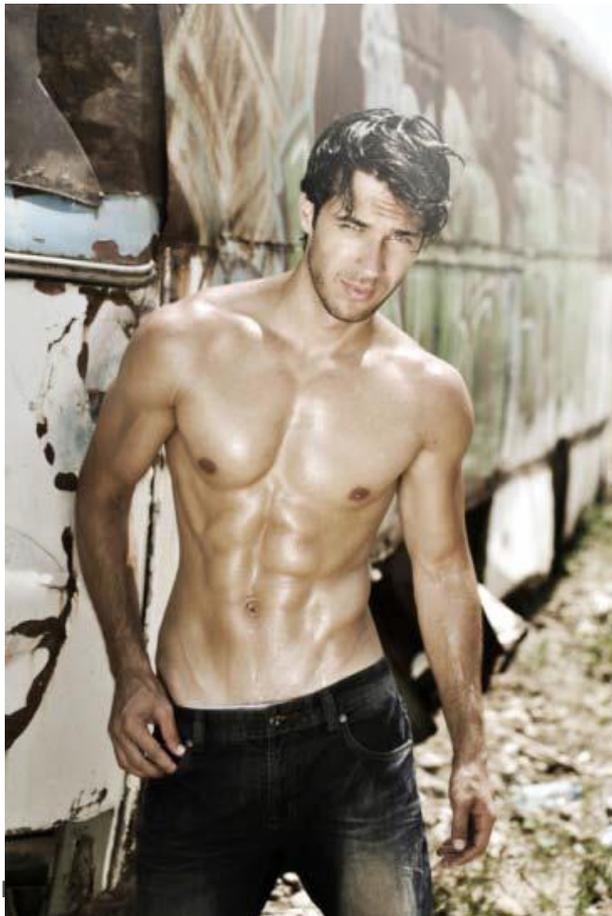
How the ASA will judge complaints

When considering complaints the ASA will take into account:

- the nature of the product advertised;
- the context of the ad and its location;
- the medium in which the ad appears, including the size of the advertisement;
- the audience; and
- the likely response of that audience.

Examples

Images that are not sexual, or no more than mildly sexual:





The second model is wearing a bikini and holding a pose which is unlikely to be considered to be sexually suggestive. Similarly, the first image shows a topless male model, but again his pose is unlikely to be considered sexually suggestive. Images in outdoor ads similar to these are likely to be seen as no more than mildly sexual.

Images that are sexually suggestive

However, the following images might be viewed as sexually suggestive. The woman in the first image is shown with her legs astride, drawing attention to her groin area, and the woman in the image on the right is shown both in sexy lingerie and in a seductive pose.



The couple in the image below are clothed, a mitigating factor, but they are shown in a passionate clinch, suggestive of sexual interaction.



Overtly sexual images

The following images are likely to be deemed overtly sexual. In the first image, a woman in lingerie pulls down the side of her knickers and bra strap in an overtly sexual and seductive way. In the second image, the couple are engaged in an overtly sexual embrace: the lingerie, clinch and facial expressions add to the overall impression.



Key questions the ASA may consider

Although not exhaustive, characteristics that the ASA might consider sexually suggestive or overtly sexual are:

- Poses suggestive of a sexual position: the parting of the legs, accentuation of the hip etc.
- Amorous or sexually passionate facial expressions
- Exposure of breasts, including partial
- Poses such as hands on the hips, gripping of hair in conjunction with a sexually suggestive facial expression
- Images of touching oneself in a sexual manner, such as stroking the legs or holding/gripping the breasts
- Suggestion in facial or bodily expression of an orgasm
- Images of suggestive undressing, such as pulling down a bra strap or knickers
- Ads which draw undue attention to body parts, such as breasts or buttocks, in a sexual way
- Ads which show people in poses emulating a sexual position or alluding to sexual activity
- Overtly sexual lingerie such as stockings, suspenders or paraphernalia such as whips and chains.

Annex 2: Responding to this consultation

How to respond

CAP and BCAP invite written comments, including supporting evidence, on the proposals contained in this document, by 5pm on 19 January 2017.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing.

Please send your response to U18sportrayal@cap.org.uk

If you are unable to reply by email, you may submit your response by fax (+44 (0)20 7242 3696) or by post:

Sexual Portrayal of Under-18s Consultation Regulatory Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. In their evaluation document, CAP and BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be attributed to you. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

Contact us

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