

## SECTION 10: DATABASE PRACTICE

**Question 32: Given CAP's policy consideration, do you agree that rules 10.15 and 10.16, relating to the collection of information from children, should be included in the Code? If your answer is no, please explain why.**

<p><i>Responses received in favour of CAP's proposal from:</i></p> <p>ASDA; AIME; Charity Law Association; E.ON; Enable; IPA; Institute of Sales Promotion; Mobile Entertainment Forum; Redcats (Brands) Ltd</p> <p>Two individuals</p> <p>Two organisations</p>	<p>ASDA: Yes E.ON: Yes Enable: Yes IPA: Yes Redcats (Brands) Ltd: Yes</p> <p>Two individuals: Yes Two organisations: Yes</p> <p><i>Summaries of significant points:</i></p> <p>1.<i>AIME and the Institute of Sales Promotion:</i> Agreed that the rules of CAP should reflect ICO guidance. Suggested each rule be qualified with "...must not knowingly as part of advertising or a promotion" in order to differentiate between CAP and ICO</p> <p>2. <i>MEF and Charity Law Association:</i> Agreed with the proposals but queried how a marketer can be confident of the age of its subscribers in order to comply with these rules.</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p>1. The Principle at the beginning of this section makes clear that these rules relate only to databases used for direct marketing purposes, and that those responsible for these databases are expected to comply. CAP considers that the distinction between its marketing-focused remit and that of the ICO is clear</p> <p>2. CAP considers that a marketer should endeavour to satisfy itself of the age of its subscribers. In the event of a complaint, the ASA would consider and potentially investigate whether the measures put</p>
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	MEF would like clear guidance on this matter.	<p>in place by the marketer were adequate.</p> <p>CAP will consider drafting Guidance at a later stage.</p>
<p><i>Responses received against CAP's proposal:</i></p> <p>Charity Law Association; Consumer Focus; Family &amp; Parenting Institute; ICO; PhonepayPlus Speechly Bircham LLP</p> <p>An organisation</p>	<p><i>Summaries of significant points:</i></p> <p>1. <i>An organisation:</i> Believed that as long as the child has gained the consent of the person about whom they are passing on details, this should be considered acceptable provided that the child is aged between 12 and 16 years.</p> <p>2. <i>Charity Law Association:</i> i) Considered that in using 'must' rather than 'should' in these rules, CAP is imposing a higher threshold than that imposed by the ICO.</p> <p>ii) Queried the remit of the rule i.e. whether it would apply to viral emails</p> <p>3. <i>Consumer Focus:</i> Noted that information must be collected in a</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p>1. CAP considers it is always inappropriate for marketers to knowingly collect personal information about other people from children under 16.</p> <p>2. i) Rules in the new Code state 'must', for example 'must not mislead'. Rules in the present Code state 'should'. 'Should' might imply that compliance with the Code is voluntary when it is not. The decision to use 'must' does not signify a substantive change; it merely removes ambiguity about the intent of the rules.</p> <p>ii) The rule applies to all marketing communications as set out in the introduction to the Code</p> <p>3. CAP considers that the general points covered in this proposal are covered in rules 10.9, 10.12,</p>

	<p>transparent and relevant manner, obtaining informed consent regarding how it is to be used.</p> <p>Proposed alternative wording for 10.15:  <i>“Marketers must not collect information for marketing or other purposes that could potentially or reasonably be associated with a consumer or device without first obtaining affirmative express consent to the collection and specific uses of that information from the consumer.”</i></p> <p>3.  <i>Family &amp; Parenting Institute:</i>  i) Expressed concern that although families have the right to complain about marketing communications and privacy issues, few do because they are unaware of the codes in place or how to complain.</p> <p>ii) Noted that existing guidelines and legislation do not agree on the definition of a child and was concerned that 12 is too young an age for a child to make a mature decision about disclosing personal information to a third party.</p> <p>Recommended that 10.15 be amended to prevent marketers from collecting personal information for marketing purposes without the consent of a parent or guardian from children aged at least 14 and possibly 16.</p>	<p>10.13.</p> <p>3.  i) A 2008 Mori Poll commissioned by the Press Complaint Commission found that the ASA is the best known media regulator. In 2008, the ASA received over 26,000 complaints.</p> <p>ii) CAP and its sister body BCAP define children as those aged 15 and below; the CAP Code provides specific protection for all children. Children’s critical understanding of advertising varies markedly between their pre-school and secondary school years. It can be justified, therefore, to differentiate between categories of children mindful of that variation in understanding. Ofcom research indicates that after eleven or twelve children can articulate a critical understanding of advertising and know, for example, that advertising can have the intent to persuade. CAP considers that in terms of the</p>
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	<p>4. <i>ICO:</i> Welcomed the inclusion of its guidance in CAP's consultation document, but clarified that its over 12 age limit referred in particular to subject access requests; it was not intended to be a precise marker for decision making about products and services that affect children. Noted that the 12 age divide can be a useful starting point where children are affected, but may not be appropriate in every instance, so campaigns should be carefully planned on a case by case basis.</p> <p>5. <i>PhonepayPlus:</i> Suggested that the proposed rules may be difficult practically to enforce in respect of content purchased using a mobile handset. It is difficult to be confident about the age of mobile handset</p>	<p>collection of data, it is proportionate to set the bar at 12 for rule 10.15.</p> <p>4. CAP understood the ICO's Data Protection Good Practice Note to endorse the standards previously set by Trust UK, which guided against webtraders from collecting information from children under 12 without first obtaining the permission of a parent or guardian<sup>1</sup>. CAP's rule simply reflects that guidance, which CAP considers to be merited because research indicated in CAP's consultation document shows that children over 12 on average have a critical understanding of advertising. CAP considers children over 12 can, therefore, provide personal information without recourse to a parent or guardian because they are sufficiently well-informed about the intended use of that information. That does not apply to children under 12.</p> <p>5. CAP considers that under the proposed rules, it will be the marketer's responsibility to collect age-related data about its subscribers before communicating with them and would not consider it appropriate for them to depend wholly on the</p>
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	<p>owners, as they are often used by individuals different from those to whom they are registered.</p> <p>6. <i>Speechly Bircham LLP:</i> Questioned why the age stated in 10.16 is 16 years old whereas in 10.15 it is 12 years of age.</p> <p>Suggested there ought to be clarification here that the collection of data required for consent is not being included in the prohibition set out in 10.16.</p>	<p>age of the person registered as the handset's owner. In the event of a complaint, the ASA will consider the measures taken to ensure that marketing communications were targeted appropriately</p> <p>6. Both rules reflect ICO guidance (see 4. above) – The policy underpinning 10.15 is that children of an age that can form a critical understanding of advertising may be the subject of data collection without recourse to a parent or guardian. 10.16 concerns the legitimacy of inviting children to provide information about other people. CAP considers it is always inappropriate for marketers to knowingly collect personal information about other people from children under 16.</p> <p>CAP considers both rules to be clear.</p>
<p><b>Question 33: Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology from certain consent requirements? If your answer is no, please explain why.</b></p>		
<p><i>Responses received in favour of CAP's</i></p>	<p>ASDA: Yes Charity Law Association: Yes</p>	<p><i>CAP's evaluation of those points and action points:</i></p>

<p><i>proposal from:</i></p> <p>ASDA British Sky Broadcasting Charity Law Association Consumer Focus E.ON Home Retail Group IPA Institute of Sales Promotion Mobile Entertainment Forum Redcats (Brands) Ltd</p> <p>An individual</p> <p>Three organisations</p>	<p>E.ON: Yes IPA: Yes An individual: Yes Two organisations: Yes</p> <p><i>Summaries of significant points:</i></p> <p>1. <i>AIME:</i> Noted its support for this proposal on the grounds that it enables Bluetooth communications.</p> <p>2. <i>British Sky Broadcasting and an organisation:</i> Welcomed CAP's confirmation that the Codes will reflect the ICO's guidance that Bluetooth is not subject to the PECR and agree with the proposals that Bluetooth communications should therefore not be subject to the Codes</p> <p>3. <i>Consumer Focus:</i> Noted its support for the proposal but considered it will be important for CAP to monitor developing technology in this area as successors to Bluetooth technology could potentially have a wider application.</p> <p>4. <i>Institute of Sales Promotion:</i> Noted that unless this exemption is included it</p>	<p>1. CAP agrees</p> <p>2.CAP agrees but notes that the exceptions proposed only apply to explicit consent and inclusion of the marketer's full name – in all other respects, marketing communications sent by Bluetooth are subject to the CAP Code3. CAP agrees with this suggestion and will consider the impact of new and developed technology as it comes onto the market</p> <p>4. CAP agrees</p>
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	<p>would be very difficult for marketers to use the technology as there is no accepted opt-in list for those with Bluetooth devices.</p> <p>5. <i>MEF Response</i> Agreed that consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the 'explicit consent requirements' of PECR to Bluetooth marketers.</p> <p>6. <i>Redcats (Brands) Ltd:</i> Agreed, as Bluetooth communication requires the mobile phone user to accept the communication.</p>	<p>5. CAP agrees</p> <p>6. CAP agrees</p>
<p><i>Responses received against CAP's proposal:</i></p> <p>DCSF DMA Enable Home Retail Group</p> <p>An individual</p>	<p><i>Summaries of significant points:</i></p> <p>1. <i>DCSF:</i> Urged caution that children may have access to such technology without understanding the implications.</p> <p>2. <i>DMA:</i> Accepted CAP's view that Bluetooth marketing is</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p>1. The CAP Code provides specific protections for children both in terms of content and placement; these protections apply to Bluetooth marketing communications as well as those delivered via other media. CAP notes that the exception proposed only applies to explicit consent and inclusion of the marketer's full name.</p> <p>2. CAP has considered whether its Code should go beyond the law in requiring Bluetooth marketers</p>

	<p>not covered by the Privacy and Electronic Communications Regulations (PECR) but disagreed that rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology.</p> <p>Noted that the ICO had previously stated that marketers should consult industry best-practice guidelines on good marketing practice. Also noted that the DMA had launched its own guidance on this issue which states that Bluetooth marketing should be subject to explicit consent.</p> <p>Suggested that in recent years, consumer concerns about sophisticated methods of sending marketing to them, including Bluetooth, have increased. Since each mobile phone has a MSC address or code, Bluetooth marketing can be used for profiling customers and for targeted behavioural advertising.</p> <p>Expressed concern that Bluetooth marketing may end up suffering from spam in the same way as email and SMS marketing has done. Suggested there is a risk that if industry does not produce self-regulatory guidelines on Bluetooth marketing, there will be consumer pressure for legislation introducing explicit consent, as was the case with email marketing.</p> <p>3. <i>Enable:</i></p>	<p>to obtain explicit consent from consumers.</p> <p>CAP also notes the higher standard to which the DMA holds its members but acknowledges the exception made by PECR.</p> <p>Anecdotal evidence suggests that the vast majority of mobile telecommunication devices with Bluetooth technology do not, as a factory setting, have Bluetooth activated. Those devices cannot therefore receive a Bluetooth marketing communication unless the Bluetooth function is manually activated. If the Bluetooth function has been activated, the consumer has the option to employ other security settings to filter or deny Bluetooth in-bound communications. On balance, CAP considers consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the 'explicit consent requirements' of PECR to Bluetooth marketers.</p> <p>3. CAP considers that the distinction here is clear;</p>
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	<p>Expressed concern that excluding Bluetooth marketing communications from requiring explicit consent may prove confusing as it is included elsewhere in the Code.</p> <p>4. <i>Home Retail Group:</i> Expressed concern that the code here is being used to prescribe more onerous requirements relating to Data Protection, and queried whether the code is the most appropriate way to address these concerns.</p> <p>5. <i>An individual:</i> Proposed that consumers should have as much protection as possible and Bluetooth should not be exempt from this.</p>	<p>the content and placement of marketing communications sent by Bluetooth are otherwise covered by the CAP Code.</p> <p>CAP considers that it would be disproportionate to require marketers to obtain explicit consent for marketing communications received via Bluetooth, for the reasons given in 2. above.</p> <p>4. The CAP Code has long included rules on required standards of database practice, which is essential to ensure acceptable direct marketing. It is of enormous benefit to consumers and direct marketers for the rules to be self-contained in a single Advertising Code. The Code therefore remains the ideal place to include rules that both reflect and, where it is appropriate, exceed Data Protection law that is relevant to direct marketing.</p> <p>5. The CAP Code provides specific protections for all consumers both in terms of content and placement; these protections apply to Bluetooth marketing communications as well as those delivered via other media.</p>
<p><b>Question 34:</b> i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are</p>		

necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

<i>Responses received from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
<p>Alliance Boots; ASDA; British Retail Consortium, Consumer Policy Group; Charity Law Association DCSF E.ON IPA PhonepayPlus Redcats (Brands) Ltd Sainsbury's supermarkets</p> <p>An individual</p> <p>Three organisations</p>	<p>1. <i>Alliance Boots:</i> Expressed concern that the rules could soon be outdated as technology advances apace.</p> <p>Suggested that the Code should adopt a principle-based approach which does not exempt or control particular technologies.</p> <p>2. <i>An organisation:</i> i) Suggested that rules in section 10 should make reference to "individual" or "data subject" rather than "consumer" to ensure consistency with current Data Protection and Privacy legislation.</p> <p>ii) Suggested changing rule 10.4.3 from: "anyone who has been notified to them as dead is not <b>mailed</b> again and the notifier is referred to the relevant Preference Service" to: "anyone who has been notified to them as dead is</p>	<p>1. CAP considers that the proposed rules are proportionate in the current media environment and undertakes to consider any developments in technology as they come to market.</p> <p>2. i) CAP considers it is appropriate for the CAP Code to refer to the 'consumer' given its remit.</p> <p>ii) CAP considers this to be a useful suggestion and has amended the rule to read:</p> <p>Executive recommends amending the rule to read "anyone who has been notified to them as dead is</p>

	<p><i>not <b>marketed to</b> again and the notifier is referred to the relevant Preference Service</i></p> <p>Noted that this would be consistent with the intention of the rule to encompass all marketing communications including telephone and fax.</p> <p>iii) Noted that Rule 10.4 does not include “mail” as an example of a remote media and suggested including this term for clarity.</p> <p>iv) Suggested changing rule 10.5 from:</p> <p><i>“Consumers are entitled to have their personal information suppressed” to:</i></p> <p><i>“Consumers are entitled to ask for their personal information not to be used or processed for marketing purposes”</i></p> <p>Noted that this would be more appropriate as their actual information is not suppressed, rather the use of it to market them is suppressed.</p> <p>v) Expressed concern about proposed rule 10.6 which requires marketing communications sent by electronic mail to contain the marketer’s full name. Noted that this would not always be possible when using SMS-type electronic mail and suggested amending the rule to permit marketers to use their “full name or a recognisable abbreviation of the name to make</p>	<p><i>not <b>contacted</b> again and the notifier is referred to the relevant Preference Service</i></p> <p>iii) CAP considers this to be a useful suggestion and has included the word ‘mail’ in the new rule</p> <p>iv) CAP considers its proposed wording appropriate as it uses terminology accepted and used by the industry; CAP has not made any changes to its proposed rule</p> <p>v) CAP considers this to be a useful suggestion and has amended the rule to read:</p> <p><i>Marketing communications sent by electronic mail (but not those sent by Bluetooth technology) must contain the marketer’s full name (or, in the case of SMS messages, a recognisable abbreviation) and a valid address, for example an e-mail</i></p>
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	<p>the firm's identity clear given the content of the message".</p> <p>3. <i>An organisation:</i> Noted that the ICO guidance on privacy and electronic communications provides guidance on best practice for marketers using 'send-to-a-friend' communications. Proposed that CAP may wish to mirror this best practice guidance.</p> <p>Respondent also considers that this type of marketing is a breach of PECR.</p> <p>4. <i>British Retail Consortium, Consumer Policy Group and Sainsbury's supermarkets:</i> Suggested that Section 10 should be technology neutral given the constant changes to, and innovation in, technology.</p> <p>5. <i>Charity Law Association:</i> i) Considered that the amendment to rule 10.9.3 makes the rule an absolute obligation and does not make the distinction between transferring to third</p>	<p><i>address or a SMS short code to which recipients can send opt-out requests.</i></p> <p>3. CAP notes that the ICO guidance warns marketers against using viral (send-to-a-friend) techniques as a way of getting around the requirement for prior consent from the recipient of the marketing communication<sup>2</sup>. CAP considers that the guidance neither outlaws nor explicitly legitimises the practice and is not suitable to form the basis of a rule in the Code. CAP has not changed the proposed rules but will consider whether to develop guidance of its own at a later stage.</p> <p>4. CAP considers that it is proportionate and appropriate to distinguish between different technologies that have different functions and applications for marketers and consumers</p> <p>5. i) CAP considers that the proposed wording is appropriate and proportionate as it places a clear obligation on marketers to collect and use data</p>
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	<p>party Data Controllers – where data subject should be able to say no and third party Data Processors – where you are not obliged to provide data subjects with the opportunity to prevent that from happening.</p> <p>Considered that the current wording may be confusing and lead marketers to think they need to do more than they have to in order to comply.</p> <p>ii) Queried whether the reference to “electronic mail” in 10.3 and 10.6 adequately describes what the rules are intended to capture.</p> <p>6. <i>DCSF:</i> The rules relating to database practice will need to be constantly updated to reflect new and emerging technologies and consideration should be given to any special issues that emerge relating specifically to children.</p> <p>7. <i>PhonepayPlus:</i> In respect of proposed rule 10.6 [around clear methods of opt-out which must be presented to the consumer], respondent asked CAP to be mindful that PhonepayPlus may require a shortcode as the method of opt-out for certain types of premium rate service</p>	<p>responsibly and transparently.</p> <p>ii) CAP considers that the Definition at the beginning of this section makes clear what is captured under the term “electronic mail”</p> <p>6. CAP is committed to maintaining the rules as technology evolves to ensure that they remain proportionate and effective in protecting consumers from misleading or harmful marketing.</p> <p>7. CAP does not consider that proposed rule 10.6 contradicts PhonepayPlus’ requirements. CAP seeks to avoid referencing other regulators’ Codes in its own rules and would expect marketers to be aware of all regulations relevant to their sector.</p>
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	<p>8.  <i>Redcats (Brands) Ltd:</i>  Expressed concern that the nature of Bluetooth technology meant that it was difficult to target it effectively, which may result in children receiving inappropriate content. Also noted that consumers are unable to identify the content of a communication received by Bluetooth when deciding whether to accept or reject it. Further noted that a marketer could omit its name or contact details from a Bluetooth communication which would make it impossible to complain about the content of a promotion.</p>	<p>8.  CAP considers that its proposed rules are proportionate in the absence of any evidence to suggest that Bluetooth technology is being used in a way that is misleading, harmful or offensive to consumers. CAP is committed to keeping the Code under constant review and would make appropriate amendments if such evidence came to light.</p>
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