

Consultation on the General Data Protection Regulation: CAP's evaluation of responses



1. Introduction

Following public consultation, the Committee of Advertising Practice (CAP) has decided to introduce new rules on the use of data for marketing purposes.

CAP has [published](#) a separate regulatory statement setting out the rationale for its decision. This document provides detailed responses to specific comments received during the consultation. This document should be read alongside the [consultation document](#).

2. List of respondents and their abbreviations used in this document

	Organisation	Abbreviation
1	Council for Advancement and Support of Education (Europe)'s working group on GDPR and Fundraising Regulation.	CASE
2	Direct Marketing Association	DMA
3	Harbottle & Lewis LLP	HL
4	Institute of Practitioners in Advertising	IPA
5	SuperAwesome	SA
6	Walgreen Boots Alliance – Retail Pharmacy International	WBA

3. Section 5: CAP's proposals for change

General comments

Respondent/s	Comments	CAP's evaluation:
HL	<p>Unclear why ASA must / should have regard to GDPR, DPA or PECR, given that purpose of consultation is to separate CAP Code from pure data protection matters. A self-regulatory body does not have jurisdiction over these pieces of legislation.</p> <p>Rules should not refer to “database practice” – this refers to a very specific use of data in a direct marketing context – and should refer to “direct marketing” as a more general concept.</p> <p>Unclear why Background refers to “and others” since the proposals indicate that the rules would only apply to marketers who are controllers.</p>	<p>CAP seeks to reflect those standards from the GDPR that it considers its stakeholders would reasonably expect to be regulated by an advertising regulator. In doing so, it does not wish to set stricter or less strict standards than those contained in the fully harmonised regime that GDPR provides. CAP and the ASA have regularly dealt with data protection matters under the rules contained in section, as noted in the consultation document, and the ICO considers there is mutual benefit to it and the self-regulatory system in this regulation. CAP considers that responsible data processing is an intrinsic part of marketing, especially in a digital age, and that it should maintain rules to achieve its aim of ensuring that marketing is responsible.</p> <p>CAP agrees that the term “database practice” is specific and proposes to rename section 10 “Use of data for marketing”.</p> <p>CAP wishes to maintain consistency with the rest of the Code. Others in addition to controllers can have a responsibility for the marketing. The Scope section of the Code makes clear, at IIIg, that “marketer” “includes an advertiser, promoter or direct marketer”. Rule 1.4 states that “Marketers must comply with all general rules and with relevant sector-specific rules”. Rule 1.8 states that “Marketing</p>

	<p>Suggests that the definition of “preference service” refers to the definition in PECR.</p> <p>Rule 8.28.5 has been a source of confusion for marketers. Conflict between obligation to publish winners’ names and to obtain consent to publish. Consent can be withdrawn at any time under data protection law. GDPR governs whether consent can be included in terms and conditions and made a condition of performance. Other lawful bases (e.g. legitimate interests) may be available to enable promoter to publish winners’ names without consent.</p>	<p><i>communications must comply with the Code. Primary responsibility for observing the Code falls on marketers. Others involved in preparing or publishing marketing communications, such as agencies, publishers and other service suppliers, also accept an obligation to abide by the Code”.</i></p> <p>This definition was not subject to consultation.</p> <p>This rule is subject to further consultation – see CAP’s regulatory statement.</p>
WBA	<p>Considers that ICO, as the statutory regulator, should be the foremost body dealing with data protection, privacy and GDPR-related matters, and questions whether such matters should be removed from the CAP Code. If CAP were to retain such matters, agrees with all proposals.</p>	<p>CAP and the ASA have regulated data protection matters that seek to reflect legislation for a number of years, alongside the ICO. In preparing for the consultation, CAP informally pre-consulted with ICO, and the ICO considers that there is benefit to consumers in individual cases in CAP’s self-regulation of marketing-related data protection matters existing alongside the statutory regime administered by the ICO. CAP has considered, and will continue to consider, what supporting guidance is needed to ensure that its rules are clear to marketers and in line with the statutory regime for the regulation of data protection. This will be achieved by close monitoring of forthcoming ICO guidance (for example, on consent), the ICO’s forthcoming direct marketing code, guidance from the Article 29 Working Party (shortly to become the European Data Protection Board) and continued dialogue with the ICO.</p> <p>If updated rules on marketing-related data protection matters are introduced into the CAP Code, CAP has reached an agreement to use</p>

		the Direct Marketing Commission, an independent industry watchdog, as an expert panel to provide advice to the CAP Executive, the ASA Executive and the ASA Council in cases involving legitimate interests and related matters. CAP uses such panels, in other areas of its work, to allow for expert input in cases raising novel or contentious issues: such advice will be taken into account by the CAP Executive, the ASA Executive and the ASA Council but will not be binding on them.
DMA	<p>Interpretation of GDPR (particularly in relation to legitimate interests and direct marketing) is uncertain. Working with the DMC, an expert body on the use of data and marketing, will help to ensure consistency between the self-regulatory system and other bodies.</p> <p>Considers CAP should take on board relevant DMA / cross-industry GDPR guidance.</p>	<p>CAP agrees.</p> <p>CAP agrees and will consider all relevant guidance.</p>

Comments on proposals to remove rules

5.1.1 Removal of rules 10.1 and 10.2: data security and transfer outside EEA		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees. Overlap between CAP Code / law / ICO guidance is confusing to businesses and consumers, with scope for discrepancies between the different regimes. Risk that consumers rights would be diminished if ASA dealt with these matters because of its limited enforcement powers compared to those of the ICO.	CAP welcomes the support for this proposal, and considers the rules should be removed because such matters are not within the ASA's expertise, and the ASA has not received any complaints under these rules, rather than on the

		basis put forward by HL. CAP considers that its enforcement powers are sufficient to achieve compliance where complaints to the ASA or CAP's own monitoring identify non-compliance with the rules in the CAP Code.
IPA	Agrees.	CAP agrees.
5.1.2 Removal of rule 10.3: access to data		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees. Does not consider rule relates to pure data protection matters.	CAP agrees.
IPA	Agrees.	CAP agrees.
5.1.3 Removal of sub-rules of 10.4: persistent and unwanted marketing communications		
Respondent/s	Comments	CAP's evaluation:
HL	<p>Rule 10.4.1 – agrees with removal, as dealt with by other rules and suitability different from whether a marketing communication is wanted or unwanted.</p> <p>Rule 10.4.2 – agrees, as consent is dealt with by law.</p> <p>Rule 10.4.3 – agrees with proposal to retain as new rule 10.11, as the deceased are outside scope of GDPR.</p> <p>Rule 10.4.4 – agrees, as consent is dealt with by law.</p> <p>Rule 10.4.5 – agrees with removal, as rule relates to “pure data protection matters”.</p>	<p>CAP agrees.</p> <p>CAP notes the support for the proposal but considers that consent should be dealt with under the CAP Code but by a different rule: see comments on HL's response to proposal 5.3.4 (below).</p> <p>CAP agrees.</p> <p>CAP notes the support for the proposal but considers that consent should be dealt with under the CAP Code but by a different rule: see comments on HL's response to proposal 5.3.4 (below).</p> <p>CAP agrees.</p>

IPA	Agrees.	CAP agrees.
DMA	Does not consider it is necessary to retain rule 10.4.3 but does not object.	CAP considers rule 10.4.3 is necessary for the reasons set out in the consultation document, and notes that the DMA does not object to its retention.
5.1.5 Removal of rule 10.8: publically available information		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees with proposal for reasons given by CAP. Cites additional reasons of clarity of existing rule.	CAP notes the support for the reasons given for its proposal.
IPA	Agrees.	CAP agrees.
5.1.6 Removal of rules 10.10 and 10.11: nature of personal information and retention		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees with CAP's proposal, as clear overlap with Article 5 GDPR.	CAP agrees.
IPA	Agrees.	CAP agrees.

Comments on proposals to add definitions

5.2.1 Consent		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees with CAP's definition and considers it should align with statutory definition in GDPR / DPA 2018.	CAP agrees.
IPA	Agrees.	CAP agrees.
5.2.2 Personal data		

Respondent/s	Comments	CAP's evaluation:
HL	Agrees with definition, as it aligns with statutory definition.	CAP agrees.
IPA	Agrees.	CAP agrees.
5.2.3 Marketers		
Respondent/s	Comments	CAP's evaluation:
HL	<p>Disagrees with proposal for the following reasons:</p> <ul style="list-style-type: none"> Statutory regulation of direct marketing does not only operate on basis of controller / processor distinction; for example, PECR does not draw this distinction. Compliance with CAP Code should not require assessment of whether marketer is controller / processor. Unclear how proposed definition relates to Scope III. g. of CAP Code. 	<p>CAP agrees that PECR does not draw this distinction. The introduction and definitions in Section 10 have been amended.</p> <p>CAP considers that marketers will need to determine whether they are controllers (and, where appropriate, register as controllers) under GDPR and that this does not therefore present an additional burden.</p> <p>The definition contained in this part of the Code will apply equally to section 10.</p>
IPA	Agrees.	CAP agrees.
5.2.4 Controllers		
Respondent/s	Comments	CAP's evaluation:
HL	Does not consider helpful to include definition in CAP Code – falls within “pure data protection matters”.	CAP disagrees, and considers that the distinction is important so that it does not impose stricter standards than those contained in GDPR. Marketers are already expected, under the GDPR, to know whether they are “controllers” and must meet the requirements that derive from this status.

IPA	Agrees.	CAP agrees.
5.2.5 Special categories of personal data		
Respondent/s	Comments	CAP's evaluation:
HL	Queries relevance of definition, as it is a "pure data protection matter".	CAP considers that to include a rule (new rule 10.9) on the use of special categories of personal data for marketing, which it considers is a marketing-related matter that stakeholders would expect an advertising regulator to regulate, it must define the "special categories of personal data".
IPA	Agrees.	CAP agrees.

Comments on proposals to add rules

5.3.1 Rule 10.1: persistent and unwanted marketing communications		
Respondent/s	Comments	CAP's evaluation:
HL	Unclear what "persistent" and "unwanted" mean.	These terms derive from the Unfair Commercial Practices Directive, and the ASA would assess them on a case-by-case basis taking into account any relevant guidance and case law.

	Unclear why rule needed as rules on withdrawal of consent and right to object already exist in law.	CAP considers this rule relates to marketing communications which are sent without the use of personal data; for example, unsolicited mailings delivered to houses by hand without targeting particular individuals. This sits outside the scope of GDPR and is governed by the Unfair Commercial Practices Directive. CAP considers that the rule provides important consumer protection.
IPA	Agrees.	CAP agrees.
DMA	Agrees.	CAP agrees.
5.3.2 Rules 10.2 and 10.3: transparency about data collection		
Respondent/s	Comments	CAP's evaluation:
HL	<p>Disagrees.</p> <p>Purpose of consultation is to remove "pure data protection matters" from CAP Code. Proposed rules overlap with Articles 13 and 14 of the GDPR, and could cause confusion among marketers / consumers.</p> <p>Proposed rules are not sufficiently industry-specific. ASA does not have sufficient regulatory power to enforce against insufficient privacy notices.</p>	<p>CAP considers the proposed rules on transparency are specific to marketing and cover matters that its stakeholders would reasonably expect an advertising regulator to regulate. The proposed rules seek to reflect Article 13 and 14, as opposed to overlapping with them.</p> <p>CAP considers that the ASA does have sufficient regulatory power to enforce against insufficient information being provided about the use of data for marketing. The ASA has ruled against such matters in the past. CAP and the ASA's enforcement powers have proved sufficient to achieve compliance where complaints or self-initiated monitoring identify non-compliance with data processing rules.</p>
IPA	Proposed rules seem to have general application rather than specific relevance to marketing. Questions the need to copy out Article 13 rather than incorporating it by reference.	CAP considers the proposed rules on transparency are specific to marketing and cover matters that its stakeholders would reasonably

	<p>Proposed rule 10.2.6 does not seem to make sense or accurately reflect Art 13.1(f) GDPR.</p> <p>Asks whether proposed rule 10.2.12 should be amended so that, in the second line, “other” is replaced by “similarly” (to more accurately reflect Art 22.1 GDPR).</p>	<p>expect an advertising regulator to regulate. CAP considers that copying out the requirements of Article 13 is helpful for marketers.</p> <p>CAP agrees, and has amended this rule.</p> <p>CAP agrees.</p>
<p>CASE</p>	<p>Agrees but considers that amendments to rule 10.3 needed.</p> <p>Article 14.3 GDPR contains three “triggers” in respect of the timing for the provision of the privacy information to the data subject:</p> <ol style="list-style-type: none"> 1. data is provided within one month having regard to circumstances 2. data is provided at the time of first communication with the data subject 3. if disclosure to another controller is envisaged, at the latest when the data is first disclosed. <p>It is consistent with the remainder of the text of GDPR to read these three triggers as being of equal weight with none having priority over another. In other words, to read 14.3 as requiring a) OR b) OR c). The Article 29 Working Party guidance treats this section differently, as has CAP’s draft rule 10.3. Instead of “a) OR b) OR c)”, it is interpreted as “a) AND [b) OR c)]”. Believes the Article 29 WP reading may be an extension of the requirements of GDPR beyond that which is stated by the law.</p> <p>Comments on effect of different interpretations.</p> <p>Exemptions in Article 14(5) GDPR should be included in rule.</p>	<p>CAP agrees, and has amended the rule to reflect better the wording of GDPR Article 14(3), which CAP agrees is more naturally to be read as alternatives rather than cumulative (ie all subject to a one-month limit), notwithstanding the Article 29 Working Party’s earlier view. However, options (ii) and (iii) do not envisage the controller sitting on the data – it must have an intention to use it, and share it with the data subject within a reasonable time.</p> <p>CAP agrees and has amended the rule.</p>

5.3.3 Rule 10.4: further processing		
Respondent/s	Comments	CAP's evaluation:
HL	<p>Disagrees.</p> <p>Proposed rule relates to a “pure data protection matter”.</p> <p>Provision of a “further privacy notice” does not of itself justify further processing. Article 6(4) GDPR assessment should also be carried out to ensure that there is an appropriate lawful basis for further processing.</p>	<p>CAP considers in the context of its confining the application of its rules to marketers who are data controllers, the proposed rules on transparency are specific to marketing and cover matters that its stakeholders would reasonably expect an advertising regulator to regulate.</p> <p>CAP had added wording to the rule to reflect compatibility with original purpose requirement of Article 6(4).</p>
IPA	Suggest removing “the” from “the marketers” in the first line.	CAP agrees.
5.3.4 Rule 10.5: lawful basis for processing		
Respondent/s	Comments	CAP's evaluation:
HL	<p>Disagrees.</p> <p>Rule relates to a “pure data protection matter”, and not appropriate for self-regulatory Code to make provisions relating to lawfulness of processing of data.</p>	<p>CAP considers the proposed rules on transparency are specific to marketing and cover matters that its stakeholders would reasonably expect an advertising regulator to regulate. CAP considers that whether a marketing communication has lawfully been sent is a core part of its regulation.</p>

	<p>Not entirely accurate to state that the “legitimate interest provision does not apply where such interests are overridden by the fundamental rights and freedoms of the data subject which require protection of personal data”. Legitimate interests can still be a lawful basis in such circumstances but subject to balancing exercise under Recital 47.</p> <p>Wording of rule could promote uncertainty. Could be a role for CAP Code in setting out various types of direct marketing which do not require consent. This could help marketers conduct their own legitimate interest assessment. ICO has stated in its legitimate interests guidance that industry codes can be considered in determining whether legitimate interests is a lawful basis for a particular activity.</p>	<p>CAP considers that the use of the word “overridden” sufficiently conveys the balancing exercise necessary, and CAP will produce guidance which elaborates further on the factors that must be taken into account in assessing whether legitimate interests is a valid basis for processing data for marketing.</p> <p>CAP agrees that clarification for marketers would be useful but considers that this is best done through guidance. CAP intends to produce such guidance having regard to available ICO and industry guidance.</p>
IPA	Questions the need for the wording after the semi-colon at the end of the proposed new rule. Wording seems intended to reflect the rules under the Privacy and Electronic Communications Regulations (PECR). Those Regulations deal with sending unsolicited electronic direct marketing messages rather than the processing of personal data.	CAP considers that this is needed to limit the scope of legitimate interests so that the rule does not present it as a basis for processing in situations where PECR requires consent.
DMA	Considers that the new rule should only contain the first sentence, as the proposed wording suggests that legitimate interests is not an equal basis for processing to consent. If the wording remains as it is, it should include clarification on consent as well.	CAP considers that the “either...or” construction of the rule makes clear that the two bases for processing are of equal status. CAP considers that the further wording on legitimate interests is necessary to set out the balancing tests which is an integral part of the legitimate interests basis but does not form part of the consent basis. However, CAP has amended the rule to include a cross-reference to the Definitions section in relation to consent.
5.3.5 Rules 10.6, 10.7 and 10.8		
Respondent/s	Comments	CAP’s evaluation:
HL	Disagrees, as these rules are covered already by PECR.	CAP acknowledges that these rules are covered by PECR, which remains relevant, but considers

		that stakeholders would reasonably expect an advertising regulator to regulate such matters.
IPA	Agrees, although since the proposed new rules are intended to reflect the requirements of PECR, suggests the inclusion of wording in proposed rule 10.6 to make clear that it applies only to <u>unsolicited</u> electronic marketing messages.	CAP considers “unsolicited” is implied in the wording. However, an amendment has been made to make clear that consent need not be obtained on each and every occasion.
5.3.6 Rule 10.9: special categories of personal data		
Respondent/s	Comments	CAP’s evaluation:
HL	Disagrees, as this covers matters within scope of GDPR / DPA 2018.	CAP considers that a rule is needed to set out marketers’ obligations in relation to the use of special categories of personal data, and that stakeholders would reasonably expect it to maintain such a rule.
IPA	Article 9.2 GDPR provides that the prohibition on the processing of special category data under Article 9.1 does not apply if any of the exemptions listed under Art 9.2 apply. For example, in addition to the data subject having given explicit consent under Art 9.2(a), processing may also take place if it relates to personal data which are manifestly made public by the data subject under Art 9.2(e). Suggests that the proposed new rule 10.9 makes reference to these exemptions so that they will apply if appropriate under the circumstances.	CAP considers that the only additional Article 9(2) exemption which might be relevant in the context of advertising is 9.2(e) – “manifestly made public by the data subject”. The rule has been amended to reflect this. In CAP’s view, use of such data for marketing purposes would still need to be consistent with general GDPR principles – e.g. a diabetic who posted information on a specialist but public diabetes group forum as part of a discussion of appropriate treatment would not necessarily expect to receive diabetes product mailings.
5.3.7 Rule 10.10: suppression		
Respondent/s	Comments	CAP’s evaluation:
HL	First sentence of rule should be deleted, as already covered by rights to withdraw consent and object to direct marketing under GDPR.	CAP considers that this should be retained. A suppression list is the practical consequence in marketing terms of the exercise of GDPR rights to withdraw consent / object.

	<p>Second sentence of rule should remain, as obligation to check suppression file is not included in GDPR and is limited in PECR.</p> <p>“Suitable period” is unclear – it could refer to running checks within the suitable period or creating a suppression file within the suitable period.</p> <p>Final sentence of rule should remain, as it provides an obligation not include in GDPR and could be used by marketers to demonstrate that retention of suppression list will be a legitimate interest and perhaps necessary for compliance with a legal obligation.</p>	<p>CAP agrees.</p> <p>CAP considers that the rule clearly refers to running checks, rather than creating suppression files.</p> <p>CAP agrees.</p>
IPA	<p>Agrees, although while the Background section makes clear that the rules relate only to data used for direct marketing purposes, asks whether proposed rule 10.10 should be amended to expressly refer to the type of marketing it is intended to cover (unsolicited electronic direct marketing messages, for example).</p> <p>Further, asks whether, with regard to the third sentence, it should be made clear to whom no other marketing communications should be sent (for example, to consumers who have opted out of receiving marketing messages/communications).</p>	<p>CAP intends this rule to apply to all types of marketing communication and considers that is clear from the wording of the rule.</p> <p>CAP agrees, and has amended this rule to make this clear.</p>

5.3.8 Rule 10.11: contacting those notified as dead

Respondent/s	Comments	CAP's evaluation:
HL	Agrees. Data of deceased persons is not subject to UK data protection law.	CAP agrees.
IPA	Agrees.	CAP agrees.

5.3.9 Rule 10.12: withdrawal of consent

Respondent/s	Comments	CAP's evaluation:
HL	Disagrees. Duplicates a provision of GDPR and is therefore a “pure data protection matter”.	CAP disagrees, as this only applies in the context of marketing, and is therefore a marketing-related data protection matter for the reasons set out in its consultation document.
IPA	Agrees.	CAP agrees.

5.3.10 Rule 10.13: right to object		
Respondent/s	Comments	CAP's evaluation:
HL	Disagrees. Proposed rule covers a “pure data protection matter”. Also disagrees with wording of rule because Article 21(2) GDPR makes no reference to lawful basis.	CAP disagrees, as this only applies in the context of marketing, and is therefore a marketing-related data protection matter.
IPA	Agrees.	CAP agrees.
5.3.11 Rule 10.14: marketing to corporate subscribers		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees. Much of the rule covers PECR corporate subscribers exemption but reference to “named employees” provides clarification on the difference between generic corporate email addresses and named employee email addresses for the purposes of PECR.	CAP agrees.
IPA	Agrees	
5.3.12 Rules 10.15 and 10.16: marketing to and collecting data from children		
Respondent/s	Comments	CAP's evaluation:
HL	Unclear why age of 12 has been chosen. DPA 2018 sets threshold at 13 for information society services. Consistency with DPA 2018 will make compliance easier for marketers. As proposed, wording of the rule means that a different standard will apply depending on whether data collected via an information society service or not. Potential confusion for marketers.	This rule is subject to further consultation – see CAP's regulatory statement.
IPA	Agrees with rule 10.15. Considers that the beginning of proposed rule 10.16 does not seem to accurately reflect Article 12.1 GDPR. Rather than requiring the controller to “ensure that the information provided...is intelligible”, Article 12.1 requires the controller to “take appropriate measures to provide any information...in an intelligible...form.”	CAP agrees. CAP agrees and has amended the rule. .
SA	Age of digital consent under Article 8 of the GDPR is 16, unless individual EU member states choose to lower the age but in any case no lower than 13. The current draft of the UK's Data Protection Bill proposes to lower the age to 13 (not 12).	This rule is subject to further consultation – see CAP's regulatory statement.

	<p>Given CAP is seeking to harmonise the CAP Code with the GDPR in all material respects, considers the age threshold for applying the protections of rules 10.15 and 10.16 should also be aligned with the GDPR.</p> <p>Recommends that rule 10.15 reads: <i>"Marketers must not knowingly collect from children under 16 (or such age as the UK determines in relation to Article 8 of the GDPR, but in any case no lower than 13) personal data about those children for marketing purposes..."</i></p> <p>Reason for this is (a) to avoid confusion for marketers who are trying to comply with the GDPR as well as the CAP Code, and (b) to align with the CAP Code's own definition of children, which —under Section 5—is anyone under the age of 16.</p>	
DMA	<p>Agrees with the first part of the rule in terms of providing information in a form that children will understand.</p> <p>Reference to avoiding using personal data of a child for personality or user profiles goes beyond Recital 38, which states special protection should apply to this but not that it cannot happen. Seems to go beyond the GDPR provisions. In addition there is no mention in Recital 71 about children, so as children are treated as data subjects like anyone else, there should not be added restrictions placed on processing their data beyond the provisions of the GDPR. Considers wording on profiling should therefore be removed.</p>	<p>CAP agrees.</p> <p>CAP disagrees. Recital 71 states "Such measure should not concern a child", and CAP considers that "should avoid" is an appropriate reflection of this.</p>

Comments on proposal to remove Appendix 3 (Online behavioural advertising)

5.4 Removal of Appendix 3		
Respondent/s	Comments	CAP's evaluation:
HL	Agrees. Approach taken by Appendix 3 and EASA OBA regime conflicts with prior consent requirements for cookies under ePrivacy Directive. Unclear how CAP will cover OBA after removing Appendix 3 to address tension between legislative and industry approaches. Notes IAB's Transparency and Consent Framework.	CAP will have regard to relevant ICO and industry guidance that covers online behavioural advertising.
IPA	Agrees.	CAP agrees.