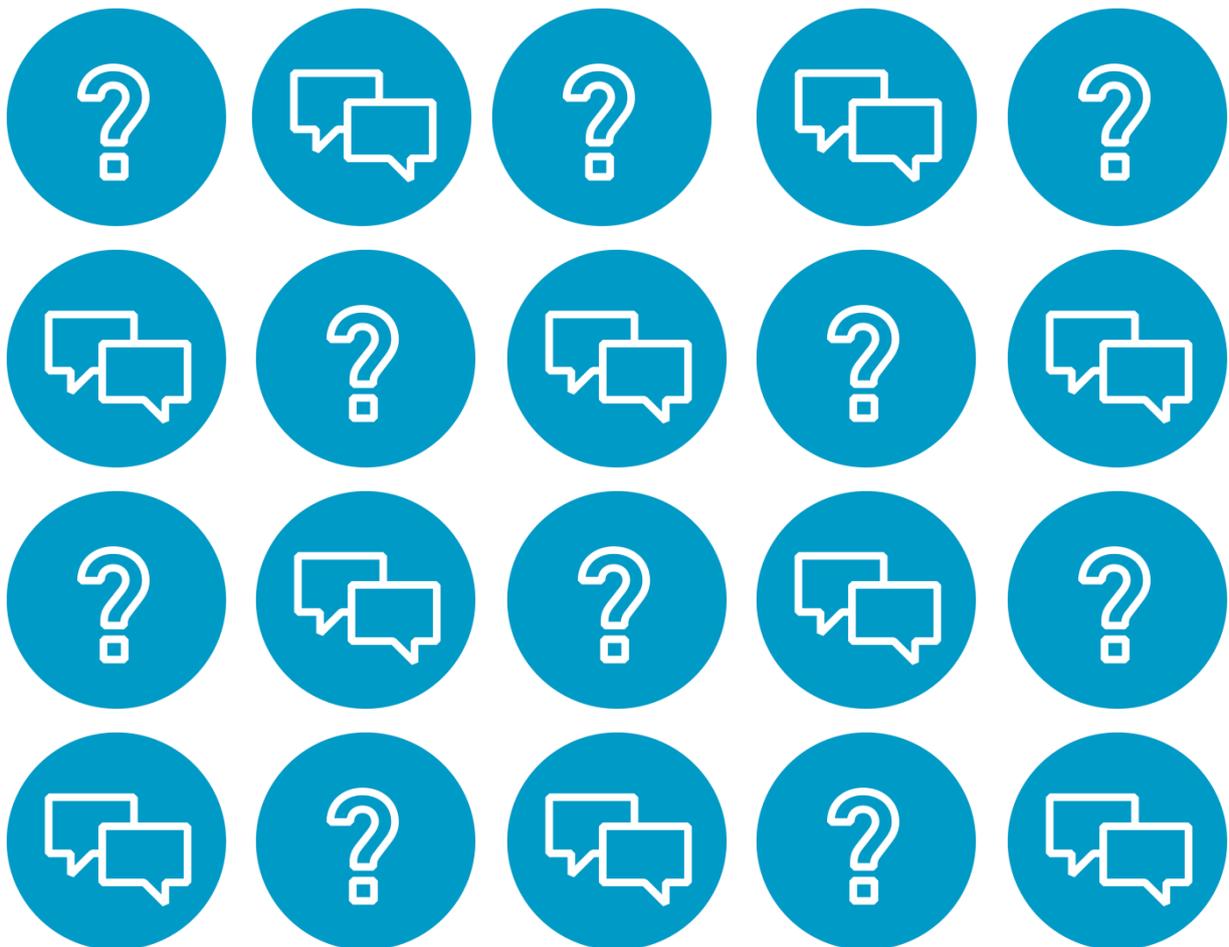


CAP consultation on use of data for marketing: children and prizewinners

Committee of Advertising Practice's proposals for amendments to its rules on marketing to children and naming prizewinners in light of the Data Protection Act 2018

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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), is consulting on two changes to its rules on the collection and use of data for marketing, following a consultation process earlier this year to align its rules on use of data for marketing with the standards introduced by the General Data Protection Regulation (EU 2016/679, the GDPR).

During its consultation on the use of data for marketing, CAP identified two issues that required further consultation: the age at which consent to marketing can be given by children in the absence of consent from the holder of parental responsibility (which is, in part, affected by Article 8 of the GDPR and section 9 of the Data Protection Act 2018); and the lawful basis for publishing the personal data of prizewinners (which is affected by the bases for processing personal data set out in Article 6 of the GDPR).

CAP is on the following changes:

1. Rule 8.28.5 currently reads:

Promoters must either publish or make available on request the name and county of major prizewinners and, if applicable, their winning entries except in the limited circumstances where promoters are subject to a legal requirement never to publish such information. Promoters must obtain consent to such publicity from all competition entrants at the time of entry. Prizewinners must not be compromised by the publication of excessive personal information.

CAP proposes to amend this rule to read:

Promoters must either publish or make available on request such information to indicate that a valid award took place – ordinarily the surname and county of major prizewinners and, if applicable, their winning entries. Promoters must inform the prizewinner of their intention to publish such details and give the prizewinner the opportunity to object to their information being published or to reduce the amount of information published about the prizewinner. In such circumstances, the promoter must nevertheless still furnish such details of the prizewinner and winning entry to the ASA if challenged. The privacy of prizewinners must not be prejudiced by the publication of personal information and in limited circumstances (for example, in relation to National Savings) promoters may need to comply with a legal requirement not to publish such information.

2. Rule 10.16 currently reads:

Marketers must not knowingly collect from children under 12 personal data about those children for marketing purposes without first obtaining the verifiable consent of the child's parent or guardian.

CAP proposes to amend this rule to read:

Marketers must comply with rule 10.5 when processing the personal data of children. Where marketers process the personal data of children under 13 in relation to an offer of online services on the basis of consent, they must obtain the verifiable consent of the child's parent or guardian. Where marketers process the personal

data of children under 13 for other marketing purposes (in other words, not in relation to an offer of online services) on the basis of consent, marketers must obtain the verifiable consent of the child's parent or guardian, unless they can demonstrate compelling reasons for relying on the child's consent and that they have had particular regard to the child's privacy rights.

This consultation will close at 5pm 7 December 2018.

2. Introduction to the UK advertising regulatory system

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, promotional 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.asa.org.uk.

2.2 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 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.

2.3 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. Policy background

3.1 General policy objectives

CAP's general policy objective is to set standards to ensure that all marketing communications are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility. CAP intends its Code to be based on the enduring principles that marketing communications should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. It seeks 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.

3.2 The General Data Protection Regulation (GDPR)

The General Data Protection Regulation (EU 2016/679, the GDPR) represents the legal framework of data protection law across the EU, and has been in force since 25 May 2018. The GDPR ensures that personal data can only be processed under strict conditions and for legitimate purposes. Organisations that collect and manage personal data must also protect such data from misuse and respect certain rights.

3.3 The Data Protection Act 2018

The Data Protection Act 2018 entered into force on 23 May 2018, and provides that the GDPR applies in UK law, supplements the GDPR with other provisions left open to EU Member States to develop and provides for the ICO's functions in relation to the GDPR and other data protection matters.

3.4 CAP's decision to consult

Following a [consultation](#) in June 2018, CAP amended [Section 10](#) of its Code to align its rules with the GDPR. However, during the consultation process, CAP identified two issues that required further consultation: one, relating to the circumstances in which personal data might lawfully be collected from children for marketing purposes; the other, relating to how prize promoters might comply with CAP's requirement that prizewinners' names should be disclosed following a promotion, in light of the GDPR's requirements. Those issues are set out in detail in part 4 of this document.

4. Proposed changes and relevant questions

4.1 Marketing to children: Data Protection Act 2018

In its initial consultation on the GDPR, CAP proposed retaining its existing rule 10.15 which provides:

10.15 Marketers must not knowingly collect from children under 12 personal data about those children for marketing purposes without first obtaining the verifiable consent of the child's parent or guardian.

This rule was derived from ICO guidance which used the age of 12 as a benchmark for capacity to consent. The ICO's [current guidance](#) on children's rights under the GDPR states the following:

In Scotland, a person aged 12 or over is presumed to be of sufficient age and maturity to be able to exercise their data protection rights, unless the contrary is shown. This presumption does not apply in England and Wales or in Northern Ireland, where competence is assessed depending upon the level of understanding of the child, but it does indicate an approach that will be reasonable in many cases. A child should not be considered to be competent if it is evident that he or she is acting against their own best interests.

Article 8 of the GDPR sets out conditions applicable to children's consent in relation to certain online services, providing the following:

1. *Where [a child has given consent to the processing of his or her personal data], in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.*

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

2. *The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.*

Since CAP began its consultation work, the Data Protection Act 2018 entered into force; by virtue of section 6 of this legislation, the UK has provided the lower age of 13 for the purposes of Article 8.

After informal consultation with the ICO, CAP considers that the age of 13 is a reasonable benchmark for assessing the age at which a child is competent to consent, independently of a holder of parental responsibility, to processing of personal data for marketing purposes, both in relation to the offer of online services falling within the scope of Article 8 and marketing purposes more generally. CAP therefore proposes the following amended rule 10.15:

Marketers must comply with rule 10.5 when processing the personal data of children. Where marketers process the personal data of children under 13 in relation to an offer of online services on the basis of consent, they must first obtain the verifiable consent of the child's parent or guardian. Where marketers process the case of personal data of children under 13 for other marketing purposes (in other words, not in relation to an offer of online services),

marketers must first obtain the verifiable consent of the child's parent or guardian unless they can demonstrate compelling reasons for relying on the child's consent and that they have had particular regard to the child's privacy rights.

Question 1: do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

4.2 Publication of prizewinners' names: CAP Code rule 8.28.5

Rule 8.28.5 was not considered as part of the initial consultation; however, after examining its section 10 rules, CAP considered that this rule raised issues under the GDPR. The current rule provides the following:

Promoters must either publish or make available on request the name and county of major prizewinners and, if applicable, their winning entries except in the limited circumstances where promoters are subject to a legal requirement never to publish such information. Promoters must obtain consent to such publicity from all competition entrants at the time of entry. Prizewinners must not be compromised by the publication of excessive personal information.

CAP does not consider that the GDPR imposes a legal requirement on promoters to never publish the information set out in the rule. However, CAP considers that the following parts of Article 7 of the GDPR affect the rule's operation:

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

These provisions affect the rule in three ways:

1. Consent is withdrawable at any time and has to be as easy to withdraw as to give. This presents difficulties where information is published and then consent withdrawn.
2. The requirement to provide consent to enter a competition is likely to be viewed as a condition of service and, under Article 7(4), and this will have an impact on whether consent is freely given. CAP considers it is likely that consent in this scenario would be seen as not freely given if an individual cannot enter a competition if they do not consent.
3. Under the GDPR, promoters do not have to use consent as a basis for processing if another basis for processing is open to them. CAP considers that subject to the circumstances and meeting the requirements for relying on this basis, promoters might appropriately rely on legitimate interests. Because of this, CAP considers that the rule should not prescribe the basis for processing.

In order to address these points, CAP proposes that the following amended version replaces the current rule 8.28.5:

Promoters must either publish or make available on request such information to indicate that a valid award took place – ordinarily the surname and county of major prizewinners and, if applicable, their winning entries. At or before the time of entry, promoters must inform entrants of their intention to publish or make available such information and give them the opportunity to object to the information being published or made available, or to reduce the amount of information published or made available. In such circumstances, the promoter must nevertheless still furnish the details of the prizewinner and winning entry (as set out above) to the ASA), if challenged. The privacy of prizewinners must not be prejudiced by the publication of personal information and in limited circumstances (for example, in relation to National Savings) promoters may need to comply with a legal requirement not to publish such information.

CAP considers that the proposed wording strikes a proportionate balance between providing enough transparency to ensure that promoters satisfactorily demonstrate a prize has been won and ensuring that any personal information published / provided is the minimum necessary to achieve this aim. CAP considers that in many cases surname and county will not be sufficient information to identify an individual and therefore the publication / provision of such information would not constitute processing of personal data. In cases where the publication of this information would be likely to identify an individual, and therefore constitute processing personal data, CAP considers that the requirement not to prejudice the privacy of prizewinners would apply and the information should not be published. However, in such cases the promoter would need to provide details of the prizewinner and winning entry to a relevant regulatory body (including the ASA) if challenged.

Question 2: do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5. How to respond and next steps

CAP is committed to considering all responses carefully and with an open mind. CAP would particularly welcome responses from stakeholders with an interest or expertise in data protection. Responses have been invited from a cross-section of interested parties representing both consumers and industry.

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

- the consultation will run for 4 weeks, closing at 5pm on 7 December 2018;
- CAP 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.

How to respond

CAP invites written comments and supporting information on the proposals contained in this document by 5pm on 7 December 2018. Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to: AdPolicy@cap.org.uk

If you are unable to respond by email you may submit your response by fax to +44(0)20 7404 3404 or post to:

Regulatory Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn London
WC1V 6QT

Confidentiality

CAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses 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 disclosed.

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

Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2200
Textphone: 020 7242 8159
Email: enquiries@cap.org.uk

www.cap.org.uk

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