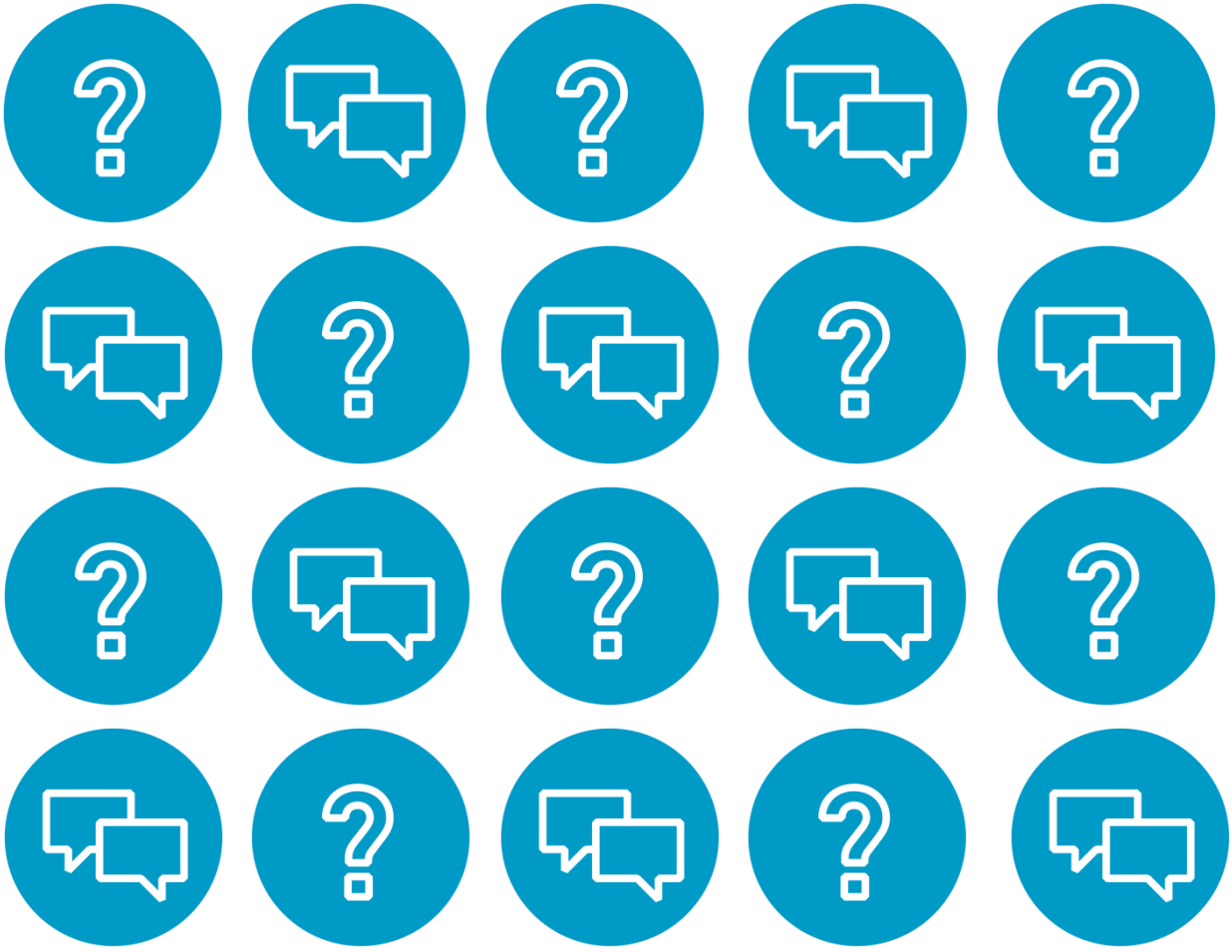
Amended rules on naming prizewinners and marketing to children

Committee of Advertising Practice's regulatory statement



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1. Summary

Following public consultation, the Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code), is introducing changes to its rules on naming prizewinners and the use of children's personal data for marketing to ensure they are aligned with the Data Protection Act 2018 and General Data Protection Regulation (EU 2016/679, the GDPR).

CAP received no responses challenging its proposal on marketing to children and one response which challenged the wording of the proposed amendments to its proposal on naming prizewinners: a summary of these responses can be found in part 3 below and a detailed evaluation can be found in the accompanying evaluation.

CAP consulted on the following changes to rule 10.15 to reflect that, under the Data Protection Act 2018, the circumstances in which children's consent can be relied on in relation to the offer of online services are limited, and to provide, after informal discussion with the Information Commissioner's Office, a benchmark on capacity to consent generally:

The wording of rule 10.15 was:

> *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.*

The amended wording of rule 10.15 is:

> *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.*

CAP consulted on the following changes to rule 8.28.5 (naming prizewinners) on the basis that, under the GDPR, legitimate interests, as opposed to consent, would appear to be the lawful ground for publishing personal data about prizewinners :

The wording of rule 8.28.5 was:

> *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.*

The amended wording of rule 8.28.5 is:

> *Promoters must either publish or make available information that indicates 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 the information and give them the opportunity to object to their 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 provide the information 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.

The changes take effect from 25 March 2019.

2. Decision to consult

2.1 Marketing to children: Data Protection Act 2018

In its initial consultation on the GDPR, CAP proposed retaining its existing rule 10.15 which derived from ICO guidance using 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 provided the lower age of 13 for the purposes of Article 8.

After informal consultation with the ICO, CAP considered that the age of 13 was 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 proposed an amended rule 10.15.

2.2 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. CAP did not consider that the GDPR imposes a legal requirement on promoters to never publish the information set out in the rule. However, CAP considered that the following parts of Article 7 of the GDPR affected 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 affected 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 proposed the amended version of rule 8.28.5. 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.

3. Consultation responses

The consultation received two responses, neither of which related to the proposal on marketing to children: one supported CAP's proposal on naming prizewinners and one challenged the wording of this proposal. CAP has published the responses it received, and has carried out a detailed evaluation of all significant points made in these responses.

The challenge to CAP's proposal on naming prizewinners related to the time at which information must be provided to those entering a promotion and the necessity of obtaining certain information about prizewinners at the time of entry. CAP considers that its proposal reflects the provisions of the GDPR and strikes a proportionate balance between entrants' privacy and ensuring that promoters can demonstrate that prizes have been awarded. A detailed analysis of these points is included in the evaluation.

4. Consultation outcome

In light of the reasons set out in the consultation proposal, and the evaluation of consultation responses, CAP will make the following changes to the wording of rule 10.15:

Existing wording:

> *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.*

New wording:

> *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.*

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Amended wording:

> *Promoters must either publish or make available information that indicates 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 the information and give them the opportunity to object to their 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 provide the information 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.*

The changes take effect from 25 March 2019.

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