CAP consultation on the General Data Protection Regulation

Committee of Advertising Practice's proposals for changes to its rules on the collection and use of data for marketing

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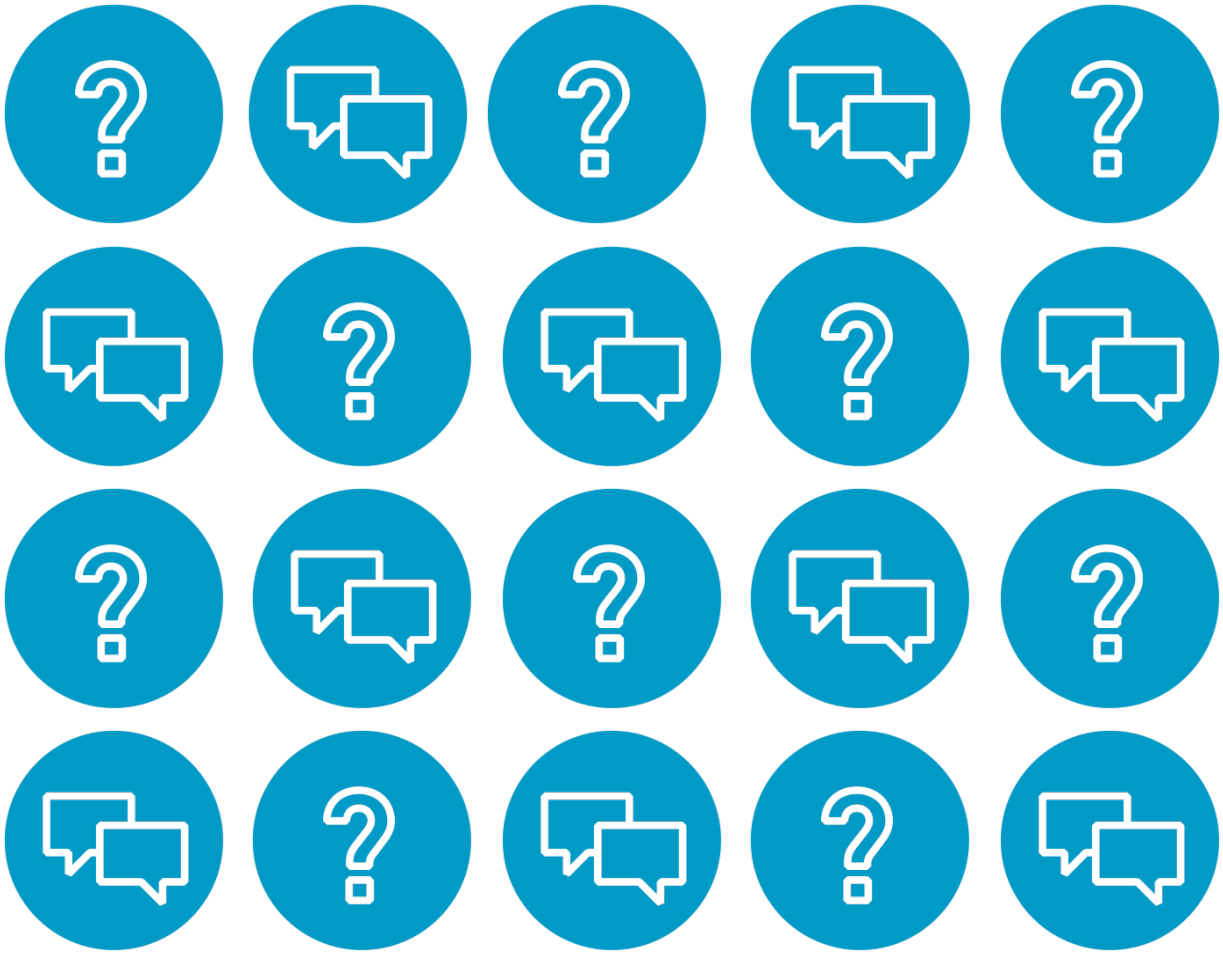

Legal, decent, honest and truthful

Contents

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 changes to its rules on the collection and use of data for marketing. These changes are intended to ensure that its rules cover data protection issues most relevant to marketing, and that they are aligned with the standards introduced by the General Data Protection Regulation (EU 2016/679, the GDPR).

CAP's regulation of data protection issues is carried out under two sets of rules: section 10 (Database practice) and Appendix 3 (Online behavioural advertising). Section 10 regulates the use of data for direct marketing generally, while Appendix 3 regulates the use of web-viewing behaviour data to serve online display advertising.

The rules in section 10 loosely reflect a mixture of data protection and e-privacy legislation – and guidance from the Information Commissioner's Office (ICO). The two main pieces of legislation from which the rules derive are the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended).

Online behavioural advertising (OBA) refers to collecting web-viewing behaviour data to deliver advertising based on the preferences or interests inferred from the data. These preferences or interests are used to target multiple web users. The rules in Appendix 3 aim to secure transparency and control for consumers by requiring notice that OBA is taking place and an opt-out mechanism for consumers to prevent their data from being used for OBA again. The rules reflect a pan-European initiative (the European Advertising Standards Alliance's Best Practice Recommendation) and an EU industry Framework.

The GDPR represents the new legal framework of data protection law across the European Union, and is enforceable from 25 May 2018. The GDPR provides an opportunity for CAP to consider its regulation of data protection matters, both in terms of the types of issues it regulates and ensuring that its rules align with the standards imposed by the GDPR (as they must, for the reasons set out at 4.1 below).

CAP's rules can be divided into two broad categories:

1. Rules that relate to "pure data protection matters". These are general rules which do not relate specifically to marketing, and CAP considers that they do not attract an expectation of regulation by an advertising regulator.

2. Rules that relate to data protection issues with a marketing dimension. These rules are directly concerned with marketing, and CAP considers that they concern matters which an advertising regulator might reasonably be expected to regulate.

In light of this distinction, and after informal pre-consultation with the ICO, CAP has developed its proposals for consultation, which can be summarised as:

- proposals for the removal of section 10 rules relating to "pure data protection matters";

- proposals for the amendment of marketing-related section 10 rules (and definitions) to ensure that they are aligned with the GDPR; and

- a proposal to remove Appendix 3 (Online behavioural advertising) of the CAP Code and deal with OBA under section 10.

This consultation will close **at 5pm on 19 June 2018.**

From 25 May 2018, when the GDPR is enforceable, until CAP introduces new rules, the ASA will not administer the existing rules in section 10 and Appendix 3 of the CAP Code. If the ASA receives complaints during this time, it will make advertisers aware of the complaint and issues raised, and ensure that they are aware that they must be complying with the GDPR. CAP encourages members of the public and businesses to find more information about their legal rights and obligations at www.ico.gov.uk.

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.cap.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 CAP's regulation of data protection issues

CAP's regulation of data protection issues is carried out under two sets of rules: section 10 (Database practice) and Appendix 3 (Online behavioural advertising). Section 10 regulates the use of data for direct marketing generally, while Appendix 3 regulates the use of web-viewing behaviour data to serve online display advertising to consumers.

3.2.1 Section 10 (Database practice)

The rules in section 10 regulate the use of data used for direct marketing purposes; they loosely reflect a mixture of data protection and e-privacy legislation – and guidance from the Information Commissioner's Office (ICO) on this legislation. The two main pieces of legislation from which the rules derive are the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended). The rules in section 10 fall into the following categories:

- rules on storage and transfer of data;
- rules on access to data;
- rules on when marketing communications can be sent;
- rules on information to be included in certain types of marketing; and
- rules on communicating the purposes for which consumers' data will be used.

The following parts of the "Scope of the Code" are relevant in assessing the types of direct marketing to which the Code applies:

> *I The Code applies to:*
>
> *a. advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including SMS and MMS), fax transmissions, catalogues, follow-up literature and other electronic or printed material*
>
> *e. marketing databases containing consumers' personal information*
>
> *II The Code does not apply to:*

h. private correspondence, including correspondence between organisations and their customers about existing relationships or past purchases

i. live oral communications, including telephone calls and announcements or direct approaches from street marketers

3.2.2 Appendix 3 (Online behavioural advertising)

Online behavioural advertising (OBA) refers to third parties collecting web-viewing behaviour data from a particular computer, across multiple web domains not under common control, which they use to deliver advertising to that particular computer based on the preferences or interests inferred from the data. These preferences or interests are used to target multiple web users who share them.

The rules in Appendix 3 aim to secure transparency and control for consumers by requiring notice, in or around online display ads served by OBA, to inform consumers that OBA is taking place, and a link to an opt-out mechanism that allows consumers to prevent their data from being used subsequently by certain (or all) third parties for OBA. The rules reflect a pan-European initiative (the European Advertising Standards Alliance's Best Practice Recommendation) and an EU industry Framework.

3.3 ASA casework under section 10

Between 1 January 2016 and 17 April 2018, the ASA received 180 complaints under section 10 of the Code, with eight instances of rules being included in formal rulings. The following table sets out the number of complaints received under each rule (some complaints involved issues under more than one rule), the issues which were covered by the rules, the number in breach of each rule and the number of formal rulings under each rule:

Rule	Number of complaints	Issue	Number in breach	Number of formal rulings
10.1	2	Data storage	1	0
10.2	0	Data transfer	0	0
10.3	9	Access to data	5	0
10.4	195	Persistent and unwanted marketing communications	175	3
10.5	160	Suppression files	151	1
10.6	29	ID of marketer / opt out mechanism in emails	25	0
10.7	0	ID of marketer / opt-out for fax and calls	0	0
10.8	19	Use of published information	19	0
10.9	3	Information about data collection and use	3	0
10.10	0	Extent of information held	0	0
10.11	1	Duration of retaining personal information	1	0
10.12	1	Consent to use information for different purpose	1	0
10.13	14	Explicit consent	9	4

10.14	2	Corporate subscribers	2	0
10.15	2	Collecting data from under-12s	1	0
10.16	1	Collecting data from under-16s about others	0	0

4. CAP's decision to consult

4.1 The General Data Protection Regulation

The General Data Protection Regulation (EU 2016/679, the GDPR) represents the new legal framework of data protection law across the EU, and is enforceable from 25 May 2018. The current law is contained in the Data Protection Directive (the DPD, 95/46/EC), which has governed EU data protection since its introduction in 1995, and which is explicitly repealed by the GDPR. The DPD is implemented in the UK by the Data Protection Act 1998 (DPA). Certain provisions of the current data protection legislation are reflected in the CAP Code (as set out at 3.2.1 above).

Given its status as a Regulation, the GDPR will be directly effective in the UK from 25 May 2018 with no implementing domestic legislation being required. In the event that the UK leaves the European Union, the GDPR will form part of domestic law, via clause 3(1) of the European Union (Withdrawal) Bill 2017 - 2019, if this proposed legislation takes effect, from the day that the UK leaves the European Union. The legal status of the GDPR also means that its provisions, save where left to Member States, are maximum harmonisation provisions, and the ASA and CAP would be acting unlawfully if they sought to maintain / enforce stricter or less strict standards than those contained in the GDPR.

Although, as noted above, the GDPR does not require implementation in the UK, the Data Protection Bill 2017 - 2019 provides for its provisions to apply in UK law, supplements them with other provisions left open to EU Member States to develop and provides for the Information Commissioner's Office's functions in relation to the GDPR and other data protection matters.

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. The key changes to the current data protection regime introduced by the GDPR and / or the Data Protection Bill which affect the CAP Code are:

- a new definition of "personal data" which explicitly refers to things like online identifiers (e.g. IP addresses);
- a more detailed definition of consent and requirements for withdrawal of consent;
- stricter requirements for offering online services to under-16s;
- more detailed transparency requirements applying to those processing data;
- a reference to direct marketing as a "legitimate interest" for processing data; and
- a "right to object" to processing for direct marketing carried out on the basis of a legitimate interest.

In January 2017, the European Commission published a proposal for a new Regulation on Privacy and Electronic Communications (the ePrivacy Regulation). This Regulation is still in draft form and, therefore, falls outside the scope of this consultation. However, CAP will, in due course, consider the impact of this legislation and the forthcoming Data Protection Act on section 10 of its Code.

4.2 CAP's decision to consult on amendments to the CAP Code

The changes made by the GDPR provide an opportunity for CAP to consider its continued regulation of data protection matters, both in terms of the types of issues to which its rules relate and ensuring that its rules align with the standards imposed by the GDPR (as they must, for the reasons set out under 4.1 above).

CAP considers that its current rules can be divided into two broad categories:

1. Rules that relate to "pure data protection matters". These are general rules which do not relate specifically to marketing, and CAP considers that they do not attract an expectation of regulation by an advertising regulator. This is reflected in the very low level of complaints received by the ASA under these rules (see 3.3 above).

2. Rules that relate to data protection issues with a marketing dimension. These rules are directly concerned with marketing, and CAP considers that they concern matters which an advertising regulator might reasonably be expected to regulate. This is reflected in the higher level of complaints received by the ASA under these rules.

CAP's proposals for consultation are made in the context of the two categories of rule set out above, and can be summarised as follows:

- proposals for the removal of section 10 rules relating to "pure data protection matters" (and section 10 rules that are unnecessary if other proposals are agreed);

- proposals for the amendment of marketing-related section 10 rules (and definitions) to ensure that they do not impose stricter or less strict standards than those imposed by the GDPR; and

- a proposal to remove Appendix 3 (Online behavioural advertising) of the CAP Code and regulate OBA under section 10.

4.3 Pre-consultation work and guidance

In preparing for this consultation, CAP has informally pre-consulted with the Information Commissioner's Office, and the ICO considers that there is benefit 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.

If updated rules on marketing-related data protection matters are introduced into the CAP Code, CAP has reached an agreement to use 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 complex cases and other matters involving the section 10 rules. 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 ASA Council but will not be binding on it.

5. Proposals for change

The sections below set out CAP's proposals for change and Annex A contains a full version of the new section 10 rules which CAP proposes. The proposals fall into the following categories:

- proposals for the removal of section 10 rules relating to "pure data protection matters" (and section 10 rules that are unnecessary if other proposals are agreed);
- proposals for the amendment of rules that relate to data protection issues with a marketing dimension (and definitions) to ensure that they do not impose stricter or less strict standards than those imposed by the GDPR; and
- a proposal to remove Appendix 3 (Online behavioural advertising) of the CAP Code and regulate OBA under section 10.

Respondents are invited to express agreement or disagreement with each proposal, and are asked to provide their rationale for doing so.

5.1 Removal of rules from section 10

CAP proposes to remove rules relating to "pure data protection matters" from section 10. These are rules which do not relate specifically to marketing and, consequently, are not about matters that attract an expectation of regulation by an advertising regulator. The ASA receives very few complaints under these rules, and CAP considers that, even in the event of complaints, the self-regulatory system has limited expertise to make judgements on them. Respondents should note that these matters are and will continue to be regulated by the ICO.

CAP also proposes to remove rules that become redundant in light of new rules being created.

5.1.1 Removal of rules 10.1 and 10.2: data security and transfer outside EEA

Rules 10.1 and 10.2 provide:

> *10.1 Personal information must always be held securely and must be safeguarded against unauthorised use, disclosure, alteration or destruction.*
>
> *10.2 Any proposed transfer of a database to a country outside the European Economic Area must be made only if that country ensures an adequate level of protection for the rights and freedoms of consumers in relation to the processing of personal information or if contractual arrangements provide that protection.*

Applying these rules would involve the ASA examining the adequacy of a marketer's data security measures and the adequacy of a non-EEA country's data protection arrangements. CAP does not consider that such matters are within the ASA's expertise, and the ASA has

not received any complaints under these rules. The ICO has and will continue to have statutory responsibility for enforcing the legislation that the rules seek to reflect.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.1.2 Removal of rule 10.3: access to data

Rule 10.3 provides:

> *10.3 Marketers must do everything reasonable to ensure that, if asked in writing, consumers or the ASA (with consent of the consumer concerned) are given available information on the nature of a consumer's personal information and from where it has been obtained.*

This rule concerns matters dealt with by the right of access to data contained in Article 15 of the GDPR, and CAP considers that this right includes matters outside the ASA's expertise and does not relate directly to marketing matters.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.1.3 Removal of rule 10.4: persistent and unwanted marketing communications

Rule 10.4 provides:

> *Marketers must not make persistent and unwanted marketing communications by telephone, fax, mail, e-mail or other remote media. To avoid making persistent and unwanted marketing communications, marketers must do everything reasonable to ensure that:…*

This rule is derived from the Unfair Commercial Practices Directive and applies whether personal data is used or not, and so has wider application than the GDPR. CAP proposes that the first sentence of the rule is retained as a new rule 10.1, which would read:

> *10.1 Marketers must not make persistent and unwanted marketing communications by telephone, fax, mail, e-mail or other remote media.*

The sub-rules of rule 10.4 provide:

> *[To avoid making persistent and unwanted marketing communications, marketers must do everything reasonable to ensure that:]*
>
> *10.4.1 marketing communications are suitable for those they target*
>
> *10.4.2 marketing communications are not sent unsolicited to consumers if explicit consent is required (see rule 10.13)*
>
> *10.4.3 anyone who has been notified to them as dead is not contacted again and the notifier is referred to the relevant preference service*
>
> *10.4.4 marketing communications are not sent to consumers who have asked not to receive them (see rule 10.5) or, if relevant, who have not had the opportunity to object to receiving them (see rule 10.9.3). Those consumers should be identifiable*

10.4.5 databases are accurate and up-to-date and that reasonable requests for corrections to personal information are effected within 60 days.

CAP proposes the following in relation to these sub-rules

10.4.1: Delete, as the suitability of marketing communications is dealt with by various rules (including those on social responsibility, children etc.).

10.4.2: Delete, as consent requirements are dealt with by the proposal for a specific rule at 5.3.4 below.

10.4.3 Maintain this rule. See proposal at 5.3.8 below.

10.4.4 Delete, as consent and withdrawal of consent requirements are dealt with by specific proposals at 5.3.9 below.

10.4.5 Delete, as this relates to "pure data protection matters".

- Do you agree or disagree with these proposals? Please provide your rationale for agreeing or disagreeing.

5.1.5 Removal of rule 10.8: publically available information

Rule 10.8 provides:

10.8 Marketers are permitted, subject to these rules and to database rights, to use published information that is generally available if the consumer concerned is not listed on a relevant suppression file.

CAP does not consider there are circumstances where generally available personal data can be used for marketing unless consent has been obtained, or there is a legitimate interest in marketing, and therefore this rule is not needed given the rule proposed at 5.3.4 below.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.1.6 Removal of rules 10.10 and 10.11: nature of personal information and retention

Rules 10.10 and 10.11 provide:

10.10 The extent and detail of personal information held for any purpose must be adequate and relevant and should not be excessive for that purpose.

10.11 Personal information must not be kept for longer than is necessary for the purpose for which it was originally obtained.

CAP considers that these rules concern matters not directly related to advertising.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.2 Addition of / amendments to definitions in section 10

5.2.1 Consent

CAP proposes the following definition:

> *"Consent" is any freely given, specific, informed and unambiguous indication of a consumer's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.*

CAP proposes this to reflect the definition contained in Article 4(11) of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.2.2 Personal data

CAP proposes the following definition:

> *"Personal data" is any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*

CAP proposes this to reflect the definition contained in Article 4(1) of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.2.3 Marketers

CAP proposes the following definition:

> *The term "marketers" is used in the rules to refer to the person(s) responsible for sending marketing communications to consumers. It is not intended to catch marketers who are not controllers.*

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.2.4 Controllers

CAP proposes the following definition to reflect the definition contained in Article 4(7) of the GDPR:

> *A "controller" is any person or organisation that, alone or jointly with others, determines the purposes and means of the processing of personal data*

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.2.5 Special categories of personal data

CAP proposes the following definition:

> *"Special categories" of personal data means: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.*

CAP proposes this to reflect the special categories of personal data contained in Article 9(1) of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3 New section 10 rules

5.3.1 Rule 10.1: persistent and unwanted marketing communications

The proposed rule is:

> *10.1 Marketers must not make persistent and unwanted marketing communications by telephone, fax, mail, e-mail or other remote media.*

This rule is derived from the Unfair Commercial Practices Directive and applies whether personal data is used or not, and so has wider application than the GDPR. It is currently contained in the first sentence of rule 10.4 and CAP proposes its retention as a new rule 10.1.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.2 Rules 10.2 and 10.3: transparency about data collection

The proposed rules are:

> *10.2 At the time of collecting consumers' personal data from them, marketers must provide consumers with the following information (e.g. in a privacy notice), unless the consumer already has it:*
>
> > *10.2.1 the identity and the contact details of the marketer or the marketer's representative*
> >
> > *10.2.2 the contact details of the data protection officer of the marketer, where applicable*
> >
> > *10.2.3 the purposes for which the collection of the personal data are intended and the legal basis for collection*
> >
> > *10.2.4 the legitimate interests of the marketer or third party, where processing is based on these interests (see rule 10.4)*
> >
> > *10.2.5 the recipients or categories of recipients of the personal data, if any*

10.2.6 where applicable, that the marketer intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the European Commission, and in the absence of such a decision, or , reference to the appropriate or suitable safeguards or binding corporate rules referred to in Article 46 or 47 of the GDPR, or to the compelling legitimate interests under the second subparagraph of Article 49(1) GDPR, and the means to obtain a copy of them or where they have been made available

10.2.7 the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period

10.2.8 the existence of the right to request from the marketer access to and rectification or erasure of personal data or restriction of processing concerning the consumer or to object to processing as well as the right to data portability

10.2.9 if relying on consent as the legal basis, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal

10.2.10 the right to lodge a complaint with a data protection supervisory authority

10.2.11 whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the consumer is obliged to provide the personal data and of the possible consequences of failure to provide such data;

10.2.12 the existence of automated decision-making, including profiling producing legal or other significant effects on consumers, referred to in Article 22(1) and (4) of the GDPR and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the consumer.

10.3 Where marketers have obtained consumers' personal data from other sources (e.g. third party list providers), they must provide consumers with the information listed in rule 10.2 (e.g. in a privacy notice), unless the consumer already has it, within a reasonable period no later than one month after obtaining the personal data or at the time of the first communication with the consumer, and where a disclosure to another recipient is envisaged, no later when the personal data is first disclosed. In such cases, controllers must also provide, within the same timeframes, information on the categories of personal data concerned, the source from which the personal information originates, and if applicable, whether it came from publicly accessible sources but a controller does not need to provide the information in rule 10.2.11 above.

CAP proposes these rules to reflect the transparency requirements of Articles 13 and 14 of the GDPR, taking into account Recitals 39, 58 and 61. They are designed to replace the current rule 10.9.

- Do you agree or disagree with these proposals? Please provide your rationale for agreeing or disagreeing.

5.3.3 Rule 10.4: further processing

The proposed rule is:

10.4 In all cases where the marketers intend to further process personal data for a purpose other than that for which it was obtained and referred to (e.g. in the original privacy notice),

they must provide consumers with information (e.g. in a further privacy notice) on that other purpose before processing it.

CAP proposes this rule to reflect the requirements of Article 13(3) and 14(4) of the GDPR. It is designed to replace the current rule 10.12.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.4 Rule 10.5: lawful basis for processing

The proposed rule is:

10.5 Marketers must either obtain prior consent from consumers before processing their personal data to send marketing communications, or be in a position to demonstrate that the processing is necessary for the purposes of their or a third party's legitimate interests. The legitimate interests provision does not apply where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child; and it does not provide a basis for processing personal data to send marketing communications by electronic mail (although, see below).

CAP proposes this rule to reflect the most likely bases for processing of personal data for direct marketing under the GDPR: consent and legitimate interests. This rule seeks to reflect Articles 6(1)(a) and 6(1)(f), taking into account Recital 47.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.5 Rules 10.6, 10.7 and 10.8

The proposed rules are:

10.6 Marketers must obtain consent before using contact details to send marketing communications to consumers by electronic mail, unless (i) the communications are for the marketer's similar products and services, (ii) the contact details have been obtained during, or in negotiations for, a sale; and (iii) marketers tell those consumers that they may opt out of receiving future marketing communications, both when they collect their contact details and on every subsequent occasion they send marketing communications to them. Marketers must give consumers a simple means to opt out. Certain organisations cannot rely on this exception from consent – charities, political parties and not-for-profits where there is no sale or negotiation for a sale. This rule does not apply where the consumer is a corporate subscriber: see rule 10.13 below.

10.7 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 address or a SMS short code to which recipients can send opt-out requests.

10.8 Fax and non-live-sound automated-call marketing communications must contain the marketer's full name and a valid address or freephone number to which recipients can send opt-out requests.

These rules are designed to reflect the current requirements of PECR and are currently dealt with by rules 10.6, 10.7 and 10.13.3: the new rules do not make material changes.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.6 Rule 10.9: special categories of personal data

The proposed rule is:

> *10.9 Marketers must obtain explicit consent before processing special categories of personal data. These categories are set out under "Definitions".*

CAP proposes this rule to reflect Article 9 of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.7 Rule 10.10: suppression

The proposed rule is:

> *10.10 Consumers are entitled to have their personal data suppressed so that they do not receive marketing. Marketers must ensure that, before use, databases have been run against relevant suppression files within a suitable period. Marketers must hold limited information, for suppression purposes only, to ensure that no other marketing communications are sent as a result of information about those consumers being re-obtained through a third party.*

This is currently dealt with by rule 10.5 and the new rule does not introduce material changes.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.8 Rule 10.11: contacting those notified as dead

The proposed rule is:

> *10.11 Marketers must do everything reasonable to ensure that anyone who has been notified to them as dead is not contacted again and the notifier is referred to the relevant preference service.*

This is currently dealt with by rule 10.4.3 and the new rule does not introduce material changes.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.9 Rule 10.12: withdrawal of consent

The proposed rule is:

> *10.12 When relying on consent as the basis for processing personal data, marketers must inform consumers that they have the right to withdraw their consent, at any time. Marketers must ensure that it is as easy for consumers to withdraw consent as it was to give consent.*

CAP proposes this rule to reflect the requirements of Article 7(3) of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.10 Rule 10.13: right to object

The proposed rule is:

> *10.13 When relying on legitimate interests as the basis for processing personal data for direct marketing, marketers must stop such processing if the consumer objects. Marketers must explicitly inform consumers, clearly and separately from any other information, of their right to object no later than the time of their first communication with the consumer.*

CAP proposes this rule to reflect the requirements of Article 21 of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.11 Rule 10.14: marketing to corporate subscribers

The proposed rule is:

> *10.14 Consent is not required when marketing business products by fax or by electronic mail to corporate subscribers (see III j), including to their named employees. Marketers must nevertheless comply with rule 10.10 and offer opt-outs in line with rule 10.6 and 10.7.*

This rule is designed to reflect the requirements of PECR and is currently dealt with by rule 10.14: it does not introduce material changes to the existing rule.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.3.12 Rules 10.15 and 10.16: marketing to and collecting data from children

CAP proposes the following amended versions of rules 10.14 and 10.15, to be numbered rules 10.15 and 10.16:

> *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.*
>
> *10.16 When collecting personal data from a child, marketers must ensure that the information provided in Rule 10.2 is intelligible to a child (or their parents if relying on Rule 10.15) and should avoid using the personal data of a child to create personality or user profiles especially in the context of automated decision-making that produces legal effects or similarly significantly affects a child.*

These rules are designed to reflect Article 12(1) and Recitals 38 and 71 of the GDPR.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5.4 Removal of Appendix 3

CAP proposes the removal of Appendix 3, which contains rules on online behavioural advertising (OBA, see 3.2.2 above)). CAP proposes that OBA complaints should be dealt with under a revised section 10, in line with the standards introduced by the GDPR, which will apply to the use of data for marketing purposes. As noted at 4.1 above, CAP will monitor the progress of the draft ePrivacy Regulation to examine any impact that this legislation has on its section 10 rules.

- Do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

6. 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 6 weeks, closing **at 5pm on 19 June 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.

Annex A: new section 10 rules

Background

In considering complaints under these rules, the ASA will have regard to the General Data Protection Regulation (“the GDPR”, (EU) 2016/679) and Data Protection Act 2018 (forthcoming) in the case of personal data, and the Privacy and Electronic Communications (EC Directive) Regulations 2003 in the case of activities relating to electronic communications. Marketers must comply with this legislation and guidance is available from the Information Commissioner's Office. Although the legislation has a wide application, these rules relate only to data used for direct marketing purposes. The rules should be observed in conjunction with the legislation, and do not replace it: in the event of doubt, marketers are urged to seek legal advice.

Responsibility for complying with the database practice rules rests with marketers who are controllers of personal data and others responsible for marketing communications involving personal data (e.g. processors).

Definitions

“Consent” is any freely given, specific, informed and unambiguous indication of a consumer's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

A "controller" is any person or organisation that, alone or jointly with others, determines the purposes and means of the processing of personal data;

The term “marketers” is used in the rules to refer to marketers and / or controllers: the rules will be applied to one or both depending on the circumstances.

“Electronic mail” in this section encompasses text, voice, sounds or image message, including e-mail, Short Message Service (SMS), Multimedia Messaging Service (MMS).

“Personal data” is any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

A "preference service" is a service that, to reduce unsolicited contact, enables consumers and businesses to have their names and contact details in the UK removed from or added to lists that are used by the direct marketing industry.

“Special categories” of personal data means: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

(See also CAP Help Notes on Mobile Marketing and Viral Marketing.)

Rules

10.1 Marketers must not make persistent and unwanted marketing communications by telephone, fax, mail, e-mail or other remote media.

10.2 At the time of collecting consumers' personal data from them, marketers must provide consumers with the following information (e.g. in a privacy notice), unless the consumer already has it:

10.2.1 the identity and the contact details of the marketer or the marketer's representative

10.2.2 the contact details of the data protection officer of the marketer, where applicable

10.2.3 the purposes for which the collection of the personal data are intended and the legal basis for collection

10.2.4 the legitimate interests of the marketer or third party, where processing is based on these interests (see rule 10.5)

10.2.5 the recipients or categories of recipients of the personal data, if any

10.2.6 where applicable, that the marketer intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the European Commission, and in the absence of such a decision, or , reference to the appropriate or suitable safeguards or binding corporate rules referred to in Article 46 or 47 of the GDPR, or to the compelling legitimate interests under the second subparagraph of Article 49(1) GDPR, and the means to obtain a copy of them or where they have been made available

10.2.7 the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period

10.2.8 the existence of the right to request from the marketer access to and rectification or erasure of personal data or restriction of processing concerning the consumer or to object to processing as well as the right to data portability

10.2.9 if relying on consent as the legal basis, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal

10.2.10 the right to lodge a complaint with a data protection supervisory authority

10.2.11 whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the consumer is obliged to provide the personal data and of the possible consequences of failure to provide such data;

10.2.12 the existence of automated decision-making, including profiling producing legal or other significant effects on consumers, referred to in Article 22(1) and (4) of the GDPR and, at least in those cases, meaningful information about the logic

involved, as well as the significance and the envisaged consequences of such processing for the consumer.

10.3 Where marketers have obtained consumers' personal data from other sources (e.g. third party list providers), they must provide consumers with the information listed in rule 10.2 (e.g. in a privacy notice), unless the consumer already has it, within a reasonable period no later than one month after obtaining the personal data or at the time of the first communication with the consumer, and where a disclosure to another recipient is envisaged, no later when the personal data is first disclosed. In such cases, marketers must also provide, within the same timeframes, information on the categories of personal data concerned, the source from which the personal information originates, and if applicable, whether it came from publicly accessible sources but a marketer does not need to provide the information in rule 10.2.11 above.

10.4 In all cases where the marketers intend to further process personal data for a purpose other than that for which it was obtained and referred to (e.g. in the original privacy notice), they must provide consumers with information (e.g. in a further privacy notice) on that other purpose before processing it.

10.5 Marketers must either obtain prior consent from consumers before processing their personal data to send marketing communications, or be in a position to demonstrate that the processing is necessary for the purposes of their or a third party's legitimate interests. The legitimate interests provision does not apply where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child; and it does not provide a basis for processing personal data to send marketing communications by electronic mail (although, see below).

10.6 Marketers must obtain consent before using contact details to send marketing communications to consumers by electronic mail, unless (i) the communications are for the marketer's similar products and services, (ii) the contact details have been obtained during, or in negotiations for, a sale; and (iii) marketers tell those consumers that they may opt out of receiving future marketing communications, both when they collect their contact details and on every subsequent occasion they send marketing communications to them. Marketers must give consumers a simple means to opt out. Certain organisations cannot rely on this exception from consent – charities, political parties and not-for-profits where there is no sale or negotiation for a sale. This rule does not apply where the consumer is a corporate subscriber: see rule 10.14 below.

10.7 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 address or a SMS short code to which recipients can send opt-out requests.

10.8 Fax and non-live-sound automated-call marketing communications must contain the marketer's full name and a valid address or freephone number to which recipients can send opt-out requests.

10.9 Marketers must obtain explicit consent before processing special categories of personal data. These categories are set out under "Definitions".

10.10 Consumers are entitled to have their personal data suppressed so that they do not receive marketing. Marketers must ensure that, before use, databases have been run

against relevant suppression files within a suitable period. Marketers must hold limited information, for suppression purposes only, to ensure that no other marketing communications are sent as a result of information about those consumers being re-obtained through a third party.

10.11 Marketers must do everything reasonable to ensure that anyone who has been notified to them as dead is not contacted again and the notifier is referred to the relevant preference service.

10.12 When relying on consent as the basis for processing personal data, marketers must inform consumers that they have the right to withdraw their consent, at any time. Marketers must ensure that it is as easy for consumers to withdraw consent as it was to give consent.

10.13 When relying on legitimate interests as the basis for processing personal data for direct marketing, marketers must stop such processing if the consumer objects. Marketers must explicitly inform consumers, clearly and separately from any other information, of their right to object no later than the time of their first communication with the consumer.

10.14 Consent is not required when marketing business products by fax or by electronic mail to corporate subscribers (see III j), including to their named employees. Marketers must nevertheless comply with rule 10.10 and offer opt-outs in line with rule 10.6 and 10.7.

Children

Background

Please see Section 5: Children

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.

10.16 When collecting personal data from a child, marketers must ensure that the information provided in Rule 10.2 is intelligible to a child (or their parents if relying on Rule 10.15) and should avoid using the personal data of a child to create personality or user profiles especially in the context of automated decision-making that produces legal effects or similarly significantly affects a child.

Annex B: responding to this consultation

How to respond

CAP invites written comments and supporting information on the proposals contained in this document **by 5pm on 19 June 2018.**

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to: gdprcon@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

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