# New rules on the use of data for marketing

**Committee of Advertising Practice's regulatory statement**

Legal, decent, honest and truthful

CAP

# Contents

## 1. Executive 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 new rules on the 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 align with the standards introduced by the General Data Protection Regulation (EU 2016/679, the GDPR).**

Until 25 May this year, CAP's regulation of data protection issues was carried out under two sets of rules: section 10 (Database practice) and Appendix 3 (Online behavioural advertising). Section 10 regulated the use of data for direct marketing generally, while Appendix 3 included rules on the transparency and control of data collected and used for the purpose of delivering ads based on web-users' browsing behaviour.

The GDPR governs the use of personal data across the European Union, and has been enforceable from 25 May 2018. Its introduction provided 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 required by the GDPR.

Until 25 May this year, when CAP suspended the rules in Section 10 and Appendix 3 pending the outcome of its public consultation, CAP's rules could be divided into two broad categories:

1. Rules that relate to "pure data protection matters" (for example, on data security and transfer of data). These are general rules which do not relate specifically to marketing.

2. Rules that relate to data protection issues with a marketing dimension. These rules are directly concerned with marketing.

In light of this distinction, and after informal pre-consultation with the ICO (which sees benefit in CAP's self-regulation of marketing-related data protection matters existing alongside the statutory regime administered by the ICO), CAP consulted on:

- proposals for the removal of section 10 rules relating to "pure data protection matters" on the basis that these rules are unlikely to attract an expectation of regulation by the UK's advertising regulator;

- 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 (OBA)) of the CAP Code and to regulate OBA under an updated Section 10.

CAP's consultation received six responses. After careful consideration of them, CAP has decided to remove rules covering "pure data protection matters", remove Appendix 3 (OBA) from the Code and retain Section 10 rules that are likely to attract an expectation of regulation by the UK's advertising regulator.

CAP has made numerous changes to Section 10 in response to important points raised by respondents, to ensure that the rules are aligned with the GDPR. CAP's consideration of significant points made by respondents on which matters should continue to be regulated

under its Section 10 rules is included in part 3.1 of this statement and CAP's decisions on specific proposals for the revision of specific rules in Section 10 is included in part 3.2.

A full version of the revised Section 10 rules is included in Annex A. Alongside this regulatory statement, CAP has published all responses received, along with a detailed evaluation of all significant points made in these responses.

The following factors are central to CAP's decision to regulate marketing-related data protection matters under its revised Section 10 rules:

- 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.

- CAP will use the Direct Marketing Commission (DMC), an independent industry watchdog, as an expert panel to provide advice to the CAP Executive, the ASA Executive and the ASA Council in cases where "legitimate interests" has been put forward as a basis for processing personal data for the purpose of producing and/or distributing a marketing communication, and related matters. The DMC will operate under a publicly available memorandum of understanding with CAP, and any advice it provides will be taken into account by the CAP Executive, the ASA Executive and the ASA Council but will not be binding on them.

- CAP and the ASA retain the discretion, under the CAP Code, to have regard to existing statutory enforcement bodies in relevant cases, and refer matters to them where appropriate. In matters relating to the use of data for marketing, CAP considers that referral to the ICO may be appropriate in cases where the issue at hand is particularly contentious and the outcome has the potential to affect widespread industry practice.

The new Section 10 rules will take effect immediately and will be subject to a 12-month review. In the first six months following the rules taking effect, the ASA is likely to deal with matters informally, but reserves the right to tackle some cases formally where it believes, having consulted with relevant bodies, that a formal ruling is in the public's and the sector's interest.

CAP will carry out a further consultation on matters that have arisen during the current consultation in two areas: marketing to children; and publication of prizewinners' names. This consultation will be published imminently and will last for four weeks.

## 2. CAP's decision to consult

### 2.1 The General Data Protection Regulation

The General Data Protection Regulation (EU 2016/679), became enforceable from 25 May 2018. The current Section 10 rules reflect certain provisions contained in the Data Protection Directive (the DPD, 95/46/EC), as implemented by the Data Protection Act 1998, which governed EU data protection from 1995 until the GDPR became enforceable.

The GDPR ensures that personal data can only be processed under certain bases. Organisations that collect and manage personal data must also protect such data from misuse and respect certain rights. The following key changes were introduced by the GDPR:

- a new definition of "personal data" which explicitly refers to concepts 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 people aged younger than 16 (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). At the time of writing, this Regulation remains in draft form and, therefore, falls outside the scope of CAP's consultation. However, CAP will consider the impact of this legislation on Section 10 of its Code in due course.

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. This legislation entered into force after CAP had begun its consultation work and did not therefore form part of the consultation. However, as it has an impact on CAP's rules relating to the use of children's personal data for marketing, CAP will carry out further consultation in this area: details of this are set out in part 4.

### 2.3 CAP's decision to consult

The changes made by the GDPR provided 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 required by the GDPR. As a Regulation, the GDPR is a maximum harmonisation measure, and therefore any rules that CAP maintains in relation to processing of personal data that falls within the GDPR's scope must not impose stricter or less strict standards than those contained in the GDPR.

CAP categorised its existing rules 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, following review of their continuing relevance, 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 of the consultation document).

2. Rules that relate to data protection issues with a marketing dimension. These rules are directly concerned with marketing, and CAP considers that they are likely to attract an expectation of regulation by the UK's advertising regulator. This is reflected in the higher level of complaints received by the ASA under these rules.

CAP's proposals for consultation were 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 rendered 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.

In preparing for the consultation, CAP informally pre-consulted with the ICO, 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 ICO guidance (for example, on consent), the ICO's forthcoming direct marketing code, guidance from the European Data Protection Board and continued dialogue with the ICO.

During its pre-consultation work, CAP 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 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 ASA Council but will not be binding on it.

## 3. Consultation responses and CAP's decisions

### 3.1 Consultation responses

The consultation received six responses, three of which challenged CAP's continued regulation of data protection matters, with the other three supporting CAP's continued regulation subject to changes to the wording of rules. CAP has published all responses it received, along with a detailed evaluation of all significant points made in these responses. The next sections set out CAP's consideration of significant points made by respondents on which matters should continue to be regulated under its Section 10 rules (Part 3.2) and CAP's decisions on specific proposals for the revision of individual Section 10 rules (Part 3.3). These sections should be read in conjunction with the consultation document and evaluation table.

### 3.2 Narrowing of matters regulated by CAP

This section deals with CAP's consideration of which matters should continue to be regulated under its Section 10 rules. As noted in Part 2.3 of this document, CAP categorised its rules into those which deal with "pure data protection matters" and those which deal with marketing-specific data protection matters, and consulted on removing the former and retaining the latter. Some respondents challenged both this categorisation and CAP's regulation of data protection issues in general terms.

CAP's analysis of significant points made by respondents is as follows (a more detailed analysis of these points can be found under "General comments" in the evaluation):

- **The ICO, not CAP, is the statutory regulator for data protection matters, and therefore it should regulate this area not CAP. There should not be two different regimes.**

  In preparing for consultation, CAP informally pre-consulted with the ICO, 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 data protection regime. This will be achieved by close monitoring of ICO guidance (for example, on the use of 'consent'), the ICO's forthcoming direct marketing code, guidance from the European Data Protection Board and continued dialogue with the ICO and industry.

  CAP will use the Direct Marketing Commission (DMC), an independent industry watchdog, as an expert panel to provide advice to the CAP Executive, the ASA Executive and the ASA Council in cases concerning "legitimate interests" and related matters. The DMC will operate under a publicly available memorandum of understanding with CAP, and any advice it provides will be taken into account by the

CAP Executive, the ASA Executive and the ASA Council but will not be binding on them.

- **CAP's classification of "pure data protection matters" should be interpreted widely to include any matters that replicate matters included in GDPR or where the interpretation of the GDPR is unclear.**

  CAP set out in its consultation document the matters that it proposed to continue to regulate: these were matters that have a marketing dimension to them and in CAP's view, in line with the data protection issues about which consumers have complained to the ASA, that stakeholders would consider are likely to attract an expectation of regulation by the UK's advertising regulator. Consultation responses have not provided any substantive points that calls into question CAP's categorisation of these matters. Any potential inconsistency between CAP's, the ASA's and the legislative regime will be mitigated by the measures that CAP and the ASA have put in place to combat this, for example the use of the DMC, dialogue with the ICO and industry and the development and use of guidance. CAP and the ASA retain the discretion, under the CAP Code, to have regard to existing statutory enforcement bodies in relevant cases, and refer matters to them where appropriate. CAP considers that referral to the ICO may be appropriate in cases where the issue at hand is particularly contentious and the outcome has the potential to affect widespread industry practice.

To better reflect the scope of the new rules, CAP has decided to rename Section 10 "Use of data for marketing". CAP will also add the following text to the "Background" of the section:

> *These rules do not seek to cover all circumstances. Other narrow grounds for processing or limited exemptions set out in the GDPR may be available to marketers, but if a marketer wishes to rely on them it would need to be able readily to explain how they are applicable.*

The next section sets out the specific changes to the rules that remain following CAP's removal of pure data protection matters.

## 3.2 Changes to CAP's rules

### CAP's decisions on proposed rule changes

This part sets out CAP's decisions in relation to the specific proposals it consulted on, and should be read in conjunction with the consultation document (which sets out the rationale for specific proposals) and evaluation table (which sets out CAP's position in relation to responses received on the specific proposals during consultation). The section follows the following format:

- Where CAP has decided to implement a proposal on the basis of the rationale presented in its consultation document and with no challenge being received, this stated.

- Where CAP has decided to implement an amended version of a proposal, this is stated together with a comparison of the initial proposal and the amended version, with a cross-reference to the evaluation table which sets out the rationale for the amendment.

- The shaded, numbered headings correspond with the numbered proposals used in the consultation document.

CAP's decisions are as follows:

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

CAP will remove these rules after receiving support and no challenges to the proposal.

#### 5.1.2 Removal of rule 10.3: access to data

CAP will remove this rule after receiving support and no challenges to the proposal.

#### 5.1.3 Removal of sub-rules of 10.4: persistent and unwanted marketing communications

CAP will remove these sub-rules after receiving support and no challenges to the proposal.

#### 5.1.5 Removal of rule 10.8: publically available information

CAP will remove this rule after receiving support and no challenges to the proposal.

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

CAP will remove this rule after receiving support and no challenges to the proposal.

### 5.2 Addition of / amendments to definitions in section 10

#### 5.2.1 Consent

CAP will include the following definition, as proposed in consultation, in section 10, after receiving support and no challenges to the proposal:

> *"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.*

#### 5.2.2 Personal data

CAP will include the following definition, as proposed in consultation, in section 10, after receiving support and no challenges to the proposal:

> *"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.*

#### 5.2.3 Marketers

CAP will not include the following definition that it proposed in consultation:

> *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.*

Instead, CAP will deal with “marketers” via the following amendment to the “Background” of section 10:

> *Responsibility for complying with the rules on the use of personal data rests primarily with marketers who are controllers of personal data. Others involved in sending marketing communications (for example, agencies and service suppliers) also have a responsibility to comply.*

An evaluation of the responses received in relation to this proposal can be found at 5.2.3 of the evaluation table.

#### 5.2.4 Controllers

CAP will include the following definition, as proposed in consultation, in section 10:

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

An evaluation of the responses received in relation to this proposal can be found at 5.2.4 of the evaluation table.

#### 5.2.5 Special categories of personal data

CAP will include the following definition, as proposed in consultation, in section 10:

> *“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.*

An evaluation of the responses received in relation to this proposal can be found at 5.2.5 of the evaluation table.

### 5.3 New section 10 rules

#### 5.3.1 Rule 10.1: persistent and unwanted marketing communications

CAP will include the following rule, as proposed in consultation:

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

An evaluation of the responses received in relation to this proposal can be found at 5.3.1 of the evaluation table.

#### 5.3.2 Rules 10.2 and 10.3: transparency about data collection

CAP will include the following rules, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

> *10.2 At the time of collecting consumers’ personal data from them, marketers must provide consumers with the following information (in, for example, 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. If so, marketers must refer to ~~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 the~~m~~transfer mechanisms relied on 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~~ similarly 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 (in, for example, a privacy notice), unless the consumer already has it, in compliance with at least one of these three options: (i) within a reasonable period, at the latest within ~~no later than~~ one month after obtaining the personal data; or (ii) if the data are to be used for communication with the consumer ~~or~~ at the latest at the time of the first communication with the consumer~~,~~; or (iii) ~~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's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.2 of the evaluation table.

### 5.3.3 Rule 10.4: further processing

CAP will include the following rule, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

> *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 (in, for example, the original privacy notice), they must ensure that the new purpose is not incompatible with the original purpose provide consumers with information (in, for example, a further privacy notice) on that other purpose before processing it.*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.3 of the evaluation table.

### 5.3.4 Rule 10.5: lawful basis for processing

CAP will include the following rule, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

> *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~~ consumer which require protection of personal data, in particular where the ~~data subject~~ consumer is a child; and it does not provide a basis for processing personal data to send marketing communications by electronic mail (although, see rule 10.6 below).*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.4 of the evaluation table.

### 5.3.5 Rules 10.6, 10.7 and 10.8

CAP will include the following rules, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

> *10.6 Marketers must have obtained 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.*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.5 of the evaluation table.

### 5.3.6 Rule 10.9: special categories of personal data

CAP will include the following rule, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

*10.9 Marketers must obtain explicit consent before processing special categories (see Definitions) of personal data unless the data has already manifestly been made public by the consumer and the use of it was fair and within the reasonable expectations of the consumer. ~~These categories are set out under "Definitions".~~*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.6 of the evaluation table.

### 5.3.7 Rule 10.10: suppression

CAP will include the following rule, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

*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 to those consumers as a result of information about those consumers being re-obtained through a third party.*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.7 of the evaluation table.

### 5.3.8 Rule 10.11: contacting those notified as dead

CAP will include the following rule, as proposed in consultation, after receiving support and no challenges to the proposal:

*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.*

### 5.3.9 Rule 10.12: withdrawal of consent

CAP will include the following rule, as proposed in consultation:

*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.*

An evaluation of the responses received in relation to this proposal can be found at 5.3.9 of the evaluation table.

### 5.3.10 Rule 10.13: right to object

CAP will include the following rule, as proposed in consultation:

*10.13 When relying on legitimate interests as the basis for processing personal data, 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.*

An evaluation of the responses received in relation to this proposal can be found at 5.3.10 of the evaluation table.

### 5.3.11 Rule 10.14: marketing to corporate subscribers

CAP will include the following rule, as proposed in consultation, after receiving support and no challenges to the proposal:

*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.*

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

CAP will carry out further consultation on an amended proposal for rule 10.15: see section 4.

CAP will include the following rule 10.16, as proposed in consultation, with amendments (marked with underlining and strikethrough) to reflect consultation responses:

*10.16 When collecting personal data from a child, marketers must ensure that the information provided in Rule 10.2 is readily 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.~~*

CAP's evaluation of responses received in relation to this proposal, and its rationale for these amendments, can be found at 5.3.12 of the evaluation table.

CAP will remove the text, marked with strikethrough from rule 10.16, using it to create the following new rule 10.17:

*10.17 Marketers 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.*

CAP considers that this deals with a discrete issue and is better placed in its own rule.

## 5.4 Removal of Appendix 3 (Online behavioural advertising)

CAP will remove this rule after receiving support and no challenges to the proposal. Online behavioural advertising will be dealt with under section 10, for the reasons set out in the consultation proposal.

## 4. Further consultation

CAP will carry out a further consultation on matters that have arisen during the current consultation in two areas: the age at which consent to marketing can be given by children in the absence of consent from the holder of parental responsibility; and the lawful basis for publishing the personal data of prizewinners. This consultation will be published imminently and will last for four weeks.

# 5. Next steps

## 5.1 Revised section 10 rules

CAP's revised section 10 rules take effect immediately and will be subject to a 12-month review.

## 5.2 Further consultation

The consultation set out in part 4 will be published imminently and will last for four weeks.

# Annex A: new Section 10 (Use of data for marketing)

## Background

In considering complaints under these rules, the ASA will have regard to Regulation (EU) 2016/679 (the General Data Protection Regulation, “GDPR”) and the Data Protection Act 2018 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 rules on the use of personal data rests primarily with marketers who are controllers of personal data. Others involved in sending marketing communications (for example, agencies or service suppliers) also have a responsibility to comply.

These rules do not seek to cover all circumstances. Other narrow grounds for processing or limited exemptions set out in the GDPR may be available to marketers, but if a marketer wishes to rely on them it would need to be able readily to explain how they are applicable.

## 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;

“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 (in, for example, 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. If so, marketers must refer to the existence or absence of an adequacy decision by the European Commission, or 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 the transfer mechanisms relied on 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 similarly 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 (for example, third party list providers), they must provide consumers with the information listed in rule 10.2 (in, for example, a privacy notice), unless the consumer already has it, in compliance with at least one of these three options: (i) within a reasonable period, at the latest within one month after obtaining the personal data; or (ii) if the data are to be used for communication with the consumer, at the latest at the time of the first communication with the consumer; or (iii) 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 marketers intend to further process personal data for a purpose other than that for which it was obtained and referred to (for example, in the original privacy notice), they must ensure that the new purpose is not incompatible with the original purpose, and provide consumers with information (in, for example, a further privacy notice) on that other purpose before processing it.

10.5 Marketers must either obtain prior consent (see Definitions) 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 consumer which require protection of personal data, in particular where the consumer is a child; and it does not provide a basis for processing personal data to send marketing communications by electronic mail (although, see rule 10.6 below).

10.6 Marketers must have obtained 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 (see Definitions) of personal data, unless the data has already manifestly been made public by the consumer and the use of it was fair and within the reasonable expectations of the consumer.

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 to those consumers as a result of information about those consumers being reobtained 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, 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 rules 10.6 and 10.7.

## Children

### Background

Please see Section 5: Children

10.15 Marketers must not knowingly collect from children under 12 (or 13 in the case of personal data collected in relation to an offer of online services) 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 readily intelligible to a child (or their parents if relying on Rule 10.15).

10.17 Marketers 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.

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