

CAP submission to ICO's call for evidence on its Age-Appropriate Design Code

1. Background to CAP and the ASA

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP).
- 1.2. CAP is the self-regulatory body that creates, revises and enforces the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (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 Ads that are judged not to comply with the Code must be withdrawn or amended.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.
- 1.3. 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.
- 1.4. By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including Directive 2005/29/EC (on misleading advertising). Self-regulation is accepted by the Department for Business, Energy and Industrial Strategy and the courts as a first line of control in protecting consumers and the industry. Further information about CAP is available at www.asa.org.uk.
- 1.5. CAP's submission to this call for evidence concerns general points relating to the overlap between existing law and regulation and matters covered by the call for evidence; it does not seek to address many of the specific matters contained in the call for evidence, as these fall outside CAP's remit and expertise.

2. CAP rules / guidance and the law relating to matters covered in the call for evidence

2.1. CAP maintains rules on Database practice (section 10) and online behavioural advertising (Appendix 3). It carried out a consultation on these rules in May and June 2018 to align them with changes introduced by the General Data Protection Regulation (GDPR), and is completing work on this. These rules complement the statutory regime administered by the ICO, and CAP pre-consulted with the ICO before publicly consulting on its rules. The consultation work is expected to be completed in late 2018.

2.2. CAP also maintains rules relating to the transparency of advertising content. These are contained in section 2 (Recognition of marketing communications) of the CAP Code, with rule 2.1 requiring marketing communications to be obviously identifiable as such. These rules (and all others in the CAP Code) apply to advertising on marketers' own or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods or services. These rules reflect the law contained in the Consumer Protection from Unfair Trading Regulations 2008, which implement Directive 2005/29/EC (the Unfair Commercial Practices Directive, "the UCPD"); because this Directive is a maximum harmonisation measure, CAP cannot lawfully impose standards that are stricter or less strict than those contained in the Directive.

2.3. The rules referred to in 2.2 therefore apply to vloggers or celebrities posting about products on Instagram, Facebook and other social media in return for money or other reward in situations covered by the Code (see this guidance and text of responsibility for content). In such cases, it must be clear that the post has been made in return for payment.

2.4. CAP has produced specific guidance for social influencers on how to make clear something is an ad in their posts, blogs and videos; for example by using #ad or making clear at the start of a vlog that it is a paid-for advertisement. CAP has worked directly with influencers, brands and agencies (talent, PR and ad) to inform them about its rules and help them stick to them. The ASA also banned influencer ads where they break CAP's rules for not being obviously identifiable as ads, with some of the rulings involving high-profile celebrities. The following pieces of guidance are based on this work:

<https://www.asa.org.uk/advice-online/recognising-marketing-communications-overview.html>

<https://www.asa.org.uk/advice-online/advertisement-features.html>

<https://www.asa.org.uk/advice-online/recognising-ads-native-advertising.html>

<https://www.asa.org.uk/advice-online/recognising-ads-social-media.html>

<https://www.asa.org.uk/advice-online/video-blogs-scenarios.html>

<https://www.asa.org.uk/advice-online/recognising-ads-blogs-and-vlogs.html>

<https://www.asa.org.uk/advice-online/affiliate-marketing.html>

<https://www.asa.org.uk/news/making-online-marketing-communications-to-children-clearly-identifiable.html>

2.5. The ASA launched a research project earlier this year exploring people's ability to recognise online ads as ads, including how they are labelled, which is likely to be concluded and reported on by the end of this year. It works closely with the Competition and Markets Authority (CMA) in this area – see, for example: <https://www.gov.uk/government/news/celebrities-and-social-media-stars-investigated-for-not-labelling-posts> .

2.6. The EU's Audiovisual Media Services Directive (AVMSD), currently being reviewed, governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. CAP understands, from the latest draft available to it, that the Directive requires that audiovisual commercial communications that are marketed, sold or arranged by video-sharing platform providers shall be readily recognisable as such. The Directive takes into account the limited control exercised by video-sharing platforms over audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platforms, for example because they are user-generated, and requires that video-sharing platforms have a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications: in those circumstances video-sharing platform providers must clearly inform users of the programmes and user-generated videos that contain audiovisual commercial communications. Personal data of minors collected or otherwise generated by video-sharing platform providers as a result of their age verification systems or parental control systems (which are both required to be in place by the Directive) shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.

3. Call for evidence proposals

3.1. CAP welcomes the aim of the Code to provide protection to children online, and the evidence-based approach taken by the ICO in drafting it. As noted earlier in this document, most of the areas concerning the design of online services are outside CAP's remit, and therefore it will not comment on these.

3.2. CAP would welcome clarity from the ICO on how its proposals relate to online content that is already regulated under the law, the CAP Code and by the CMA. The transparency of online content often involves situations in which personal data are not processed, and such situations are already regulated by the UCPD, the AVMSD and the CAP Code. CAP would be happy to meet with the ICO to discuss these matters should it be useful.