



New actors and risks in online advertising

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Arlette Meiring, Joanna Strycharz, Claire ten Heuvelhof**



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Foreword

Online advertising funds much of the digital media system. It is a major source of revenue for the online platforms that have risen to the top of not only the digital economy, but the economy as a whole. It also supports the influencers active on these platforms, traditional media organisations, and a host of other digital media companies. The technology and value chain behind the advertising on digital media has grown increasingly complex. The AI-driven personalised advertising systems that match advertisers to individuals bear little resemblance to the simple banner ads with which online advertising started in the early 1990s. And the value chain behind a targeted online advertisement now includes data management companies that collect and manage customer data, ad networks connecting advertisers and publishers, automated content creation companies, and consent management tools, as well as of course online platforms such as Facebook.

The past years have seen legislators, in particular on the EU level, try to adapt legal frameworks to the increasing complexity and impact of online advertising. This *IRIS Special* provides an overview of the technological developments and key players in online advertising (Chapter 1), and then maps the European regulatory framework that applies to online advertising (Chapter 2). Subsequently, it explores recent developments in three areas of online advertising regulation.

Chapter 3 focuses on the traditional forms of advertising regulation: bans that aim to protect individuals from harmful advertising, and transparency requirements that allow individuals to inform themselves. It focuses on norms that apply to online advertising under the Audiovisual Media Services Directive (as revised in 2018), and the application of online advertising rules to influencers in the Netherlands.

Chapter 4 focuses on targeted advertising. Though a relatively new part of advertising regulation, the regulation of targeted advertising has matured considerably over the past decade, especially with the entry into force of the General Data Protection Regulation. This chapter explores how national data protection authorities in France and Spain have begun to enforce existing data protection law, and analyses how the DSA is set to impose new restrictions on targeted advertising at the EU level.

Chapter 5 focuses on a relatively new area in European advertising law, namely policies and legislation intended to address online advertising's impact on democracy. Traditionally falling under national competence, this space has seen increased European Commission activity after concerns over targeted manipulation and disinformation mounted in 2016. The chapter analyses how media literacy initiatives aim to counteract disinformation spread through online advertising, what the EU's proposal for a regulation on the transparency and targeting of political advertising entails, and how advertising libraries potentially increase the transparency of advertising on platforms.

This *IRIS Special* was drafted while the Digital Services Act package was in the final stages of the legislative process and as such still a moving target. I would like to warmly thank Max van Drunen for the excellent coordination work during this challenging period: his deep knowledge of the topic together with his reactivity and spirit of initiative have made him the best possible interlocutor for this editorial project. My deep thanks go also

to Tarlach McGonagle, Associate professor at IViR and long-standing partner of the European Audiovisual Observatory, for his scientific advice during the editorial process.

Strasbourg, July 2022

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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1. The key players and technological developments in online advertising

Joana Strycharz, Amsterdam School of Communication Research, University of Amsterdam

The prevalence of online advertising is staggering when considered across numerous dimensions. Since the first banner ad appeared online in 1994,¹ the importance of digital advertising has grown tremendously and is predicted to further increase in the near future. Online advertising is in fact seen as one of the key drivers of the (European) digital economy.² Parallel to this economic importance, the possibilities and digital advertising tools have expanded far beyond the traditional banner ads and include such forms as mobile advertising³ and computational advertising.⁴

The emergence and growth of online advertising has changed the advertising landscape and its key actors. Until very recent years, the overall advertising business ecosystem included: the mass media industry that was financially supported by advertising revenues; the advertising industry whose business was creating, planning, and executing advertising campaigns for clients; advertisers that hired advertising agencies and spent money on advertising campaigns; consumers who were the target audience of advertising; and the regulators responsible for the legal framework.⁵ However, with the growth of big data and advancements in computational systems, today's advertising message creation, targeting, and delivery take on whole new forms, processes, and routes, and many new actors now take part in the advertising ecosystem – which requires a redefinition of old concepts related to the advertising industry.

¹ Singel R., "Web Gives Birth to Banner Ads", Wired, 2010, <https://www.wired.com/2010/10/1027hotwired-banner-ads/>.

² "Digital Advertising, a Key Driver for the European Digital Economy", 2015, IAB, https://ec.europa.eu/futurium/en/system/files/ged/digital_advertising_a_key_driver_for_the_european_digital_economy.pdf.

³ Liu-Thompkins Y., "A Decade of Online Advertising Research: What We Learned and What We Need to Know", 2019, *Journal of Advertising*, 48(1), 1–13, <https://doi.org/10.1080/00913367.2018.1556138>.

⁴ Huh J. and E.C. Malthouse, "Advancing Computational Advertising: Conceptualization of the Field and Future Directions", 2020, *Journal of Advertising*, <https://doi.org/10.1080/00913367.2020.1795759>.

⁵ Helberger N. et al., "Macro and Exogenous Factors in Computational Advertising: Key Issues and New Research Directions", 2020, <https://doi.org/10.1080/00913367.2020.1811179>.

1.1. Brief history of online advertising

Originally, online advertising was limited to “deliberate messages placed on third-party websites including search engines and directories available through Internet access”.⁶ However, over time, online advertising tools have expanded beyond the initial options of banner ads placed on websites. The industry now has at its disposal numerous formats, including inventions such as advergames, mobile advertising, and retargeted advertising. They are all characterized by the use of the Internet as a medium to reach out to consumers. Looking at the data- and technology-driven transformations in advertising over the past few decades, research has identified three main phases of the evolution of online advertising, namely, the early interactive advertising phase, the current programmatic advertising phase, and the intelligent advertising phase coming in the future.⁷ The early interactive advertising phase refers to the period ranging from the beginning of online advertising in the early 1990s, followed by development of diverse forms of online advertising with interactivity, which distinguished it from conventional advertising, based largely on one-way communication between advertisers and consumers. Next, the programmatic advertising phase started with advertising automation technology and algorithms enabling the ad-buying process, to automate and optimize in real time.⁸ In short, what distinguished this second phase of online advertising was centrality of not only interactivity, but also of automation of the ad-buying and delivery process. Finally, intelligent advertising that constitutes the most recent phase in online advertising development can be conceptualised as automated digital advertising that is enhanced with innovative artificial intelligence (AI) technologies. These technologies include different applications of machine-learning algorithms in order for advertising to directly respond to consumers’ input or assess consumers’ preferences and needs, by serving them hyper-personalised ads or product recommendations.⁹ While the application of AI technologies to online advertising has substantially increased the efficiency of ad delivery,¹⁰ it has also impacted the structure of the advertising industry, changed the role of its key actors, and introduced new players to the field. The key driver and underlying force in the current advertising transformation, with regard to both programmatic and intelligent advertising, is data. Consumer data are indeed considered the new currency and power in today’s advertising ecosystem.

⁶ Ha L., “Online Advertising Research in Advertising Journals: A Review”, 2008, *Journal of Current Issues & Research in Advertising*, 30(1), 31–48, <https://doi.org/10.1080/10641734.2008.10505236>.

⁷ Li H., “Special Section Introduction: Artificial Intelligence and Advertising”, 2019, *Journal of Advertising*, 48 (4), 333–37, <https://doi.org/10.1080/00913367.2019.1654947>.

⁸ “Programmatic Everywhere? Data, Technology and the Future of Audience Engagement”, 2013, IAB, <https://www.iab.com/wp-content/uploads/2015/07/WinterberryGroupWhitePaperProgrammaticEverywhere.pdf>.

⁹ Li, “Special Section Introduction: Artificial Intelligence and Advertising”.

¹⁰ Qin X. and Z. Jiang, “The Impact of AI on the Advertising Process: The Chinese Experience”, 2019, *Journal of Advertising* 48(4), 338–46, <https://doi.org/10.1080/00913367.2019.1652122>.

1.2. Typology of online advertising

Online advertising, being a broad phenomenon, can be characterised by different formats used for advertising delivery on a variety of online channels and by the technology used for advertising creation, sales and delivery.

1.2.1. Advertising formats

In general, a number of main formats can be distinguished including banner ads, search ads, native ads, social media ads, rich-media ads and email ads.¹¹ Table 1 shows examples for each format. Each format distinguishes itself by the advertising delivery method. First, banner ads are one of the most dominant forms of advertising on the Internet. Banner ads are a form of display advertising (a form of online advertising where an advertiser's message is shown on a destination web page and apps) that can range from a static graphic to full motion video that includes audio.¹² Second, search advertising involves placing online ads on web pages and in apps that show results from search queries. Consumers can be directly targeted during their online search for information, products, or services. In search advertising, companies select specific keywords and create text ads that the search engine serves up, or that match their products with the keywords when a consumer searches for these keywords.¹³ Third, native advertising involves ads following the natural form and function of the user experience in which the ad is placed. This type of ads aims to be cohesive with the platform content, assimilated into the design, and consistent with the platform experience.¹⁴ Next, social media advertising encompasses all situations in which a social media platform provides the environment of the ad. This delivery platform can be used for different advertising formats such as display, native, and right-content ads. What makes social media ads unique is that they enable customers to have more engagement (i.e., liking, re-sharing, commenting,) with the ads.¹⁵ Rich-media ads are characterized by advanced features like video, audio, or other elements that encourage consumers to interact and engage with the content.¹⁶ Finally, email ads include banners, links or native advertising content that appear in email newsletters, email marketing campaigns and other commercial email communications.¹⁷

As demonstrated above, there are different delivery formats available to advertisers online that can be served to consumers through different channels. Different technologies

¹¹ Ha, "Online Advertising Research in Advertising Journals".

¹² IAB glossary, <https://www.iab.com/insights/glossary-of-terminology/#index-16>.

¹³ Rutz O.J. and M. Trusov, "Zooming In on Paid Search Ads—A Consumer-Level Model Calibrated on Aggregated Data", 2011, *Marketing Science*, 30(5), 789–800, <https://doi.org/10.1287/mksc.1110.0647>.

¹⁴ IAB glossary.


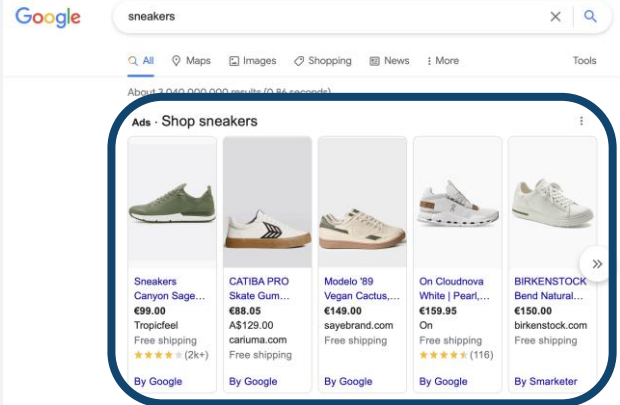
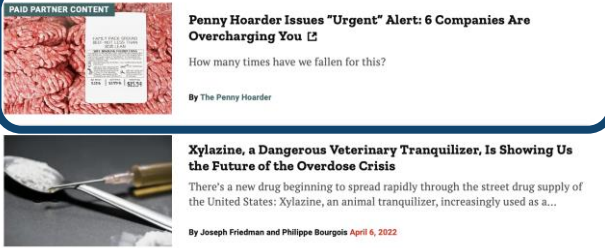
¹⁵ Alalwan A.A., "Investigating the Impact of Social Media Advertising Features on Customer Purchase Intention", 2018, *International Journal of Information Management*, 42 (1), 65–77, <https://doi.org/10.1016/j.ijinfomgt.2018.06.001>.

¹⁶ IAB glossary.

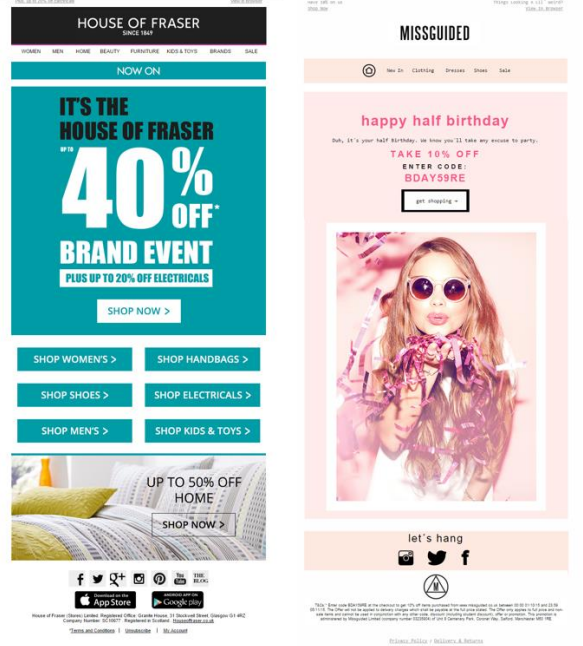
¹⁷ IAB glossary.

that can be used to serve the formats mentioned above to consumers will be discussed in the next section.

Table 1. Definitions and examples of different online advertising formats

Advertising format	Definition	Example
Banner ads	Online advertising where an advertiser's message is shown on destination web pages or apps	 <p>Website banner on Forbes website</p>
Search ads	Online advertising on web pages and in apps that show results from search queries	 <p>Search engine advertising on Google</p>
Native ads	Online advertising that follows the natural form and function of the user experience in which the ad is placed.	 <p>Native advertisement on Time website</p>

Ads placed on Instagram Stories and on Facebook Newsfeed (source: businessofapps.com)

<p>Email ads</p>	<p>All advertising that appears in email newsletters, email marketing campaigns and other commercial email communications</p>	 <p>Email ads in the form of newsletters (source: https://blogs.brighton.ac.uk/mh406/2015/11/10/a-consumer-analysis-on-email-marketing-real-examples/)</p>
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1.2.2. Advertising technology

1.2.2.1. Online behavioural advertising and retargeting

There are many terms such as “online profiling”, “behavioural targeting” and “retargeting” commonly used for online advertising based on an individual’s past browsing behaviour.¹⁸ In general, all these techniques can be defined as “the practice of monitoring people’s online behaviour and using the collected information to show people individually targeted advertisements”.¹⁹ Online behaviour in this case can refer to browsing history data, search histories, media consumption data (e.g., videos watched), app use data, purchases, click-through responses to ads, and posts and interactions on social networking sites.²⁰ To collect data on consumers’ browsing behaviour, companies often use tracking cookies. Once such a cookie is set on the user’s device, the advertiser is able to show ads (often display ads) to

¹⁸ Bennett S.C., “Regulating Online Behavioral Advertising”, *John Marshall Law Review*, 44 (4), 899–962.

¹⁹ Boerman S., S. Kruikemeier, and F. J. Zuiderveen Borgesius, “Online Behavioral Advertising: A Literature Review and Research Agenda”, 2017, *Journal of Advertising*, 46(3), 363–76, <https://doi.org/10.1080/00913367.2017.1339368>.

²⁰ Zuiderveen Borgesius F, “Improving Privacy Protection in the Area of Behavioural Targeting”, 2014, University of Amsterdam.

that user elsewhere on the Internet via an ad exchange. Currently, also other tracking methods such as flash cookies and device fingerprinting are used for online behavioural advertising.²¹

1.2.2.2. Contextual advertising

This type of targeting involves showing mostly display ads based not on behaviour or characteristic of the consumer, but on the content they are viewing. So-called contextual advertising entails the display of relevant ads based on the content that consumers view for example on a website or in an app. This builds on the assumption that consumers' content preferences indicate their interests and product preferences.²² While targeting advertising based on the context of the website has been common for decades, it is gaining popularity as it does not involve processing consumers' personal data to serve them theoretically relevant ads.²³

1.2.2.3. Programmatic advertising

Programmatic advertising began as a system that automates buying and selling of unsold online display advertising space, but it has evolved into much more than that and is currently seen as one of the most important developments in the online advertising industry.²⁴ Nowadays, programmatic advertising is applied to different advertising formats on a variety of channels. It can be achieved in two main ways: real-time bidding (RTB) auctions, which involve an automated auction with real-time interactions where the highest bid wins the impression, or alternatively via the so-called private market place, which is an invite-only variation of the RTB model. In such a situation, the auction is not public, but a pre-selected group of advertisers are invited to bid for the impression.²⁵ Both types of auctions take place on a case-by-case basis in the time it takes a web page to load on a user's browser (i.e., around 100 milliseconds). An example can best explain this procedure: There is a free banner on a news website. Thanks to cookies the publisher and advertisers have information about the visitor. It turns out that the visitor has visited a website of an airline (based on past browsing behaviour). This is a potential client. Thus, the airline offers to pay 5 cents for the banner. On the other hand, ID matching shows that the person has

²¹ Altaweel, I. N. Good, and C.J. Hoofnagle, "Web Privacy Census", 2015, SSRN Scholarly Paper, Social Science Research Network, Rochester, NY, <https://papers.ssrn.com/abstract=2703814>.

²² Zhang K. and Z. Katona, "Contextual Advertising", 2012, *Marketing Science*, 31 (6), 980–94, <https://doi.org/10.1287/mksc.1120.0740>.

²³ Davies J, "Personalization diminished: In the GDPR era, contextual targeting is making a comeback" 2018,, DigiDay, <https://digiday.com/media/personalization-diminished-gdpr-era-contextual-targeting-making-comeback/>.

²⁴ Strycharz J. et al., "Contrasting Perspectives – Practitioner's Viewpoint on Personalised Marketing Communication", 2019, *European Journal of Marketing*, 53(4), 635–60, <https://doi.org/10.1108/EJM-11-2017-0896>.

²⁵ Palos-Sanchez P., J.R. Saura, and F. Martin-Velicia, "A Study of the Effects of Programmatic Advertising on Users' Concerns about Privacy Overtime", 2019, *Journal of Business Research*, 96, 61–72, <https://doi.org/10.1016/J.BUSRES.2018.10.059>.

also visited a web shop where he or she has put a pair of shoes in the basket but did not complete the purchase (based on past browsing behaviour). Thus, the web shop offers 3 cents for the banner. Finally, as the article content is about nature, an NGO working in the field of wilderness preservation offers 1 cent for the banner (based on the context on the website). These offers go to bidding and the highest bid wins (the airline in this example).²⁶

1.2.2.4. Lookalike advertising

While online behavioural advertising focuses on past behaviour of individuals, and most of the programmatic advertising builds on characteristics of the target audience of an ad, look-alike targeting models allow identification of new audiences based on a user set that is already known to be interested in an advertiser. Such targeting is based on the assumption that user similarity correlates with the probability of reacting positively to an ad.²⁷ To put it simply, users similar to other users in different ways (e.g., demographics, past browsing behaviour or predicted interests) get targeted ads that have worked for similar users. Lookalike advertising is commonly applied on social media where an organisation can create a so-called custom audience based on information they have on their customers (e.g., email, phone number and address) to identify their customers on the platform. Then, this custom audience can be used to advertise to the social medium users who are similar to the members of the custom audience.

1.3. Online advertising landscape

The new advertising formats and techniques used to sell and display ads have substantially changed the advertising industry and its actors. More specifically, in the past the advertising industry mostly encompassed ad content creators (such as ad agencies) and media platforms and media content providers responsible for ad delivery (such as publishers). However, in the online advertising landscape characterised by the technical developments described earlier, any business entities that generate revenues from consumer data and advertising should be considered a part of the new advertising industry.²⁸ Along these lines, the Interactive Advertising Bureau (IAB), a leading industry organisation, also conceptualises the current advertising industry as “media companies, brands, and the technology firms responsible for selling, delivering, and optimizing digital ad marketing campaigns”.²⁹ Hence, this means that not only creators and publishers, but also technology firms that provide technology necessary for the processes described above, are now part of the industry. In particular, this category includes 1) hardware companies that develop,

²⁶ Strycharz et al., “Contrasting Perspectives – Practitioner’s Viewpoint on Personalised Marketing Communication”.

²⁷ Popov A. and D. Iakovleva, “Adaptive Look-Alike Targeting in Social Networks Advertising”, 2018, in *Procedia Computer Science*, <https://doi.org/10.1016/j.procs.2018.08.264>.

²⁸ Helberger et al., “Macro and Exogenous Factors in Computational Advertising: Key Issues and New Research Directions”.

²⁹ See <https://www.iab.com/our-story/>.

manufacture, and market electronic devices through which consumers access media that function as data collection points (including Internet of Things devices such as smart speakers, TVs or watches); 2) advertising technology companies that provide technological support enabling online advertising in its different forms described above; 3) data-aggregating companies that provide technological support in converting potential audience views into actual ad exposure and product sales effects. This section will introduce the main actors within the advertising technology sector that enable online advertising processes.

1.3.1. Data management platforms

In general, data management platforms (DMP) are software solutions used for collecting and managing the data of consumers. In short, they are data warehouses in which data are sorted in a way that's useful for advertising purposes. The data in DMPs can be pulled from different sources (first-party – own data of the company in question; second-party – data collected by a different organisation and acquired by the company in question; third-party data – data bought from outside sources which are not the original collectors of that data). It is then combined and used to build a profile of each individual customer.³⁰ DMPs are important in programmatic advertising as they connect to demand-side platforms (DSPs) or supply-side platforms (SSPs) to purchase ads through ad networks. DMPs also collect information on ad performance to analyse and improve future ad purchases. Salesforce DMP, Adobe Online Manager, SAP Hana and Oracle Data Cloud include examples of currently popular DMPs.

1.3.2. Ad networks

Online ad networks connect digital advertisers with websites that want to publish digital ads. The key function is to match ad supply from publishers with an advertiser's demand. Advertisers can sign up with ad networks and supply them with digital ads to run across various online publishers.³¹ Ad networks act as an intermediary between advertisers and publishers. Currently, Google with its DoubleClick service is the highest-ranking ad network. Other examples include PropellerAds, Criteo and TripleLift for native ads.

³⁰ Starita L., "How Does a Data Management Platform Work?", 2019, Gartner, <https://www.gartner.com/en/marketing/insights/articles/how-does-a-data-management-platform-work>.

³¹ Marketo, "Types of Digital Ad Technology", <https://www.marketo.com/ebooks/types-of-digital-ad-technology/>.

1.3.3. Ad exchanges

Ad exchanges are digital marketplaces that enable advertisers and publishers to buy and sell advertising space. They function like the trading floor of a stock market, but for online display advertising.³² The ad exchange is in the middle of the programmatic advertising process and is connected to a DSP on the advertiser's side and an SSP on the publisher's side. In contrast to ad networks, which focus on ad inventory, they have available on their publisher websites an ad exchange focusing on audience metrics and matching available space with demand.³³

1.3.4. Demand-side platforms

DSPs are an ad technology that enables companies to purchase different ad formats in an automated fashion. An advertiser signs up with a DSP, which is connected to an ad exchange. When a user visits a website that has empty ad space and that is connected to the ad exchange, an auction signal is sent to the exchange. The exchange then inquires with the DSP if the advertiser has any ads that might fit the placement (based on the data the advertiser has available in their DMP) and, if so, the bid for an ad space is sent back to the auction in real time.³⁴ LiveRamp, Facebook Ads Manager, Adelphic and MediaMath include large DSPs.

1.3.5. Supply-side platforms

SSPs constitute software used by publishers to manage their available ad space. The aim of SSPs is to connect to an ad exchange and communicate what kind of ad inventory is available. Through real-time bidding this inventory is automatically auctioned off to the highest bidder. As publishers aim to maximize the bids, SSPs enable them to connect their inventory to multiple ad exchanges, DSPs, and ad networks. This results in a large range of potential buyers.³⁵ Examples of SSPs include Google Ad Manager, OpenX and PubMatic.

1.3.6. Automated content creation companies

Emerging technology companies developing AI tools for content creation represent a new type of advertising industry. As AI-based intelligent advertising is emerging as the next

³² Rask, "What is Programmatic Advertising?".

³³ IAB Europe, "The advent of RTB", <https://iab europe.eu/blog/lavpersons-programmatic/>.

³⁴ Rask O., "What is Programmatic Advertising? The Ultimate 2020 Guide", 2022, Match2One, <https://www.match2one.com/blog/what-is-programmatic-advertising/>.

³⁵ Rask, "What is Programmatic Advertising?".



evolution of digital advertising, these AI companies will play an increasingly important role in the future of advertising.³⁶ AI can enable further consumer insight discovery, ad content creation, more targeting, and media planning.³⁷ An increasing number of companies specialize in automated brand-generated content, i.e., “the output of transforming brand and consumer data into a message that is created and delivered with some level of automation”.³⁸ Hence, not only the ad delivery process can be automated, but in the future, it is expected that content creation will become increasingly automated too.

³⁶ Li, "Special Section Introduction: Artificial Intelligence and Advertising".

³⁷ Qin and Jiang, "The Impact of AI on the Advertising Process".

³⁸ Van Noort G. et al., "Introducing a Model of Automated Brand-Generated Content in an Era of Computational Advertising", 2020, *Journal of Advertising*, 49(4), 411–27, <https://doi.org/10.1080/00913367.2020.1795954>.

2. The legal framework

2.1. Advertising, freedom of expression, and privacy

Ronan Fahy, Institute for Information Law (IViR), University of Amsterdam

This section provides a brief overview of Council of Europe (CoE) law and standard-setting instruments relating to advertising, freedom of expression, and privacy. In particular, it focuses on the European Convention on Human Rights (ECHR),³⁹ and the case law of the European Court of Human Rights (ECtHR), which is tasked with the interpretation and application of the ECHR.⁴⁰ In addition, important standard-setting instruments from the CoE's Committee of Ministers and Parliamentary Assembly are also discussed, as recommendations and resolutions from these bodies provide relevant guidance for CoE member states, and are routinely relied upon by the ECtHR when interpreting the ECHR.⁴¹

2.1.1. European Court of Human Rights case law

When examining the issue of advertising and freedom of expression, it is important to begin with Article 10 ECHR, which guarantees the right to freedom of expression.⁴² Notably, the European Court of Human Rights (ECtHR) has delivered numerous judgments and decisions on whether commercial advertising and political advertising are an exercise of freedom of expression, and in what circumstances such advertising may be restricted. For ease of reading, ECtHR case law on commercial advertising is discussed first, followed by political advertising.

2.1.1.1. Commercial advertising and freedom of expression

At the outset, it is important to note that the ECtHR has long held that commercial advertising is an exercise of the right to freedom of expression. Indeed, in one of its first judgments considering the question of whether commercial advertising falls within the

³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11, 14 and 15, E.T.S. No. 5, 4 November 1950 (ECHR), https://www.echr.coe.int/documents/convention_eng.pdf.

⁴⁰ ECHR, Article 32(1).

⁴¹ See, for example, *Delfi AS v. Estonia* [Grand Chamber], Application no. 64569/09, 16 June 2015, para. 113, <https://hudoc.echr.coe.int/eng?i=001-155105> (citing with approval the Recommendation CM/REC(2011)7 of the Committee of Ministers to the member States of the Council of Europe on a new notion of media, 21 September 2011, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0).

⁴² ECHR, Art. 10(1).



scope of Article 10 ECHR, the Court rejected the argument that advertising should “not come within the ambit” of freedom of expression, and held that Article 10 ECHR guarantees freedom of expression to “everyone”, and “[n]o distinction is made in [Article 10 ECHR] according to whether the type of aim pursued is profit-making or not”.⁴³ Importantly, the Court confirmed that commercial advertising is an exercise of the right to freedom of expression, and is a “means of discovering the characteristics of services and goods offered”.⁴⁴

Helpfully, the ECtHR has also expanded upon what it considers to be commercial advertising, which includes “inciting the public to purchase a particular product”,⁴⁵ inducement to buy a particular product”,⁴⁶ and “product marketing.”⁴⁷ Notably, commercial advertising may be restricted, especially to prevent “untruthful or misleading advertising”.⁴⁸ In this regard, it is important to note that the ECtHR grants CoE member states a “broad” margin of appreciation in the regulation of “speech in commercial matters or advertising”.⁴⁹ However, restrictions on commercial advertising are “closely scrutinised” by the Court, which seeks to determine whether measures at national level are “justifiable in principle and proportionate”.⁵⁰

Notably, the ECtHR has decided a number of recent cases on commercial (online) advertising, demonstrating how the Court approaches commercial advertising from a freedom-of-expression perspective. In a 2018 judgment relating to *Sekmadienis Ltd. v. Lithuania*,⁵¹ the Court considered the case of a company being sanctioned by a consumer authority over its advertisements. The case centred on an advertisement campaign by a Vilnius-based clothing company, where the advertisements featured two models with halos, including a shirtless and tattooed model, with the caption, “Jesus [and] Mary, what are you wearing!”.⁵² Following a number of complaints, Lithuania’s State Consumer Rights Protection Authority found the advertisements violated the Law on Advertising (which prohibits advertising that “violates public morals”), holding that the advertisements “degraded” the “sacred symbols of Christianity” and were likely to “offend the feelings of religious people”, and imposed a fine on the company.⁵³

⁴³ *Casado Coca v. Spain*, Application no. 15450/89, 24 February 1994, para. 51, <https://hudoc.echr.coe.int/eng?i=001-57866>.

⁴⁴ *Casado Coca v. Spain*, Application no. 15450/89, 24 February 1994, para. 51.

⁴⁵ *VgT Verein gegen Tierfabriken v. Switzerland*, Application no. 24699/94, 28 June 2001, para. 57, <https://hudoc.echr.coe.int/eng?i=001-59535>.

⁴⁶ *Mouvement raëlien suisse v. Switzerland* (Grand Chamber), Application no. 16354/06, 13 July 2012, para. 62, <https://hudoc.echr.coe.int/eng?i=001-112165>.

⁴⁷ *TV Vest As & Rogaland Pensjonistparti v. Norway* (Application no. 21132/05) 11 December 2008, para. 64, <https://hudoc.echr.coe.int/eng?i=001-90235>.

⁴⁸ *Casado Coca v. Spain*, Application no. 15450/89, 24 February 1994, para. 51.

⁴⁹ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 73, <https://hudoc.echr.coe.int/eng?i=001-180506>.

⁵⁰ *Casado Coca v. Spain*, Application no. 15450/89, 24 February 1994, para. 50.

⁵¹ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018.

⁵² *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, paras. 7-9.

⁵³ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 18.

The company later made an application to the ECtHR, claiming a violation of its right to freedom of expression under Article 10 ECHR. At the outset, the Court reiterated that CoE member states have a “broad” margin of appreciation in the regulation of “speech in commercial matters or advertising”.⁵⁴

However, the Court reviewed the domestic authorities’ decision to interfere with the company’s freedom of expression, and held that it “cannot accept” the reasons given as “relevant and sufficient”.⁵⁵ The Court reiterated that freedom of expression also extends to ideas which “offend, shock or disturb”, and religious persons must “tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.⁵⁶ These principles applied, even though the advertisements had a “commercial purpose and cannot be said to constitute ‘criticism’ of religious ideas”.⁵⁷ Therefore, the Court concluded there had been a violation of Article 10 ECHR, as the authorities had “failed to strike a fair balance” between protection of public morals and rights of religious people, and freedom of expression.⁵⁸ Thus, the Court demonstrated a strict standard of review over interference with commercial freedom of expression, including the notion that commercial advertising can shock, offend and disturb.

Another case that is instructive in understanding the ECtHR’s approach to commercial advertising is the 2021 judgment in *Gachechiladze v. Georgia*,⁵⁹ where the ECtHR considered social media advertising. The case concerned a Tbilisi-based producer of condoms, which were sold online in Georgia, and advertised on the brand’s Facebook page. The advertising featured packaging designs which sought to shatter stereotypes in Georgia on sex and sexuality, and included depictions of a well-known Georgian Orthodox Church saint, and a reference to a Christian holy day. The case arose when a complaint was filed with a municipal inspectorate suggesting that the advertising was “insulting to the religious feelings of Georgians”.⁶⁰ The inspectorate found that the applicant had placed “unethical advertising” on the product and the brand’s Facebook page,⁶¹ in violation of the Advertising Act, which prohibited unethical advertising. The domestic courts upheld the decision, and notably issued an order to prohibit “dissemination of the relevant designs” on social media.⁶²

The applicant made an application to the ECtHR, claiming a violation of her right to freedom of expression. The first question for the ECtHR was whether the advertising only had a “commercial purpose”, as argued by the Georgian government, meaning the national authorities had a “wide” margin of appreciation.⁶³ Notably, the Court disagreed, and held that the advertising was partly aimed at “contributing to a public debate”, noting that the “objective” was to aid understanding of sex and sexuality; and as such, the margin of

⁵⁴ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 73

⁵⁵ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 79.

⁵⁶ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 73.

⁵⁷ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 73.

⁵⁸ *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018, para. 83.

⁵⁹ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021,

⁶⁰ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 11.

⁶¹ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 11.

⁶² *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 18.

⁶³ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 18.

appreciation was “necessarily narrower”, compared to situations of “solely commercial speech”.⁶⁴ The Court then reviewed the domestic court decisions, and found the courts had failed to adequately explain how certain depictions could fall within the definition of unethical advertising under the Advertising Act.⁶⁵ The Court applied the principle that in a “pluralist democratic society” those who exercise the freedom to manifest their religion must “tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.⁶⁶ As such, the Court held that none of the reasons justified interference with the applicant’s freedom of expression, in violation of Article 10 ECHR, and that there were no sufficient reasons to “limit the dissemination” of the designs.⁶⁷

A final case of relevance is that of *TIPP 24 AG v. Germany*,⁶⁸ where the ECtHR considered a ban on online advertising for games of chance.⁶⁹ The case involved a Hamburg-based company which had claimed that a prohibition on online advertising for public games of chance (lotteries) violated its right to freedom of expression. The Court first reiterated that states have a broad margin of appreciation in the regulation of speech in commercial matters or advertising, and reviewed the objectives of the ban. Importantly, the Court held that the objectives of (a) preventing dependency on games of chance and (b) ensuring the protection of minors, were both “undoubtedly very important aims in the general interest”, and further accepted that games of chance being “accessible online” may impose “different and more significant risks” compared to traditional forms of such games.⁷⁰ As such, the Court held that any interference with the applicant company’s right to freedom of expression was “justified” as being “necessary in a democratic society”, and there had been no violation of Article 10 ECHR.⁷¹

2.1.1.2. Political advertising and freedom of expression

In addition to freedom of expression being applicable to commercial advertising, the ECtHR has also importantly held that political advertising is an exercise of the right to freedom of expression under Article 10 ECHR.⁷² While the Court has not ruled on online political advertising, in one of its most recent landmark Grand Chamber judgments on political advertising, it considered the impact of social media. The case was *Animal Defenders International v. the United Kingdom*,⁷³ where the Grand Chamber considered a prohibition on

⁶⁴ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 55.

⁶⁵ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 61.

⁶⁶ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 62.

⁶⁷ *Gachechiladze v. Georgia*, Application no. 2591/19, 22 July 2021, para. 61.

⁶⁸ *TIPP 24 AG v. Germany* (dec.), Application no. 21252/09, 27 November 2012.

⁶⁹ *TIPP 24 AG v. Germany* (dec.), Application no. 21252/09, 27 November 2012.

⁷⁰ *TIPP 24 AG v. Germany* (dec.), Application no. 21252/09, 27 November 2012, para. 33.

⁷¹ *TIPP 24 AG v. Germany* (dec.), Application no. 21252/09, 27 November 2012, para. 39.

⁷² See *VgT Verein gegen Tierfabriken v. Switzerland*, Application no. 24699/94, 28 June 2001, <https://hudoc.echr.coe.int/eng?i=001-59535>. See also *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [Grand Chamber], Application no. 32772/02, 30 June 2009, <https://hudoc.echr.coe.int/eng?i=001-93265>.

⁷³ *Animal Defenders International v. the United Kingdom* [Grand Chamber], Application no. 48876/08, 22 April 2013, <https://hudoc.echr.coe.int/eng?i=001-119244>.

political advertising in the UK. Notably, the Grand Chamber was divided by the closest of margins (nine votes to eight), with the Court majority finding a ban on political advertising did not violate Article 10 ECHR. The case centred on an animal rights NGO, which sought to broadcast an advertisement condemning the abuse of primates. However, the advertisement was refused broadcast pursuant to the Communication Act 2003's prohibition on political advertising. The domestic courts found the prohibition did not violate the NGO's right to freedom of expression, and the applicant NGO subsequently made an application to European Court.

First, the ECtHR held that the term 'political advertising' includes "advertising on matters of public interest".⁷⁴ Second, and decisively, the Court held that member states can, "consistently with the Convention", adopt what the Court called "general measures" which apply to "pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases" affecting freedom of expression.⁷⁵ The Court then reviewed the rationales for the prohibition on political advertising under this general-measures principle, and held that the ban was necessary (a) to prevent the "risk of distortion" of public debate by wealthy groups enjoying unequal access to political advertising,⁷⁶ (b) because of "the immediate and powerful effect of the broadcast media",⁷⁷ and (c) because a relaxed ban was not feasible, as there would be a risk of abuse.⁷⁸ Finally, the Court briefly addressed the issue of social media, and held that even though there has been "significant development of the internet and social media in recent years", there was "no evidence of a sufficiently serious shift in the respective influences" of online and broadcast media to "undermine the need for special measures" for broadcasting.⁷⁹ Therefore, a majority of the Court held that the prohibition on political advertising was not a disproportionate interference in freedom of expression.

2.1.1.3. Refusals and obligations to carry advertisements

In addition to considering the compatibility of bans on political advertising with Article 10 ECHR, the Court has also considered the issue of whether a media outlet's refusal to publish an advertisement violates Article 10 ECHR. This was first addressed in *Remuszko v. Poland*,⁸⁰ where an author had submitted a paid advertisement to promote his book to a newspaper, with the newspaper subsequently refusing to publish the advertisement. The newspaper's decision was upheld by the Polish courts, and when the case reached the ECtHR, the Court unanimously held that privately owned media outlets "must be free to exercise editorial

⁷⁴ *Animal Defenders International v. UK* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 99.

⁷⁵ *Animal Defenders International v. UK* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 106.

⁷⁶ *Animal Defenders International v. the United Kingdom* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 117.

⁷⁷ *Animal Defenders International v. the United Kingdom* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 119.

⁷⁸ *Animal Defenders International v. the United Kingdom* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 111.

⁷⁹ *Animal Defenders International v. the United Kingdom* [Grand Chamber], Application no. 48876/08, 22 April 2013, para. 119.

⁸⁰ *Remuszko v. Poland*, Application no. 1562/10, 16 July 2013,

discretion” in deciding whether to publish articles, comments, letters, and advertisements; and an effective exercise of the freedom of the press “presupposes the right of the newspapers to establish and apply their own policies in respect of the content of advertisements”.⁸¹ Further a state’s obligation to ensure an individual’s freedom of expression “does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions”.⁸² Finally, the Court held that in a “pluralistic media market”, publishers not being obliged to carry advertisements proposed by private parties is “compatible” with freedom of expression standards under Article 10 ECHR,⁸³ and as such, there had been no violation of Article 10 ECHR.

Most recently, in 2020, the Court also considered whether an obligation to carry a political advertisement violated Article 10 ECHR. The case was *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*,⁸⁴ and involved the Swiss public broadcaster SSR. Following the broadcaster’s refusal to broadcast a political advertisement by an animal rights NGO which criticised the broadcaster for “supressing” information, the Swiss courts ordered the broadcaster to carry the advertisement. Crucially, the broadcaster made an application to the ECtHR claiming that the order violated its right to freedom of expression. First, the Court held that the advertisement concerned a “debate of public interest”, as the NGO was seeking to publicise the suggestion that the broadcaster had “suppressed information” published by the NGO.⁸⁵ The Court then reviewed the domestic courts’ decisions, and held that it saw no reason to depart from the domestic courts’ reasoning: the broadcaster was required to accept critical opinions, even if this involved information or ideas that “offended, shocked or disturbed”.⁸⁶ Further, while the advertisement was presented in a “very provocative manner”, it was obvious to viewers that it represented the opinion of a third party.⁸⁷ As such, the Court unanimously held that there had not been a violation of the broadcaster’s freedom of expression.

2.1.1.4. Application of political advertising rules to media reporting

Finally, it must also be mentioned that the ECtHR has considered cases where domestic authorities have applied electoral and political advertising rules to media reporting during elections. Notably, in a 2017 judgment in *Orlovskaya Iskra v. Russia*, the ECtHR reviewed the fining of a newspaper by Russian authorities under the Electoral Rights Act for failing to “indicate who had sponsored the publication” of its articles during an election.⁸⁸ Notably,

⁸¹ *Remuszko v. Poland*, Application no. 1562/10, 16 July 2013, para. 79.

⁸² *Remuszko v. Poland*, Application no. 1562/10, 16 July 2013, para. 79.

⁸³ *Remuszko v. Poland*, Application no. 1562/10, 16 July 2013, para. 86.

⁸⁴ *Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA v. Switzerland*, Application no. 41723/14, 22 December 2020,

⁸⁵ *Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA v. Switzerland*, Application no. 41723/14, 22 December 2020, para. 85.

⁸⁶ *Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA v. Switzerland*, Application no. 41723/14, 22 December 2020, para. 89.

⁸⁷ *Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA v. Switzerland*, Application no. 41723/14, 22 December 2020, para. 89.

⁸⁸ *Orlovskaya Iskra v. Russia*, App. no. 42911/08, 21 February 2017, para. 15.

the ECtHR unanimously found a violation of Article 10 ECHR, with the Court wholly rejecting that the articles were “(paid-for) political advertisements”, and instead held that the articles were “ordinary” journalistic work during an election campaign.⁸⁹ The Court reiterated that the “public watchdog” role of the press is “no less pertinent at election time”, and is “not limited to using the press as a medium of communication, for instance by way of political advertising”, but also encompasses an “independent exercise of freedom of the press by mass media outlets” on the basis of “free editorial choice” aimed at imparting information on matters of public interest, including discussion of candidates.⁹⁰

2.1.1.5. Advertising and the right to respect for private life

As recognised by Council of Europe bodies, a particular feature of online advertising is its potential impact on the right to private life under Article 8 ECHR, including the right to protection of personal data.⁹¹ This is because online advertising can utilise data-driven tools, such as micro-targeting, where personal data can be collected to engage in “segmentation and profiling of users”, and deliver highly “personalised” and targeted advertising.⁹² Notably, this data-driven advertising can be used for both commercial and political advertising. While the ECtHR has not to date considered the compatibility of microtargeted or personalised advertising with Article 8 ECHR, any such advertising must be consistent with the principles the ECtHR has laid down in its case law. In this regard, the ECtHR’s Grand Chamber has explicitly confirmed that the right to “protection of personal data” is of “fundamental importance” to a person’s right to privacy under Article 8 ECHR.⁹³

Notably, the Court has laid down a number of principles under Article 8 ECHR that apply to the right to protection of personal data, including that there must be appropriate safeguards to prevent any use of personal data as may be inconsistent with the guarantees of this Article, and that the “need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned”.⁹⁴ Indeed, when interpreting Article 8 ECHR, the ECtHR has applied the principles contained in the CoE’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, including the principle that personal data must be: (a) obtained and processed fairly and lawfully; (b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are stored; (d) accurate and, where necessary, kept up to date; (e) preserved in a form which permits identification of the data subjects for no

⁸⁹ *Orlovskaya Iskra v. Russia*, App. no. 42911/08, 21 February 2017, para. 120.

⁹⁰ *Orlovskaya Iskra v. Russia*, App. no. 42911/08, 21 February 2017, para. 130.

⁹¹ See, for example, Parliamentary Assembly of the Council of Europe, Resolution 2326 (2020) Democracy hacked? How to respond, 31 January 2020, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28598&lang=en>.

⁹² Parliamentary Assembly of the Council of Europe, Resolution 2326 (2020) Democracy hacked? How to respond, 31 January 2020, Section 4.

⁹³ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Grand Chamber), Application no. 931/13, 27 June 2017, para. 137, <https://hudoc.echr.coe.int/eng?i=001-175121>.

⁹⁴ *S. and Marper v. the United Kingdom*, Application nos. 30562/04 and 30566/04, 4 December 2008, para. 103.

longer than is required for the purpose for which the data are stored.⁹⁵ Finally, it should be noted in relation to online political advertising that the ECtHR recently delivered a notable judgment in *Catt v. the United Kingdom*, where the ECtHR held that personal data “revealing political opinion” falls among the special categories of sensitive data attracting a “heightened” level of protection under Article 8 ECHR.⁹⁶ Thus, online commercial and political advertising must be consistent with these Article 8 ECHR principles.

2.1.2. Council of Europe standards

In addition to the case law of the ECtHR, other CoE bodies have adopted resolutions and recommendations on the issue of advertising, freedom of expression, and privacy, including the Committee of Ministers,⁹⁷ and the Parliamentary Assembly.⁹⁸ At the outset, it is important to note that the Committee of Ministers has confirmed its view that freedom of expression applies to “commercial and political advertising, tele-shopping and sponsorship”.⁹⁹ Importantly, limitations are “only admissible within the conditions set out” in Article 10 ECHR, and such limitations may be needed for “protection of consumers, minors, public health or democratic processes”.¹⁰⁰ In this regard, the Committee of Ministers has adopted a number of recommendations for CoE member states specifically on political advertising, commercial advertising, and online advertising.

The first, relevant recommendations are the Committee of Ministers’ 1999 Recommendation on measures concerning media coverage of election campaigns,¹⁰¹ and the Committee of Ministers’ 2007 Recommendation on measures concerning media coverage of election campaigns.¹⁰² The Recommendations contain a number of important recommendations for CoE member states in relation to political advertising, including that if the media accept paid political advertising, “regulatory or self-regulatory frameworks should ensure that such advertising is readily recognisable as such”.¹⁰³ Further, where public

⁹⁵ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Treaty Series – No. 108, <https://rm.coe.int/1680078b37>.

⁹⁶ *Catt v. the United Kingdom*, Application no. 43514/15, 24 January 2019, para. 112

⁹⁷ The Committee of Ministers is the Council of Europe’s decision-making body. It is composed of the ministers for foreign affairs of the member states of the Council of Europe or their permanent representatives in Strasbourg, see <https://www.coe.int/en/web/cm/about-cm>.

⁹⁸ The Parliamentary Assembly of the Council of Europe (PACE) is one of the two statutory organs of the Council of Europe. It is made up of parliamentarians from the national parliaments of the Council of Europe’s member states, and generally meets four times a year for a week-long plenary session in Strasbourg, see <https://www.coe.int/en/web/no-hate-campaign/parliamentary-assembly1>.

⁹⁹ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011, Appendix, Section 97, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cc2c0.

¹⁰⁰ Recommendation CM/Rec(2011)7, Appendix, Section 97.

¹⁰¹ Recommendation No. R (99) 15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, 9 September 1999.

¹⁰² Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, 7 November 2007.

¹⁰³ Recommendation CM/Rec(2007)15, Appendix, Section I6.

media accept paid political advertising, they should ensure “all political contenders and parties that request the purchase of advertising space are treated in an equal and non-discriminatory manner”.¹⁰⁴ Notably, in member states where political parties and candidates are permitted to buy advertising space for election purposes, the Recommendation states that “regulatory frameworks should ensure that all contending parties have the possibility of buying advertising space on and according to equal conditions and rates of payment”.¹⁰⁵ Finally, the Recommendation states that member states “may consider” introducing a provision in regulatory frameworks to “limit the amount of political advertising space and time which a given party or candidate can purchase”.¹⁰⁶

Further, the Committee of Ministers’ 2018 Recommendation on media pluralism and transparency of media ownership¹⁰⁷ contained further important standards on advertising. Notably, media and other actors should “adhere to the highest standards of transparency” with regard to the sources of content, and “always indicate clearly when content is provided by political sources”, or involves “advertising or other forms of commercial communications, such as sponsoring and product placement”.¹⁰⁸ Further, these transparency obligations also apply to “hybrid” forms of content, such as branded content, native advertising, advertorials and infotainment. Notably, where these obligations are “not fulfilled”, provision should be made for “proportionate measures to be applied by the competent regulatory authorities”.¹⁰⁹

In relation to online advertising, the Committee of Ministers’ 2019 Declaration on the financial sustainability of quality journalism in the digital age¹¹⁰ includes specific recommendations for online platforms. First, it recognises that the data-driven business models of online platforms, and potential for personalised and targeted messaging, make these actors “very attractive for the advertising industry”.¹¹¹ It thus recommends platforms “commit” to improving the “transparency and oversight of advertisement placement on their websites”, and avoid “diverting revenues from credible news sources to sources of disinformation and false content”.¹¹² Further, in relation to online advertising and children, it is important to note the Committee of Ministers’ Recommendation on guidelines to respect, protect and fulfil the rights of the child in the digital environment.¹¹³ The Recommendation recognises that online advertising represents a “risk of harm” to children, and recommends that member states take measures to ensure that children are protected from “commercial exploitation in the digital environment”, including (a) requiring that advertising and marketing towards children is “clearly distinguishable to them as such, and

¹⁰⁴ Recommendation CM/Rec(2007)15, Section I(4).

¹⁰⁵ Recommendation CM/Rec(2007)15, Section II(5).

¹⁰⁶ Recommendation CM/Rec(2007)15, Section II(5).

¹⁰⁷ Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member states on media pluralism and transparency of media ownership, 7 March 2018,

¹⁰⁸ Recommendation CM/Rec(2018)1[1], Section 7.

¹⁰⁹ Recommendation CM/Rec(2018)1[1], Appendix, Section 2.7.

¹¹⁰ Declaration by the Committee of Ministers on the financial sustainability of quality journalism in the digital age, 13 February 2019.

¹¹¹ Declaration on the financial sustainability of quality journalism in the digital age, Section 5.

¹¹² Declaration on the financial sustainability of quality journalism in the digital age, Section 12.

¹¹³ Recommendation CM/Rec(2018)7 of the Committee of Ministers to member states on guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018



requiring all relevant stakeholders to limit the processing of children’s personal data for commercial purposes”; and (b) protect children from exposure to age-inappropriate forms of advertising and marketing.¹¹⁴ Finally, the Committee of Ministers also established the ad hoc Committee of Artificial Intelligence (CAHAI), to examine a legal framework on artificial intelligence, based on CoE standards.¹¹⁵ This examination also included the impact of AI on elections, and the use of micro-targeting and profiling for political advertising, with the CAHAI making a number of recommendations, including on the importance of transparency.¹¹⁶

2.1.2.1. Parliamentary Assembly

The Parliamentary Assembly has also adopted important resolutions, particularly relating to online political advertising, which should be noted. For example, in its 2019 Resolution on media freedom as a condition for democratic elections,¹¹⁷ the Assembly called on member states to ensure there is a “requirement for paid political advertising to be readily recognisable as such”.¹¹⁸ Further, in relation to the online environment, the Assembly called on member states to develop “specific regulatory frameworks for internet content at election times and include in these frameworks provisions on transparency in relation to sponsored content published on social media, so that the public can be aware of the source that funds electoral advertising or any other information or opinion”.¹¹⁹

Further, in its 2020 Resolution on “democracy hacked”,¹²⁰ the Parliamentary Assembly took the view that “data-driven electoral campaigning on social media”, especially “dark advertising” on platforms targeting potential voters, was a growing phenomenon which “must be better regulated in order to ensure transparency and data protection, and build public trust”.¹²¹ In this regard, the Assembly called on member states to strengthen transparency in political online advertising, and address the implications of the micro-targeting of political advertisements with a “view to promoting a political landscape which is more accountable and less prone to manipulation”.¹²² Finally, the Assembly also welcomed the EU’s recent action to “ensure greater transparency on paid political advertising”.¹²³

¹¹⁴ Recommendation CM/Rec(2018)7, Appendix, Section 57.

¹¹⁵ See <https://www.coe.int/en/web/artificial-intelligence/cahai>.

¹¹⁶ See CAHAI, “Towards Regulation of AI Systems”, 2020, “Towards Regulation of AI Systems”, 2020, Council of Europe Study DGI 16, pp. 82-83, <https://rm.coe.int/prems-107320-gbr-2018-compli-cahai-couv-texte-a4-bat-web/1680a0c17a>.

¹¹⁷ Parliamentary Assembly of the Council of Europe, Resolution 2254 (2019) Media freedom as a condition for democratic elections, 23 January 2019.

¹¹⁸ Parliamentary Assembly of the Council of Europe, Resolution 2254 (2019) Media freedom as a condition for democratic elections, 23 January 2019, Section 8.8.

¹¹⁹ Resolution 2254 (2019), Section 9.2.

¹²⁰ Parliamentary Assembly of the Council of Europe, Resolution 2326 (2020) Democracy hacked? How to respond, 31 January 2020.

¹²¹ Resolution 2326 (2020), Section 4.

¹²² Resolution 2326 (2020), Section 6.5.

¹²³ Resolution 2326 (2020), Section 7.

2.1.3. Conclusion

This section has provided a brief overview of CoE law and standards relating to advertising, freedom of expression, and privacy; and a number of concluding points can be made. First, both commercial and political advertising are protected forms of freedom of expression under Article 10 ECHR. Second, ECtHR case law provides helpful guidance particularly on the definitions of commercial and political advertising, with the ECtHR delineating the boundaries between commercial and political advertising. Notably, ECtHR case law also demonstrates that its concept of political advertising is quite broad, and is not limited to election advertisements, but extends to advertising related to matters of public interest. Third, in relation to commercial advertising in particular, the ECtHR emphasises the broad margin of appreciation member states enjoy. However, recent case law also demonstrates that the ECtHR will review restrictions on commercial advertising with considerable scrutiny. Fourth, the overview also demonstrates how Article 8 ECHR contains important safeguards for the protection of personal data that may be used in online advertising. Finally, the standards adopted by CoE bodies contain important principles and recommendations for member states, in particular in relation to online commercial advertising, and online political microtargeting.

2.2. An overview of EU advertising regulation

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Online advertising is regulated by a patchwork of horizontal legislation and sector-specific legislation. This section provides a comprehensive overview of the main (proposals for) EU legislation that apply to online advertising. It introduces each piece of legislation's topic and personal scope, and briefly outlines how it regulates online advertising.

2.2.1. Consumer law

Consumer law is one of the traditional spaces in the legal framework where advertising is regulated. In particular, the Unfair Commercial Practices Directive (UCPD) contains general norms governing business-to-consumer relationships.¹²⁴ It aims to protect consumers against unfair commercial practices (including advertising) that are likely to cause

¹²⁴ "Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (UCPD)", Pub. L. No. OJ L 149, 2005, pp. 22–39, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005L0029>.

consumers to take a transactional decision they would not have taken otherwise.¹²⁵ The UCPD does so through a combination of open norms art. (5-9) and specific examples (Annex I and II) that target different forms of unfair advertising.

In particular, the UCPD prohibits misleading and aggressive commercial practices. Misleading commercial practices omit information the consumer needs to take an informed decision or involve an action that is likely to deceive a consumer. The ban on misleading advertising covers, for example, advertising that is unlabelled, undisclosed payments in return for placement of a product higher in a ranking algorithm, or advertising which creates confusion with products of a competitor.¹²⁶ Aggressive commercial practices significantly impair a consumer's freedom of choice through harassment, coercion, or undue influence (art. 8-9). Advertising that directly urges children to (persuade their parents to) buy a product is named as a specific example in the UCPD. More recently, regulatory attention has shifted to new forms of manipulation in online advertising. For example, the Commission argues that targeted advertising that exploits consumers' vulnerabilities or influencers who abuse the trust relationship with their audience may also fall under the UCPD's ban on aggressive commercial practices.¹²⁷

The Consumer Rights Directive (CRD) aims to further strengthen the position of consumers.¹²⁸ Though the directive is not specifically focused on (online) advertising, the CRD does include a few relevant transparency provisions. For example, businesses must provide consumers with all the necessary information about the (advertised) goods before entering a contract with the trader, and notify consumers when the (advertised) price has been personalised.¹²⁹

Finally, the Misleading and Comparative Advertising Directive aims to protect businesses against the unfair consequences of misleading advertising, and to regulate the

¹²⁵ UCPD article 1, 2(d). The Commission names a click on an online advertisement as an example of a transactional decision in its recent guidance "Commission Notice – Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market", (Text with EEA Relevance), 2021, Brussels: European Commission, para. 2.4, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514>.

¹²⁶ UCPD Annex I, art. 11a (on payments to achieve a higher place in the ranking), and arts. 6-7.

¹²⁷ "Commission Notice - Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market (Text with EEA Relevance)", para. 4.2.6-4.2.7; Helberger N. et al., "Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability", 2021, *Journal of Consumer Policy*, 22, <https://doi.org/10.1007/s10603-021-09500-5>.

¹²⁸ "Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA Relevance)", 2022, <http://data.europa.eu/eli/dir/2011/83/2022-05-28/eng>.

¹²⁹ "Commission Notice – Guidance on the Interpretation and Application of Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights (Text with EEA Relevance)", 2021, Brussels: European Commission, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2804%29&qid=1640961745514>.

conditions under which comparative advertising is permitted.¹³⁰ The Directive's provisions on misleading advertising are aimed at B2B relationships (as the UCPD already covers misleading advertising in B2C relationships). It uses three factors to determine whether advertising is misleading, namely the characteristics of the goods, the price, and the attributes of the advertiser. The provisions on comparative advertising apply in both B2B and B2C relationships. They permit comparative advertising as long as it meets the following conditions:

- “it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of [the UCPD];
- it compares goods or services meeting the same needs or intended for the same purpose;
- it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
- for products with designation of origin, it relates in each case to products with the same designation;
- it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name;
- it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.”¹³¹

2.2.2. Data protection law

The personal data needed for targeting also brings online advertising into the scope of data protection law. The General Data Protection Regulation (GDPR) lays down extensive obligations concerning the processing of this data.¹³² It does so with two main aims: to ensure the protection of natural persons when personal data is processed, and to enable the free movement of such data. Data protection law's implications for online advertising

¹³⁰ "Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising (Codified Version; Text with EEA Relevance)", 2006, OJ L 376, 27.12.2006, pp. 21–27 §, <http://data.europa.eu/eli/dir/2006/114/oj/eng>.

¹³¹ Misleading and Comparative Advertising Directive art. 4.

¹³² "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (GDPR)", 2016, Pub. L. No. OJ L 119 pp. 1–88, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

have been examined in detail elsewhere.¹³³ This publication restricts itself to providing a basic overview of the regulatory framework and an analysis of recent developments in data protection relevant to online advertising. In particular, section 4.1 analyses recent enforcement by national data protection authorities, and section 5.2.3 analyses newly proposed EU legislation on the use of personal data for targeted political advertising.

The GDPR imposes its obligations primarily on data controllers. These are defined as actors who determine the purposes and means for which personal data is processed. Controllers can act alone, or jointly with others.¹³⁴ Regulators and courts have increasingly used the joint controllership to grapple with the many actors who can influence how data is processed online, including in the value-chain in online advertising.¹³⁵ Where multiple controllers exist, they must transparently determine their responsibilities (in particular concerning compliance with data subjects' rights and information) and comply with their respective responsibilities under data protection law.¹³⁶

The GDPR requires controllers to ensure they have a legal basis on which to process personal data. In the context of online behavioural advertising in which personal data play an important role, the safest and arguably only legal basis is consent. The other two potential legal bases require the controller to argue that processing data to provide advertising is necessary for either the performance of a contract, or under their legitimate interest.¹³⁷ When there is a legal basis for data processing, the GDPR imposes a number of other obligations relevant for online advertising. First, individuals must be provided with information regarding for example how and by whom their data is processed. Second, controllers must comply with obligations intended to limit the risks of data processing,

¹³³ Lynskey O., "Track(Ing) Changes: An Examination of EU Regulation of Online Behavioural Advertising through a Data Protection Lens", 2011, *European Law Review*, 36(6), pp. 876–86,

<http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=6968&recordid=427>;

Zuiderveen Borgesius F.J., "Singling out People without Knowing Their Names – Behavioural Targeting, Pseudonymous Data, and the New Data Protection Regulation", 2016, *Computer Law & Security Review* 32(2), pp. 256–71, <https://doi.org/10.1016/j.clsr.2015.12.013>; *Regulating Online Behavioural Advertising Through Data Protection Law*, 2021, <https://www.elgaronline.com/view/9781839108297.xml>.

¹³⁴ Finck M., "Cobwebs of Control: The Two Imaginations of the Data Controller in EU Law", 2021, *International Data Privacy Law*, 11(4), pp. 333–47, <https://doi.org/10.1093/idpl/ipab017>.

¹³⁵ Veale M., Nouwens M. and Santos C., "Impossible Asks: Can the Transparency and Consent Framework Ever Authorise Real-Time Bidding After the Belgian DPA Decision?", 2022, *Technology and Regulation*, pp. 12–22, <https://doi.org/10.26116/techreg.2022.002>.

¹³⁶ "Guidelines 07/2020 on the Concepts of Controller and Processor in the GDPR", 2020, EDPB, https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_202007_controllerprocessor_en.pdf;

Finck, "Cobwebs of Control"; *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, No. C-210/16 (CJEU 2016). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CA0210&qid=1646304250798>;

Jehova's Witnesses, No. C-25/17 (CJEU 10 July 2018). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0025&qid=1646304318006>; *Fashion ID*, No. C-40/17 (CJEU 29 July 2019). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0040&qid=1646304352460>.

¹³⁷ Chen J., *Data Protection Principles Governing OBA, Regulating Online Behavioural Advertising Through Data Protection Law*, 2021, Edward Elgar Publishing, pp. 111–13,

<https://www.elgaronline.com/view/9781839108297.00015.xml>; Zuiderveen Borgesius F.J., "Personal Data Processing for Behavioural Targeting: Which Legal Basis?", 2015, *International Data Privacy Law*, 5(3), pp. 163–76, <https://doi.org/10.1093/idpl/ipv011>.

including those related to data minimalization, confidentiality, and data protection by design. Finally, data controllers may only transfer personal data outside the Union if appropriate safeguards are in place to do so.

The GDPR is complemented by the ePrivacy Directive.¹³⁸ The ePrivacy Directive requires that individuals give consent in two situations that are relevant to online advertising. Firstly, individuals must give consent when information is stored on or accessed from their device. This obligation applies to any information, not only personal data, and covers the tracking cookies that are often used for online behavioral advertising.¹³⁹ Furthermore, the ePrivacy Directive also requires that users give consent before they are contacted via email, automated calling machines, or fax for direct marketing.¹⁴⁰ The Court of Justice of the European Union (CJEU) has clarified that this requirement also applies to email providers who place advertisements between emails.¹⁴¹

An update to the ePrivacy Directive, the ePrivacy Regulation, was proposed on 10 January 2017.¹⁴² Trilogue negotiations between the Commission, the Parliament, and the Council resumed after the Council published its draft on 10 February 2021.¹⁴³ If the normal 24-month transitional period is maintained, the ePrivacy Regulation will not enter into force before 2024. Significant differences remain between the way the Commission, Parliament, and Council propose to regulate targeting technologies and direct marketing. These differences concern, for example, whether consent for tracking must be given through the browser or to individual websites.

¹³⁸ "Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications)", 2009, Pub. L. No. OJ L 201, 31.7.2002, p. 37, 58, <http://data.europa.eu/eli/dir/2002/58/2009-12-19/eng>.

¹³⁹ *Verbraucherzentrale Bundesverband eV v Planet49 GmbH*, No. C-673/17 (CJEU 2017). ePrivacy Directive recital 17.

¹⁴⁰ There is an exception when an email address has been obtained from a user during a sale, is only used to promote products or services from the same seller, and users are given the ability to opt out initially and in each message (ePrivacy Directive recital 40).

¹⁴¹ *StWL Städtische Werke Lauf ad Pegnitz GmbH v eprimo GmbH*, No. C-102/20 (CJEU 25 November 2021). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0102&qid=1646303572087>

¹⁴² "Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)", 2017, Pub. L. No. COM/2017/010 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0010>.

¹⁴³ "Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)", 2021, Pub. L. No. 6087/21, <https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf>.

2.2.3. Platform and Internet regulation

2.2.3.1. Legislation in force

The eCommerce Directive was long the foundational legal framework for online services in the EU.¹⁴⁴ The most impactful provisions of the eCommerce Directive deal with intermediaries. Article 14 provides hosting providers (including online platforms) with a liability exemption for content (including advertising) uploaded by a user as long as they have no knowledge of or control over the content on their service.¹⁴⁵ Article 15 bans member states from imposing a general monitoring obligation. Additionally, Article 6 to 8 impose limited transparency obligations with regard to online advertising. These primarily concern the identifiability of advertisers, advertisements, promotional offers such as discounts, and promotional competitions. Member states are also required to authorise online advertisements by regulated professions.¹⁴⁶

The P2B regulation aims to provide businesses with fairness, transparency, and redress when they offer goods or services to consumers through platforms or search engines. Online advertising tools or exchanges (including services connected to search engine optimisation or advertising blocking) are excluded from its scope.¹⁴⁷ In practical terms, this means that advertising services such as Google DoubleClick do not fall under the P2B regulation, but eCommerce platforms that allow a business user to pay to promote their product in their ranking do.¹⁴⁸ If platforms or search engines allow business users to pay to influence the ranking, they must provide a description of the possibilities and the effects that payment has on the ranking.¹⁴⁹

¹⁴⁴ "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (ECD)", 2000, Pub. L. No. OJ L 178, pp. 1–16.

¹⁴⁵ *l'Oréal v. eBay*, No. ECLI:EU:C:2011:474 (CJEU 7 December 2011), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0324>; *Cyando*, No. ECLI:EU:C:2021:503 (CJEU 22 June 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0682&qid=1650270348902>.

¹⁴⁶ The Services Directive similarly requires member states to permit advertising (including offline) by regulated professions. "Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market", 2006, 376 OJ L §, <http://data.europa.eu/eli/dir/2006/123/oj/eng>.

¹⁴⁷ "Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (P2B Regulation)", 2019, Pub. L. No. OJ L 186, pp. 57–79, <http://data.europa.eu/eli/reg/2019/1150/oj/eng> art. 1(3), rec. 11.

¹⁴⁸ "P2B Regulation Impact Assessment", 2018, Brussels: European Commission, pp. 7–8, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-proposal-regulation-european-parliament-and-council-promoting-fairness-and>.

¹⁴⁹ "Commission Notice – Guidelines on Ranking Transparency Pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council", 2020, Brussels: European Commission, para. 2.1.1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC1208%2801%29>.

2.2.3.2. The proposed DSA package

In December 2020, the Commission proposed two regulations (the Digital Services Act and Digital Markets Act) in order to reform the legal framework that applies to digital services. With this package, the Commission aims to “create a safer digital space in which the fundamental rights of all users of digital services are protected, [and] establish a level playing field to foster innovation, growth, and competitiveness”.¹⁵⁰ The Digital Services Act (DSA) focuses on the responsibilities of online intermediaries for the content and advertising on their service, and imposes increasingly stringent obligations on hosting services, platforms, and very large online platforms. The Digital Markets Act (DMA) focuses on the obligations of gatekeepers, so as to ensure “contestable and fair markets in the digital sector”.¹⁵¹

The proposed DSA is a regulation which will complement the eCommerce Directive and replace its provisions concerning the liability of intermediaries.¹⁵² However, the changes the DSA makes to Article 14 and 15 of the eCommerce Directive are not particularly significant for online advertising. More relevant are the new obligations the DSA imposes on online platforms. All online platforms must make more information, including about the main targeting parameters, available to users who see an advertisement, and are prohibited from using sensitive data to target advertising.¹⁵³ Very large online platforms (defined as platforms with 45 million monthly active users) are subject to additional obligations that aim to address their systemic impacts. These include an obligation to mitigate systemic risks that result from, for example, their advertising systems, and an obligation to create publicly accessible databases containing (metadata about) all advertisements that have run on their service in the past year.¹⁵⁴

The proposed DMA is a regulation which will build on the P2B regulation by imposing more stringent rules on gatekeepers.¹⁵⁵ Gatekeepers operate a core platform service that is a gateway between business users and consumers, hold an entrenched position, and have a significant impact on the internal market. Undertakings are presumed to impact the internal market if their annual EU turnover has exceeded EUR 7,5 billion for three years, or if their EU market value exceeds EUR 75 billion and they provide the same core platform service in at least three member states. Undertakings are presumed to operate a gateway if they have over 45 million monthly active users, and 10 000 yearly

¹⁵⁰ European Commission, “The Digital Services Act Package”, 2020, <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

¹⁵¹ DMA article 1(1).

¹⁵² The analysis in this “Special” is based on the version of the DSA voted on by the European Parliament’s Internal Market and Consumer Protection Committee on 16 June 2022, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf.

¹⁵³ Article 24 DSA proposal.

¹⁵⁴ DSA Proposal art. 25, 26, 27, 30.

¹⁵⁵ This analysis is based on the version of the DMA voted on by the European Parliament’s Internal Market and Consumer Protection Committee on 16 May 2022, <https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf>.

active business users in the EU.¹⁵⁶ Online advertising services (including advertising networks and exchanges) qualify as a core platform service if the gatekeeper also offers another core platform service (such as a search engine, social networking service, or operating system).¹⁵⁷

Article 5(2) of the proposed DMA prohibits gatekeepers from processing data for advertising purposes of end users who use a third-party service relying on a core platform service. Article 5(2) also prohibits gatekeepers from combining or cross-using personal data they obtain through the different services they offer, or signing end users in to other services in order to combine personal data. The prohibitions in article 5(2) do not apply when the end user has been presented with a specific choice and given consent in the sense of the GDPR. When consent is refused or withdrawn, *“the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year”*. Though article 5(2) mostly does not focus on advertising specifically, it does potentially limit the extent to which gatekeepers can aggregate data in order to provide more fine-grained targeted advertising services.

The provisions in the DMA that focus on online advertising primarily aim to increase the transparency of advertising services with regard to business users. Article 5(9) gives advertisers a right to request (daily and free-of-charge), the following information about each ad they place:

- the price and fees they paid for each of the advertising services (including deductions and surcharges);
- the remuneration the publisher received, including deductions and surcharges (subject to the publisher’s consent; without consent, gatekeepers must instead provide the daily average remuneration the publisher receives;.
- the metrics used to calculate each of the prices, fees, and remunerations.

Article 5(10) provides publishers with a similar right concerning the remuneration they receive and that their advertisers are paid. Article 6(1)(g) gives advertisers and publishers the right to request free access to the gatekeeper’s performance-measuring tools and the (aggregated and non-aggregated) data they need to verify the ad inventory.¹⁵⁸ This data must be provided in a way that allows advertisers and publishers to use their own verification and measurement tools to assess the performance of the core platform services the gatekeeper provides.

¹⁵⁶ DMA art. 3.

¹⁵⁷ DMA art. 2(2)(j).

¹⁵⁸ DMA recital 42, 44, 53; Vezzoso S., “The Dawn of Pro-Competition Data Regulation for Gatekeepers in the EU”, 2021, *European Competition Journal*, 17(2), pp. 391–406, <https://doi.org/10.1080/17441056.2021.1907080>. Vezzoso argues that the latter may require gatekeepers to provide, for instance, user-level data that allows advertisers to scrutinise the advertising service by analysing how long an ad was visible to users. Additionally, art. 13 requires platforms to provide the Commission with an annually updated audited description of the profiling techniques it uses for its online advertising services.

2.2.4. Sector-specific regulation: Media and political expression

Finally, EU law contains a wide array of legislation covering advertising in specific media or on specific topics.¹⁵⁹ This publication focuses on two important recent developments in this space, namely the Audiovisual Media Services Directive (AVMSD, revised in 2018) and the Regulation on Political Advertising (RPA, proposed in 2021).

The AVMSD regulates services that provide access to media content, including (as of 2018) video-sharing platforms.¹⁶⁰ It bans advertising that negatively affects a wide variety of individual and public interests, including human dignity, the right to non-discrimination, health, safety, and the protection of the environment and minors. The AVMSD also prohibits or limits advertising for alcohol, tobacco, medical products. In addition to these limits imposed on the content of advertising, the AVMSD imposes transparency requirements requiring, for example, the disclosure of sponsorship and product placement.

The RPA is the first piece of EU legislation which directly addresses political advertising, which has so far been left to the member states.¹⁶¹ The RPA primarily imposes transparency obligations providing individuals, supervisory authorities, and private actors (such as researchers and journalists) with information about the context and targeting of political advertisements. The provisions on transparency constitute maximum harmonisation.¹⁶² Additionally, the RPA restricts the extent to which sensitive data can be used to target or amplify political advertisements.¹⁶³ The RPA is discussed in more detail in section 5.2; section 5.3 analyses how the RPA facilitates public scrutiny of political advertising by requiring platforms to include information about political advertisements in ad libraries.

¹⁵⁹ "Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community Code Relating to Medicinal Products for Human Use", 2001, 311 OJ L §, <http://data.europa.eu/eli/dir/2001/83/oj/eng> art. 86; "Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products (Text with EEA Relevance)", 2003), <http://data.europa.eu/eli/dir/2003/33/2003-06-20/eng>; "Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market", art. 4(11), 24.

¹⁶⁰ Consolidated text: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (Text with EEA relevance)Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>.

¹⁶¹ "Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising", 2021, COM/2021/731 final §, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A731%3AFIN>; Furnémont J. and Kevin D., "Regulation of Political Advertising: A Comparative Study with Reflections on the Situation in South-East Europe", 2020, Council of Europe, <https://rm.coe.int/study-on-political-advertising-eng-final/1680a0c6e0>; Dobber, Ó Fathaigh R. and Zuiderveen Borgesius F.J., "The Regulation of Online Political Micro-Targeting in Europe", 2019, *Internet Policy Review*, 8(4), <https://policyreview.info/articles/analysis/regulation-online-political-micro-targeting-europe>.

¹⁶² RPA article 3, chapters 2 and 3.

¹⁶³ RPA article 12(1)(2).

3. Harmful and hidden advertising

This chapter analyses recent developments in traditional advertising regulation: prohibitions that limit the public's exposure to harmful advertising, and transparency requirements designed to enable individuals to identify advertising. It focuses in particular on the 2018 revised Audiovisual Media Services Directive (AVMSD).¹⁶⁴ Section 3.1 starts with a brief overview of the normative background of advertising bans and transparency requirements. Section 3.2 then provides a detailed outline of the rules in the AVMSD applicable to advertising in video-on-demand services and video-sharing platform services. As the online environment is the focal point of this publication, the regime for (offline) television advertising and teleshopping is left outside the scope of the analysis. The chapter ends with a case study on the regulation of influence marketing on video-sharing platform services in the Netherlands.

3.1. Why prohibit certain advertising and require the disclosure of commercial intent?

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Advertising regulation has traditionally been inspired by, on the one hand, economic interests of effective market competition, and on the other hand, the need to safeguard certain state, collective and individual interests.¹⁶⁵ It is generally agreed that consumers should be protected against potential negative impacts of advertising such as deception, limited consumer choice, exploitation of vulnerabilities and discrimination.¹⁶⁶ Legislators have addressed these challenges, *inter alia*, by prohibiting harmful advertising content and by imposing transparency obligations on advertising service providers.

¹⁶⁴ Consolidated text: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (Text with EEA relevance) Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>.

¹⁶⁵ Price M., "The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance", 2002, *USAID Office of Democracy and Governance Occasional Paper Series*, p. 29, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1065&context=asc_papers; see also Pitofsky R., "Beyond Nader: Consumer Protection and the Regulation of Advertising", 1977, *Harvard Law Review*, 90 (84), p. 669, and further, <https://doi.org/10.2307/1340281>, about the importance of consumer protection in the regulation of advertising.

¹⁶⁶ See for an overview of how consumers can be (negatively) affected by online advertising practices Fourberg N. e.a., "Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice", 2021, European Parliament: Luxembourg, p. 31 and further, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)662913](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)662913).



Restrictions on advertising content are typically justified on the grounds of consumer protection¹⁶⁷ as well as the protection of society from behaviour prejudicial to the public interest.¹⁶⁸ The ultimate goal of regulation is to ensure that “advertising [is] prepared with a sense of responsibility towards society, and [with] particular attention to the moral values forming the basis of any democracy”.¹⁶⁹ This responsibility is especially pertinent in the area of audiovisual advertising, considering that audiovisual media have an “immediate and powerful effect”¹⁷⁰ on viewers compared to other media. Although audiovisual advertisements are usually of relatively short length, they can, due to their nature, still have great influence and play an important role in changing attitudes in society.¹⁷¹

In banning certain advertising content, the AVMSD aims to protect individual consumers’ interests such as health and safety, non-discrimination and the moral development of minors. At the same time, it seeks to ensure (primarily) societal interests such as the protection of the environment. Individual consumers’ interests and societal interests may well overlap: the restrictions on advertising for cigarettes and alcoholic beverages, for example, can be said to serve both individual and public health interests.¹⁷² The same applies to the prohibition of discrimination, which is arguably not only intended to protect specific groups of consumers targeted by discriminatory content but also to reduce discrimination in society as a whole.

Importantly, even when advertising is not necessarily harmful to the public as such, it may still have an unfavourable impact in that it can deceive or mislead consumers. If people are not (made) aware of the commercial nature of content they are exposed to, they

¹⁶⁷ See e.g., the preamble of the former Television Without Frontiers Directive (89/552/EEC): “Whereas in order to ensure that *the interests of consumers as television viewers are fully and properly protected*, it is essential for television advertising to be subject to a certain number of minimum rules and standards (...)” See also recital 99 of the 2010 AVMSD (2010/13/EU): “(...) it is essential to *ensure a high level of consumer protection* by putting in place appropriate standards regulating the form and content of such broadcasts.” And see recital 46 of the amending Directive to the AVMSD (2018/1808): “Since users increasingly rely on video-sharing platform services to access audiovisual content, it is necessary to *ensure a sufficient level of consumer protection* by aligning the rules on audiovisual commercial communications, to the appropriate extent, amongst all providers” [emphasis added].

¹⁶⁸ Importantly, consumers’ interests and societal interests are often intertwined. For example, it can be argued that children, as vulnerable consumers, must be protected from exposure to high-fat food advertisements in order to protect their individual health (as studies have shown that there is a link between advertising exposure and the extent to which children consume these foods) but also to protect the public interest in preventing widespread child obesity.

¹⁶⁹ Bychawska-Siniarska D., *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A handbook for legal practitioners*, 2017, Council of Europe: Strasbourg, p. 96, <https://edoc.coe.int/en/fundamental-freedoms/7425-protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners.html>.

¹⁷⁰ See e.g., ECtHR 23 September 1994, No. 15890/80, *Jersild v. Denmark*, § 31, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-57891%22%7D>.

¹⁷¹ Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 5 October 1995 on the image of women and men portrayed in advertising and the media, 95/C 296/06, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41995X1110%2801%29>.

¹⁷² This follows from recital 31 of Directive 2018/1808, stating that it is necessary to ensure the effectiveness of self- and co-regulatory measures mentioned in the AVMSD, such as the implementation of codes of conduct regarding alcohol advertising and advertising for unhealthy foods and beverages (Article 9(3) and (4)), “aiming, in particular, at protecting *consumers or public health*” (emphasis added).

are generally unable to critically assess the persuasive nature thereof.¹⁷³ Since knowledge has proven to be an essential factor in the consumer's defence against advertising, legislators have formulated transparency obligations according to which advertisers and advertising facilitators must be clear and open about the economic (and other) interests behind their content. The AVMSD, for instance, aims to limit commercial manipulation by requiring the disclosure of advertising and by prohibiting techniques designed to circumvent users' awareness, that is to say, so-called subliminal techniques.¹⁷⁴

3.2. The revised Audiovisual Media Services Directive

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Since its creation in 1989 for television,¹⁷⁵ the AVMSD has been revised twice in response to the changes in the European audiovisual media landscape to also include newly emerged online services like video-on-demand services (2007 revision)¹⁷⁶ and video-sharing platforming services (2018 revision¹⁷⁷). For the purposes of this chapter, 'AVMSD' refers to the consolidated text¹⁷⁸ of Directive 2010/13/EU and the amending Directive of 2018.

Due to the many revisions over the years, the structure of the AVMSD has undergone profound changes. Although the differences between the regulation of television broadcasting and on-demand services were largely removed in 2018 in favour of a more uniform approach, a separate set of obligations was created for video-sharing platform services, which resulted in an interesting mix of rules for different types of audiovisual content services.

3.2.1. Definitions and the overarching nature of commercial communications

With the evolution and expansion of the Directive, concepts and definitions have also evolved. According to Article 1(1)(a) of the current AVMSD, there are two types of audiovisual media services (AVMS):

- (i) Services, the principal purpose of which (or of a dissociable section thereof) is devoted to providing programmes under the editorial responsibility of a media

¹⁷³ Although not the only factor, see Rozendaal E., M. Buijzen and E.A. van Reimersdal, "Reconsidering Advertising Literacy as a Defence Against Advertising Effects", *Media Psychology*, 14 (4), p. 338, <https://doi.org/10.1080/15213269.2011.620540>.

¹⁷⁴ "Because of its negative effect on consumers", see Recital 90 of Directive 2010/13/EU.

¹⁷⁵ Directive 89/552/EEC (Television Without Frontiers Directive).

¹⁷⁶ Directive 2007/65/EC.

¹⁷⁷ Directive 2018/1808.

¹⁷⁸ Accessible via: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>

- service provider to the general public in order to inform, entertain or educate;
and
(ii) Audiovisual commercial communications.

The first type of AVMS can be divided into two subgroups: television broadcasts and video-on-demand (VOD) services. VOD services allow viewers to access audiovisual content online at any time and place and from any device. A key element in definition (i) is that the programmes provided by such services aim to “inform, entertain or educate”, thereby excluding services with a purely commercial purpose (e.g., promotional videos).¹⁷⁹ However, services with a commercial purpose may constitute an AVMS as well, namely if they meet the criteria of “audiovisual commercial communication” as laid down in Article 1(1)(h) AVMSD.¹⁸⁰

- the communication consists of images, with or without sound;
- the images have a promotional purpose, directly or indirectly;
- the images promote the goods, services or image of a natural or legal person pursuing an economic activity;
- the images accompany, or are included in, a programme or user-generated video; and
- the images are shown in return for payment or for similar consideration or for self-promotional purposes.

Examples of audiovisual commercial communications are television advertising, teleshopping, sponsorship and product placement.

Although Article 1(1)(a) AVMSD indicates that audiovisual commercial communications are a separate category of AVMS, the argument raised in literature is that advertisements form an integral part of television broadcasts and VOD services, and can therefore not be considered services in their own right.¹⁸¹ This interpretation is supported by the Directive’s definition of audiovisual commercial communications stating that such communications “*accompany, or are included in, a programme or user-generated video*” [emphasis added]. In other words, audiovisual commercial communications do not stand alone but are always integrated in a larger whole.¹⁸²

¹⁷⁹ Compare CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland GmbH v. Deutsche Umwelthilfe eV*), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0132&qid=1650278077681>.

¹⁸⁰ In this chapter, the terms “advertising” and “commercial communications” are used as abbreviated forms of audiovisual commercial communications.

¹⁸¹ See Chavannes R. and O. Castendyk, “Article 1 (Definitions) of Directive 2007/65/EC”, 2008, in: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Kluwer Law International: Alphen aan den Rijn, p. 819; see also Verdoodt V., “Children’s rights and advertising literacy in the digital era: Towards an empowering regulatory framework for commercial communication”, 2018, dissertation, p. 141, <https://biblio.ugent.be/publication/8585920>.

¹⁸² See also CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 (*Peugeot Deutschland GmbH v. Deutsche Umwelthilfe eV*), paras. 27-30.

Audiovisual media services are generally provided by “media service providers” (Article 1(1)(d)): natural or legal persons who have editorial responsibility for the choice of audiovisual content of the audiovisual media service and who determine the manner in which the content is organised. However, commercial communications (type 2 AVMS) may also be provided by “video-sharing platform providers”: natural or legal persons who operate a video-sharing platform service (Article 1(1)(da)). A video-sharing platform service (VSPS) has as its principal purpose or as its essential functionality the provision of programmes, user-generated videos, or both, to the general public in order to inform, entertain or educate (Article 1(1)(aa) AVMSD). The main difference between media service providers and VSP providers is that the latter do not have editorial responsibility for the majority of the programmes and/or user-generated videos uploaded to their infrastructures. VSP providers do, however, determine the organisation of the collection of uploaded audiovisual content, for example by displaying, tagging, or sequencing videos.

The services provided by media service providers and VSP providers sometimes overlap. A video channel offered on a video-sharing platform, for instance BBC News on YouTube, may in itself constitute a type-1 AVMS, and more specifically, a VOD service. The fact that the audiovisual content is transmitted via the infrastructure of a VSP provider does not alter the channel’s legal status as an independent AVMS.¹⁸³ Section 3.3 touches on the recent guidance issued by the Dutch media regulator regarding the conditions under which online influencers active on VSPs must comply with the obligations for on-demand AVMS. Furthermore, advertisements on a video channel offered through a VSP can either be arranged by the media service provider (BBC News) in the form of sponsorship or product placement within the videos, or by the VSP (YouTube) in the form of paid advertising spots displayed before the start of the video or as an interruption in the middle of the video.

The next paragraphs describe the qualitative and transparency-related rules applicable to online audiovisual advertising in the order in which they appear in the AVMSD, starting from the general norms applicable to all audiovisual media services – including commercial communications – as provided by media service providers; then proceeding to the specific norms applicable to commercial communications provided by media service providers; and ending with the separate regime for advertisements shown on VSPs.

3.2.2. General requirements for audiovisual media services

Chapter III of the AVMSD contains a set of basic rules applicable to all audiovisual media services provided by media service providers. With respect to online advertising, this means that Chapter III applies to commercial communications as provided by VOD service providers but not by VSP providers.¹⁸⁴

Given that Chapter III applies to AVMS more generally, the provisions are not all equally important for (online) advertising. Article 5 on the identification of media service

¹⁸³ Recital 3 of Directive 2018/1808.

¹⁸⁴ The separate regime for services provided by VSPs is laid down in Chapter IXA.

providers, for instance, does not relate to audiovisual content but to the media provider itself. And although Article 7 on accessibility of content for persons with disabilities is technically applicable to commercial communications, it appears to be written predominantly for non-commercial content aiming to “inform, entertain or educate”.¹⁸⁵ Articles 6 and 6a, on the other hand, contain qualitative and transparency requirements that could well be applied to online audiovisual advertising.

Article 6 establishes two general requirements, stipulating that audiovisual media services may not contain hate speech or a public provocation to commit a terrorist offence.¹⁸⁶ In legal literature, the question has been posed whether the requirements of Article 6 apply or should apply to advertising.¹⁸⁷ Considering that Article 9 already sets out specific requirements for audiovisual commercial communications (see Section 3.2.3) that partly overlap with those set out in Article 6, the application of the general Article 6 to advertising may indeed appear redundant. Article 9, however, does not explicitly prohibit hate speech and lacks the reference to terrorist offences added in the AVMSD’s latest revision. Moreover, the definition of “audiovisual media services” in the AVMSD is crystal clear in that it includes audiovisual commercial communications, meaning that Article 6 applies to commercial communications as well.¹⁸⁸

Article 6a focuses on audiovisual content, including advertising which is potentially harmful to minors, on the grounds that the content “may impair [their] physical, mental or moral development”. The article was introduced during the 2018 revision and aligned the requirements for the protection of minors in VOD services with those already applicable to television broadcasting.¹⁸⁹ It mainly requires member states to ensure that viewers have “sufficient information” about potentially harmful content, and to take appropriate measures to ensure that harmful content is only made available in a way that minors will not normally hear or see it, for example through the use of age verification tools. The most harmful content, such as gratuitous violence and pornography, must be subject to the strictest measures such as encryption and effective parental controls. In line with the principle of purpose limitation as enshrined in the GDPR, paragraph 2 stipulates that personal data of minors collected or otherwise generated in order to comply with paragraph 1 may not be processed for commercial purposes such as direct marketing, profiling and behaviourally targeted advertising.

¹⁸⁵ Article 7a (media services of general interests), Article 7b (unauthorised overlay of media services for commercial purposes), and Article 8 (cinematographic works) are also considered irrelevant for online advertising and are therefore left outside the analysis.

¹⁸⁶ Hate speech is defined as incitement to violence or hatred directed at a group (member) on the grounds listed in article 21 of the Charter (e.g., sex, race, political opinion); a terrorist offence is defined with reference to article 5 Directive 2017/541.

¹⁸⁷ Verdoodt V., “Children’s rights and advertising literacy in the digital era: Towards an empowering regulatory framework for commercial communication”, 2018, PhD thesis, p. 141.

¹⁸⁸ This is also assumed in: European Audiovisual Observatory, *Commercial communications in the AVMSD revision, IRIS Plus* 2017-2, p. 17, <https://book.coe.int/en/european-audiovisual-observatory/7471-iris-plus-2017-2-commercial-communications-in-the-avmsd-revision.html>.

¹⁸⁹ As a result, the former provisions of Directive 2010/13/EU on the protection of minors with regard to on-demand services (Article 12) and television broadcasting (Article 27-Chapter VIII) were removed.

3.2.3. Requirements for (all kinds of) audiovisual commercial communications

Article 9 AVMSD lays out specific rules applicable to audiovisual commercial communications provided by media service providers. It contains a list of negative requirements which has remained almost entirely unchanged since 2007.

Subparagraphs (a) and (b) relate to the way in which advertisements are to be presented to the public. Commercial communications must be recognisable as such, meaning that any type of surreptitious (hidden) advertising or use of subliminal techniques is illegal.¹⁹⁰ These forms of advertising are also prohibited under the generic Unfair Commercial Practices Directive (UCPD), that is, in case they constitute misleading actions or misleading omissions that unduly influence consumers.¹⁹¹ However, where the UCPD allows for the assessment of a commercial practice from the perspective of the average member of the group that is specifically targeted by the practice,¹⁹² such as children, the AVMSD takes a blunter approach by prohibiting surreptitious and subliminal advertising in all instances, irrespective of the different vulnerabilities among viewers and irrespective of the different circumstances they may find themselves in (e.g., the online environment).¹⁹³

Subparagraphs (c)-(g) relate to the content of advertising. Subparagraph (c) prohibits the transmission of content prejudicial to human dignity, discrimination, health and the environment. Subparagraphs (d)-(f) specifically ban advertising for certain products that are commonly considered harmful for consumer health and safety,¹⁹⁴ including (electronic) cigarettes and medicinal products or treatments available only on prescription, and, where the advertising is aimed at minors or encourages immoderate consumption, alcohol. Subparagraph (g) elaborates on the ambition of the AVMSD to protect minors against harmful audiovisual content, prohibiting advertisements that exploit their inexperience, incredulity or trust in for example parents or teachers, that encourage them to persuade others to buy a product, or that unreasonably show minors in dangerous situations.

With the 2018 revision of the AVMSD, Article 9 was expanded. Further detail was added to the existing obligation to develop codes of conduct regarding commercial

¹⁹⁰ Following from the principle of “identification” and “separation”, see Chavannes R. and O. Castendyk, p. 892.

¹⁹¹ Weinand J., *Implementing the EU Audiovisual Media Services Directive: Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK*, 2018, Nomos Verlagsgesellschaft: Baden-Baden, p. 737, referring to Articles 6 and 7 of the UCPD in conjunction with Annex I.

¹⁹² The “average consumer test”, see recital 18.

¹⁹³ Montalbano L., “Transparency in a Digitally Intertwined World: A Hybrid Approach to Consumers’ Protection”, 2021, *Open Journal of Social Sciences*, 2021, 9, p. 456, <https://doi.org/10.4236/jss.2021.98031>. It should however be noted that the AVMSD only guards against some forms of commercial manipulation – subliminal or surreptitious advertising – and not against all forms of manipulation.

¹⁹⁴ This follows from recital 31 of Directive 2018/1808, which states that it is necessary to ensure the effectiveness of self- and co-regulatory measures mentioned in the AVMSD – such as the implementation of codes of conduct regarding alcohol advertising and advertising for unhealthy foods and beverages (Article 9(3) and (4)) – “aiming, in particular, at protecting *consumers or public health*” (emphasis added).

communications for unhealthy foods and beverages (“HFSS foods”¹⁹⁵) in and around children’s programmes by specifying that these codes must aim to effectively reduce the exposure of children to advertising for HFSS foods, and must provide that the advertisements do not emphasise the positive quality of the nutritional aspects of such foods and beverages (Article 9(4)). A similar obligation to implement codes of conduct was inserted with regard to alcoholic beverages in order to limit the exposure of minors to alcohol advertisements (Article 9(3)). Last but not least, the rules for VOD services were levelled with those for television broadcasts by ensuring that the strict criteria for television advertising and teleshopping for alcoholic drinks (Article 22) are directly applicable to alcohol advertising in VOD services. In addition to the rules already set forth in Article 9(1)(e), alcohol advertisements in VOD services may not: depict minors consuming alcoholic beverages; link the consumption of alcohol to enhanced physical performance or driving, or to social or sexual success, or to mental healing; present abstinence or moderation in a negative light; place emphasis on high alcoholic content as being a positive quality of the beverages (Article 9(2)).

Interestingly, Article 9 AVMSD does not include any restrictions on gambling advertising. Although not explicitly excluded from the scope of the AVMSD, the preamble to Directive 2018/2808 suggests that gambling advertising policy is a national competence,¹⁹⁶ stating that “a Member State should be able to take certain measures to ensure respect for its consumer protection rules which do not fall in the fields coordinated by Directive 2010/13/EU” and that such measures, “including in relation to gambling advertising” must be “justified, proportionate (...) and necessary”.¹⁹⁷ Nonetheless, recital 30 of the 2018 Directive stresses the importance of the protection of minors from exposure to audiovisual communications relating to the promotion of gambling and refers to existing self- and co-regulatory systems for the promotion of responsible gambling.

3.2.4. Requirements for special forms of audiovisual commercial communications

Following the norms applicable to all commercial communications provided by media service providers, Articles 10 and 11 of Chapter III of the AVMSD deal with two special forms of commercial communications: sponsorship and product placement. In contrast to Article 9, these provisions are phrased so they do not regulate the practices of sponsorship and product placement as such, but rather the programmes or audiovisual media services (including VOD services) carrying these forms of commercial communications.

According to Article 1(1)(k), “sponsorship” refers to “any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media

¹⁹⁵ “Foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended.”

¹⁹⁶ As part of general gambling policies.

¹⁹⁷ Recital 10 of Directive 2018/1808.

services or video-sharing platform services or in producing audiovisual works, to the financing of audiovisual media services, video-sharing platform services, user-generated videos or programmes, with a view to promoting their name, trademark, activities or products.” Sponsorship must be distinguished from advertising spots since the latter aim to promote the supply of specific products, whereas sponsorships aim to promote the sponsor’s name, trademark, image, activities, or general offering of products.¹⁹⁸

The rules on sponsorship essentially remained the same during the 2018 revision. Article 10(1) requires that audiovisual media services or programmes: not be influenced by sponsorship in such a way as to affect the responsibility and editorial independence of the media service provider; not directly encourage the purchase or rental of goods and services; and inform viewers about the sponsorship in a clear manner. Sponsorship by tobacco companies is prohibited, and sponsorship by pharmaceutical companies is allowed under certain circumstances only (Article 10(2)-(3)). News and current affairs programmes may not be sponsored, and member states can decide for themselves whether to also prohibit sponsorship of children’s programmes or the showing of a sponsorship logo during children’s programmes, documentaries, and religious programmes (Article 10(4)).

According to Article 1(1)(m), “product placement” refers to “the inclusion of, or reference to, a product, a service or a trademark thereof within a programme or a user-generated video, in return for payment or for similar consideration”. The difference between sponsorship and product placement is that the latter is “built into the action of a programme”, whereas sponsoring references “may be shown during programmes but are not part of plot”.¹⁹⁹ Product placement must further be distinguished from surreptitious advertising, which also consists of the representation of goods or services in programmes but intends to mislead the public regarding its nature as an advertisement (Article 1(1)(j)).

The product placement regime changed considerably in 2018, at least on a textual level. Where Directive 2010/13/EU prohibited product placement and listed a few exceptions (“positive list”²⁰⁰), the revised AVMSD allows the practice of product placement except in certain cases. On a substantive level, however, the situations in which product placement is (not) allowed have practically remained the same.²⁰¹ Product placement is still prohibited in news and current affairs programmes, consumer affairs programmes, religious programmes, and children’s programmes (Article 11(2)). Additionally, the product placement of (electronic) cigarettes and other tobacco is not allowed, just like the product placement of medicinal products or medical treatments available only on prescription (Article 11(4)).

¹⁹⁸ Cabrera Blázquez F.J., Cappello M., Grece C., Valais S., *Commercial communications in the AVMSD revision*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2017, p. 22, <https://rm.coe.int/168078348c>.

¹⁹⁹ Recital 91 Directive 2010/13/EU.

²⁰⁰ Recital 92 Directive 2010/13/EU.

²⁰¹ Broughton Micova S., “The Audiovisual Media Services Directive”, 2021, in: P.L. Parcu and E. Brodi (eds.), *Research Handbook on EU Media Law and Policy*, Edward Elgar Publishing: Cheltenham, p. 274-275.

Programmes²⁰² that legitimately include product placement: may not be influenced by the product placement in such a way as to affect the responsibility and editorial independence of the media service provider; shall not directly encourage the purchase or rental of goods or services; may not give undue prominence to the product in question; and must inform viewers of the placement in a clear manner at the start and end of the programme and after an advertising break. Under certain circumstances, member states may waive this transparency requirement (Article 11(3)).

3.2.5. Requirements for commercial communications on VSPs

Probably the most salient change resulting from the 2018 revision of the AVMSD is the inclusion of video-sharing platform services (VSPs) within the Directive's scope (Chapter IXA). According to the recitals of the amending Directive 2018/1808, the extension of addressees was proposed for two reasons. First, VSP providers were considered “well-established new players” which “compete for the same audiences and revenues as audiovisual media services.”²⁰³ Second, VSPs were assumed to have “a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users”. Since citizens, particularly young people, increasingly access audiovisual content through VSPs, the EU legislator deemed it necessary to “protect minors from [the impact of] harmful content and all citizens from incitement to hatred, violence and terrorism”.²⁰⁴

In light of these objectives, Article 28b AVMSD imposes a set of (limited) obligations on VSP providers. Although a significant share²⁰⁵ of the content provided on VSPs is not under the editorial responsibility of the VSP provider but under that of users uploading it, VSP providers certainly do exercise organisational control over the uploaded collection of videos, for instance by displaying, tagging (“most frequently watched”) or sequencing them with the assistance of algorithms.²⁰⁶ VSP providers are active players that, through organisational filters, exercise influence over what audiovisual content viewers are exposed to.²⁰⁷ For that reason, the 2018 AVMSD placed (some) responsibility on VSP providers in

²⁰² It is unclear from the text of the AVMSD whether and to what extent product placement featured within user-generated videos is allowed. Compare Broughton Micova S. and S. Jacques, *The playing field in audiovisual advertising: what does it look like and who is playing?*, 2019, Centre on Regulation in Europe (CERRE): Brussels, p. 73-74, <https://cerre.eu/publications/playing-field-audiovisual-advertising/>.

²⁰³ Recitals 1 and 4 of Directive 2018/1808.

²⁰⁴ Recitals 4 and 44-46 of Directive 2018/1808.

²⁰⁵ Some of the content may actually be produced and/or published by the VSP provider itself. YouTube, for example, has offered a premium service in the past through which users could access “YouTube Originals” produced by YouTube itself. However, in January 2022 YouTube announced it will shut down its original programming division.

²⁰⁶ Recital 47 of Directive 2018/1808; see also the definition of VSP service in Article 1(1)(aa).

²⁰⁷ Van Drunen M.Z., “The post-editorial control era: how EU media law matches platforms’ organizational control with cooperative responsibility”, 2020, *Journal of Media Law*, 12(2), p. 172, <https://doi.org/10.1080/17577632.2020.1796067>.

addition to their existing obligations under the E-Commerce Directive and soon, the DSA.²⁰⁸ This responsibility, however, only extends to the organisation of the content and not to the content as such.²⁰⁹

The 2016 Commission Proposal for the 2018 revision did not initially introduce any rules regarding commercial communications displayed on VSPs. It emphasised that these were “already regulated” by, *inter alia*, the UCPD²¹⁰ and the Tobacco Advertising Directive.²¹¹ The choice not to regulate audiovisual advertising on VSPs was somewhat surprising given the typical business model of VSP providers involving heavy reliance on revenues from the sale of advertising space around audiovisual content. After modifications by the Council,²¹² Directive 2018/1808 eventually included commercial communications on VSPs in the area of harmonisation in an attempt to align the rules amongst all audiovisual content providers so as to “to ensure a sufficient level of consumer protection”.²¹³

Article 28b AVMSD imposes three sets of obligations on VSP providers with respect to the content of audiovisual commercial communications disseminated via their platforms. First, Article 28b(1) lays down a general obligation of means (“take appropriate measures”) to protect two audiences from three types of harmful content in all videos, including audiovisual commercial communications, regardless of whether the videos are under the control of the VSP provider or not. VSP providers must protect:

- minors, from content which may impair their physical, mental, or moral development in accordance with Article 6a(1);
- the general public, from content containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter; and
- the general public, from content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence, offences concerning child pornography and offences concerning racism and xenophobia.²¹⁴

²⁰⁸ Directive 2000/31/EC; see also Quintais J., “The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright”, 2022, forthcoming in *European Journal of Risk Regulation*.

²⁰⁹ Recital 48 Directive 2018/1808.

²¹⁰ UCPD (dir. 2005/29/EC).

²¹¹ Tobacco Advertising Directive (dir. 2003/33/EC). See recital 27 of the 2016 AVMSD Commission Proposal; see also Weinand J., *Implementing the EU Audiovisual Media Services Directive: Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK*, 2018, Nomos Verlagsgesellschaft: Baden-Baden, pp.735, 737.

²¹² Council of the European Union, Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 5 October 2018, 2016/0151(COD), p. 31.

²¹³ Recital 46 of Directive 2018/1808.

²¹⁴ Notably, Article 28b(1) does not regulate content that may be unlawful according to national law, e.g., content infringing on copyright, nor does it regulate content that is controversial for other reasons than those mentioned in Article 28b(1).

In addition to the general obligation applicable to all videos, Article 28b(2) set outs two specific obligations with respect to advertisements. For commercial communications that are “marketed, sold or arranged” by VSP providers (VSP-controlled advertising), the first paragraph of Article 28b(2) constitutes an obligation to ensure compliance with the requirements of Article 9(1). Thus, where VSP providers exercise direct control over advertisements, they must comply with the same qualitative rules as media service providers (see Section 3.2.3). For commercial communications that are “not marketed, sold or arranged” by VSP providers (non-VSP-controlled advertising), the second paragraph of Article 28b(2) includes a looser obligation of means to take appropriate measures to comply with the requirements of Article 9(1). Here, the “limited control” exercised by VSP providers over those advertisements should be taken into account. Although the obligation is framed in less strict terms, it is clear that the AVMSD aims to secure the same types of consumer protection for advertising on VSPs.²¹⁵

The difficulty with this binary distinction is that the AVMSD does not explain how the terms “marketed, sold or arranged” should be understood. Where VSP providers directly sell advertising space themselves, their control over the advertisements is evident. And where uploaders independently agree with advertisers to include paid promotions in their videos, the control of VSP providers is certainly lacking. However, there are many situations conceivable in which VSP providers exercise different degrees of control in relation to advertising on their platforms. The UK regulator Ofcom recently issued guidance for VSPs in this regard. Ofcom considers advertising to be marketed, sold or arranged by a VSP provider “when a VSP provider is involved in making the advertising available on the platform, which may include (but is not limited to): enabling advertising on their platform, either directly or via a third-party, and/or providing tools that enable advertisers to target or optimise the reach of their advert served on the provider’s platform”.²¹⁶

Significantly, Article 28b refers solely to Article 9(1) and *not* also to the obligations related to sponsorship and product placement as set out in Articles 10 and 11 AVMSD: the requirements for these special forms of advertising do not therefore apply to VSP providers. This seems odd at first, given the omnipresence of sponsorship and product placement in videos on VSPs (for example in influencer vlogs), and given the 2018 amendment allowing for inclusion of the elements “video-sharing platform services” and “user-generated videos” in the legal definitions of sponsorship and product placement.²¹⁷ On the other hand, the regulatory decision makes sense in view of the limited control VSP providers exercise over sponsorship and product placement. As these communications are integrated within the

²¹⁵ Ofcom, “Video-sharing platform guidance: Guidance for providers on control of advertising”, 7 December 2021, p. 2, https://www.ofcom.org.uk/_data/assets/pdf_file/0014/229010/vsp-guidance-control-of-advertising.pdf.

²¹⁶ Ofcom, “Video-sharing platform guidance: Guidance for providers on control of advertising”, 7 December 2021, p. 2.

²¹⁷ See also Jurjens E.W., “De definitieve nieuwe Richtlijn Audiovisuele Mediadiensten: een eerste analyse”, *Nederlands tijdschrift voor Europees recht*, 2019, Vol. 1-2, p. 47, https://www.bjutijdschriften.nl/tijdschrift/tijdschrifteuropeesrecht/2019/1-2/NtER_1382-4120_2019_025_102_003.

programmes and user-generated videos uploaded to VSPs²¹⁸, VSP providers are simply unable to meet the requirements associated with the editorial responsibility of the video creator.²¹⁹ In case a video channel qualifies as an AVMS, it is the channel's operator (the media service provider) that must comply with the requirements of Articles 10 and 11 of the AVMSD.

This does not mean, however, that VSP providers can sit back and relax. The third paragraph of Article 28b(2) obliges VSP providers to give information about the presence of commercial communications in all videos uploaded to their platforms, regardless of the degree of control exercised over the communications, provided that advertising is either declared by the uploaders or the VSP provider has otherwise learned about it.

The fourth paragraph of Article 28b(2) encourages VSP providers to draft and implement codes of conduct aimed at effectively reducing the exposure of children to audiovisual commercial communications on VSPs for HFSS foods, as well as ensuring that such communications do not emphasise the positive quality of the nutritional aspects of these unhealthy foods and beverages.

The “appropriate measures” referred to in Article 28b(1) and (2) to be taken to protect users from harmful and hidden advertising on VSPs are preferably put in place through co-regulation (Article 28b(4) jo. Article 4a(1) AVMSD). They shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected and the rights and legitimate interest at stake, including those of the VSP providers and the users having created or uploaded content as well as the public interest. The measures must be practicable and proportionate, considering the size of the VSP, and may not lead to ex-ante control measures or upload-filtering practices which would conflict with Article 15 of the E-Commerce Directive (Article 28b(3)).²²⁰

Article 28b(3) outlines 10 measures VSP providers should take if considered appropriate. Of particular relevance for online advertising are measures which consist of:

- a. including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in Article 28b(1);
- b. including and applying in the terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) for audiovisual commercial communications that are not marketed, sold, or arranged by the VSP providers;
- c. having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know.

²¹⁸ “Integrative advertising”, see Clifford D. and V. Verdoodt, “Integrative advertising: the marketing ‘dark side’ or merely the emperor’s new clothes?”, 2017, *European Journal of Law and Technology*, 8(1), <https://ejlt.org/index.php/ejlt/article/view/547>.

²¹⁹ For example, the requirement to prevent “undue prominence” being given to a product (Article 11(3)(c)) or to ensure that the video does not directly encourage the purchase or rental of goods or services (Article 11(2)(b)).

²²⁰ See also Recital 48 Directive 2018/1808.

The other 7 measures provide users with flagging and rating mechanisms (d, e, g), parental controls and age verification systems (f, h), media literacy tools (j) and procedures to contest the implementation of some of these measures (i).

The main objective behind the list of measures seems to prevent the upload of harmful content by including a prohibition to do so in the terms and conditions of the video-sharing platform service.²²¹ If the content is still uploaded, then measures should be in place to limit access to such content (e.g., through age verification and parental control systems) or to ensure that the content can be taken down as soon as possible (e.g., through reporting and flagging mechanisms).²²² By demanding that VSP providers set up mechanisms through which platform users can exercise their influence, the AVMSD essentially divides the responsibility for eliminating harmful content between VSP providers and the uploaders/viewers.²²³

The last paragraph of Article 28b(3) notes that personal data of minors collected or otherwise generated by VSP providers in order to comply with the measures (f) and (h) cannot be processed for commercial purposes such as direct marketing, profiling and behaviourally targeted advertising.

Finally, Article 28b(6) allows member states to impose more detailed or stricter measures than those proposed by the Directive, provided that they comply with the liability regime and prohibition on general monitoring obligations as set forth in the E-Commerce Directive and soon, the DSA. The appropriateness of the measures must be assessed by the national regulatory authorities according to mechanisms established by the member states (Article 28b(5) AVMSD).

3.3. Influencer marketing: A case study of the Netherlands

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As platforms' popularity has increased, so too has the popularity of individual content creators on platforms. These creators have increasingly begun to work with businesses to advertise their products and services, creating a new form of online advertising commonly referred to as influencer marketing. Influencer marketing adapts word-of-mouth advertising techniques to the communities that have formed on platforms. Traditionally, word-of-mouth advertising involves the endorsement of a product or service by a trusted individual

²²¹ Ofcom, "Video-sharing platform guidance: Guidance for providers on advertising harms and measures", 7 December 2021, p. 3.

²²² Jurjens E.W., "De definitieve nieuwe Richtlijn Audiovisuele Mediadiensten: een eerste analyse", 2019, *Nederlands tijdschrift voor Europees recht*, 1(2).

²²³ See e.g., Van Drunen M.Z., "The post-editorial control era: how EU media law matches platforms' organizational control with cooperative responsibility", 2020, *Journal of media law*, 12(2), pp. 166-190.

in a small community. In the case of influencer marketing, the influencer directly communicates to the audience they have built up over the years.²²⁴

For businesses, influencer marketing offers a particularly attractive opportunity to advertise their services. Influencers are typically highly trusted by their fanbase. For influencers, it creates the opportunity to monetise their popularity on social media in addition to (and without the commission charged by) the advertising systems offered by platforms themselves. This can take many different forms, including affiliate links, providing goods to be reviewed, or having an influencer endorse a product.²²⁵ Additionally, influencers themselves vary significantly depending on for example the sector in which they operate (e.g. beauty vloggers, travel writers, or child influencers) or the size of their audience (ranging from nano influencers with under 1 000 followers, to mega-influencers with over a million followers).²²⁶ A recent definition aiming to capture this wide diversity states that an influencer involved in marketing is “a content creator with a commercial intent, who builds trust- and authenticity-based relationships with their audience (mainly on social media platforms) and engages online with commercial actors through different business models for monetisation purposes”.²²⁷

This brief description of influencer marketing already raises issues with regard to many aspects of advertising law. Transparency requirements come into play where it is unclear to viewers that an influencer is reviewing a product they have received for free, or where influencers do not disclose they have been paid to speak positively about a place, product, or service.²²⁸ The potential to exploit the trusting relationship between influencers and their audience for commercial purposes also creates a risk of undue influence, particularly when influencers market products to vulnerable consumers such as children.²²⁹ Finally, the sheer diversity and scale of influencer marketing presents its own challenges on how to design and enforce advertising regulation that applies to influencer marketing.

These issues have been primarily addressed by member states through consumer law and media law.²³⁰ The following section will zoom in on the specific way in which

²²⁴ Goanta C. and S. Ranchordas, “The Regulation of Social Media Influencers: An Introduction”, in *The Regulation of Social Media Influencers*, Elgar, <https://www.elgaronline.com/view/edcoll/9781788978279/9781788978279.xml>.

²²⁵ De Gregorio G. and C. Goanta, “The Influencer Republic: Monetizing Political Speech on Social Media”, 2022, *German Law Journal*, 23 (2), p. 208, <https://doi.org/10.1017/glj.2022.15>.

²²⁶ Campbell C. and J. Rapp Farrell, “More than Meets the Eye: The Functional Components Underlying Influencer Marketing”, 2020, *Business Horizons*, 63 (4), pp. 469–79, <https://doi.org/10.1016/j.bushor.2020.03.003>; Goanta and Ranchordas, “The Regulation of Social Media Influencers”.

²²⁷ Michaelsen F. et al., “The Impact of Influencers on Advertising and Consumer Protection in the Single Market”, 2022, Luxembourg: European Parliament, p. 25, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf).

²²⁸ Antoniou A., “Advertising Regulation and Transparency in Influencers” Endorsements on Social Media”, 2021, *Communications Law - Journal of Computer, Media and Telecommunications Law*, 26(8), pp. 190–207, <http://repository.essex.ac.uk/31491/>.

²²⁹ Verdoodt V. and N. Feci, “Digital influencers and vlogging advertising: Calling for awareness, guidance and enforcement”, 2019, *Auteurs & Media*, 1, pp. 11–21, <http://hdl.handle.net/1854/LU-8723069>.

²³⁰ Riefa C. and L. Clausen, “Towards Fairness in Digital Influencers’ Marketing Practices”, 2019, *Journal of European Consumer and Market Law*, 8(2), p. 65,

influencer marketing has been regulated in the Netherlands. The Netherlands has in the past two years seen a number of interesting developments in the way (European) norms applying to online advertising can be adapted to fit the characteristics of influencer marketing.

3.3.1. Legislation of influencers in the Netherlands

In the Netherlands, the legal framework regarding influencers and online advertising consists of both legislation and self-regulation. The first piece of relevant legislation is the Unfair Commercial Practices Act, which implements the Unfair Commercial Practices Directive and is enforced by the Authority for Consumers & Markets (ACM). The ACM's guidance and enforcement of consumer law in the context of influencer marketing has taken a narrow focus on the use of fake likes, followers, or reviews to promote products and services. Its 2020 guidelines on the protection of consumers from online influence emphasised consumers' reliance on the experiences and behaviour of others when deciding to buy a product. In this context, influencer marketing can steer consumer behaviour either when businesses pay influencers to endorse a product, or when influencers buy followers or likes to promote posts selling their own products. So far, the ACM has focused on the latter practices.²³¹ In 2020, the ACM took its first enforcement action against an influencer. The influencer had misleadingly promoted his products by using fake likes and followers, leading consumers to have a more positive image of the (products of) the influencer.²³² This is a violation of the Unfair Commercial Practices Act's provisions on misleading advertising, or more specifically Article 6:193 subparagraph v: fraudulently claiming or creating the impression that the trader is not acting for the purposes of his trade, business, craft or profession or fraudulently impersonating a consumer. In 2022, the ACM disclosed it had issued warnings to six more influencers who had similarly bought fake likes to promote

<https://kluwelawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/8.2/EuCML2019012>; Pflücke F., "Making Influencers Honest: The Role of Social Media Platforms in Regulating Disclosures", 2020, The Regulation of Social Media Influencers, <https://www.elgaronline.com/view/edcoll/9781788978279/9781788978279.00023.xml>; De Cock Buning M., "Life after the European Audiovisual Media Services Directive: Social Media Influencers through the Looking-Glass", 2020, The Regulation of Social Media Influencers, <https://www.elgaronline.com/view/edcoll/9781788978279/9781788978279.00011.xml>.

²³¹ ACM/19/035689, Leidraad Bescherming van de online consument: grenzen aan online beïnvloeding, 11 February 2020, <https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf>.

²³² ACM/20/042072, Besluit van de Autoriteit Consument en Markt op grond van artikel 2.9 van Wet handhaving consumentenbescherming tot het opleggen van een last onder dwangsom aan Bicep Papa B.V. wegens overtreding van artikel 8.8 van de Wet handhaving consumentenbescherming, 24 November 2020, <https://www.acm.nl/sites/default/files/documents/last-onder-dwangsom-bicep-papa-voor-gebruik-nepvolgers-en-neplikes.pdf>.

their products, and noted influencers who continued to use fake followers or fines risked a fine.²³³

In addition to the Unfair Commercial Practices Act, the Media Act (which implements the Audiovisual Media Services Directive (AVMSD)) applies to audiovisual media. The AVMSD's applicability to influencers depends on whether they can be qualified as commercial on-demand media service providers (the Dutch counterpart to VOD providers under the AVMSD). Because there is as yet no EU-wide guidance on the way the definition of a commercial on-demand media service applies to influencers, the Dutch media authority (*Commissariaat voor de Media* (CvdM)) is conducting its own research into how they apply this definition to influencers. This research shows that, for the time being, three cumulative conditions must be met before influencers are designated as audiovisual media services.²³⁴ First, they must be a channel on a video platform on which 24 or more videos have been published in the previous 12 months. Second, there must be a registration with the Chamber of Commerce and the achievement of economic benefit by publishing videos.²³⁵ Finally, (the channel of) the influencer must have at least 500 000 followers. When these conditions are met, influencers qualify as audiovisual media services that have to register with the authority and comply with the Media Act. For the most part, the provisions in the Media Act that are set to apply to influencers are direct transpositions of their counterparts in the AVMSD.²³⁶ Additionally, under Article 3.6 of the Media Act audiovisual media service providers (including influencers) are obliged to join the Advertising Code Foundation and comply with the rules of the self-regulatory instrument: the Social Media and Influencer Marketing Advertising Code (*Reclamecode Social Media and Influencer Marketing* (RSM)).

3.3.2. Self-regulation of influencers in the Netherlands

Self-regulation has played an important role in the Dutch approach to advertising. In the world of advertising, it is important to draw up comprehensible rules that take account of practice. This creates a wide support base and a level playing field for fair competition and business operations. Self-regulation can also prevent advertising rules from being laid down in detail by law and give the sector itself the opportunity to flesh out open standards, such as those from the Unfair Commercial Practices Act. These more detailed rules will be

²³³ Autoriteit Consument & Markt, "Influencers stoppen met neplikes en nepvolgers na waarschuwing ACM | ACM.nl", Nieuwsbericht, 11 March 2022, <https://www.acm.nl/nl/publicaties/influencers-stoppen-met-neplikes-en-nepvolgers-na-waarschuwing-acm>.

²³⁴ Bakhuis A., "VMC Studiemiddag over regulering van online content", 2022, Mediaforum 19, <https://www.mediaforum.nl/art/5162/vmc-studiemiddag-over-regulering-van-online-content>.

²³⁵ Registration is required for every business, Handelsregisterwet 2007, Chapter 3, <https://wetten.overheid.nl/jci1.3:c:BWBR0021777&hoofdstuk=3&z=2022-03-02&q=2022-03-02>. According to guidance supplied by the Chamber of Commerce on starting businesses, registration is required when a business (1) supplies goods and/or services (2) charges more than a symbolic payment, and (3) takes part in regular commercial transactions. Chamber of Commerce, "When do you have a Business", 2022, <https://www.kvk.nl/english/starting-a-business-in-the-netherlands/when-do-you-have-a-business/>.

²³⁶ See for an overview of the transposition of the relevant provisions "AVMSD Database", 2022, European Audiovisual Observatory, <http://avmsd.obs.coe.int/>.

tested continuously and, if necessary, adjusted to developments in society in consultation with consumer representatives. In this way, advertising remains responsible and the consumer retains confidence in it. Especially given the speed of (technological) developments in the field of social media and influencer marketing, the above is even more important with regard to this special form of advertising.²³⁷

The Dutch Advertising Code is the primary self-regulatory instrument for advertising in the Netherlands; it includes a specific section, the RSM, which applies to influencers.²³⁸ The RSM was originally drafted in 2014 under government supervision by the consumer rights association and the advertising industry, and updated in 2019 following evidence of limited compliance among influencers and calls for additional clarification as to whether influencer campaigns should be considered permissible or not.²³⁹ The drafters believed it important that consumers be able to interpret statements correctly and be able to easily understand that they are engaging with an advertisement. With openness and honesty, consumer confidence in this popular form of advertising is increased. Ultimately, this is positive for all parties: the brand, the influencer and the consumers.²⁴⁰

The RSM imposes basic norms that require advertising by influencers to be transparent, and not manipulative (especially regarding children). The RSM aims to promote transparency in social media and influencer marketing by disclosing the relationship between the advertiser (the brand, product or company being promoted) and the disseminator (the influencer). The Advertising Code Committee (*Reclame Code Commissie* (RCC)) supervises compliance with the RSM. Therefore, it is ultimately up to the RCC, after receiving complaints from consumers or competitors about non-compliance with the RSM, to determine on a case-by-case basis whether the posts fall under the concept of 'advertising' and comply with the RSM. If one of the parties does not agree with the decision of the RCC, the advertisement can be submitted to the internal Board of Appeal. If a violation is established, the Compliance Department from the Advertising Code Foundation checks whether the ruling has been followed up. If not, the name and verdict in question are published via the non-compliant list on the website of the Advertising Code Foundation as a form of naming and shaming.²⁴¹ The following section will explore how the RSM regulates influencer advertising, and how its rules have been interpreted by the RCC.

²³⁷ AVMSD 2010, recital 45; European Commission, "Communication from the Commission to the Council and the European Parliament - Better Regulation for Growth and Jobs in the European Union", 2005, European Commission, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52005DC0097>.

²³⁸ Additionally, the Social code: YouTube was introduced in 2017 following an investigation by the Media Authority. Given the limits of its scope and obligations, this section focuses on the RSM. Koehoorn, X. "De 'Social Code: YouTube' – zwakke zelfregulering in de strijd tegen sluikreclame", 2020, *Mediaforum* 2, 42, <https://www.mediaforum.nl/scripts/download.php?id=4111>.

²³⁹ Cock Buning, de, M., "Social Media Influencers: liever door de hond of door de kat gebeten? Een analyse van de nieuwe Europese regelgeving voor influencer-marketing", 2019, *IER*, 2, p. 249, <https://hdl.handle.net/1814/70256>. Cock Buning, de, M., "Life after the European Audiovisual Media Services Directive: Social Media Influencers through the Looking-Glass", 2020, *The Regulation of Social Media Influencers*, <https://www.elgaronline.com/view/edcoll/9781788978279/9781788978279.00011.xml>.

²⁴⁰ See <https://www.reclamecode.nl/social/>, 2022.

²⁴¹ See <https://www.reclamecode.nl/compliance/non-compliant/>, 2022.

The RSM clarifies the general definition of advertising in the NRC, which also applies to influencer marketing. A few useful clarifications have also been made in the context of social media. First, the RSM explicitly clarifies that the advertiser may only encourage (rather than directly order) the disseminator to publish an advertising message.²⁴² Nor is it necessary for an advertiser to determine or influence the content of an advertisement themselves.²⁴³ Finally, for the qualification of a video as advertising, it is also important that it does not make a difference whether commendatory statements are made continuously or at specific moments.²⁴⁴

In order for addressees (consumers and businesses) to correctly interpret an advertising message via social media and influencer marketing, they need to have knowledge of the nature of the relationship between the advertiser and the disseminator.²⁴⁵ This relationship is called the “relevant relationship” in the RSM. Both the advertiser and the disseminator are responsible for compliance with the RSM.²⁴⁶ If the “relevant relationship” arises from an agreement, then the advertiser must require the disseminator to comply with the RSM. In other cases, when inviting disseminators to give their opinion about its products, the advertiser must explicitly point out the RSM to them. The RCC and the Board of Appeal have also emphasized that advertisers remain responsible for recognising and disclosing the “relevant relationship”. They have a duty of care and cannot hide behind influencers.²⁴⁷

In determining the “relevant relationship” a double test is always involved: there must be some monetary or in-kind advantage for the influencer and that advantage must affect the credibility of the statement concerned.²⁴⁸ With respect to that advantage it does not matter whether the advertiser has paid money to the influencer or the video is a *quid pro quo* for receiving a product, as is clear from a judgment relating to the fact that Fanatec had sent a racing wheel to a YouTuber in the hope and expectation that she would publicise it.²⁴⁹

²⁴² See article 2(b) and the Appendix associated with the Reclame Code Social Media & Influencer Marketing (RSM) – Explanation.

²⁴³ Reclame Code Commissie 17 March 2016, nr. 2016/00079, <https://www.reclamecode.nl/uitspraken/gezondheid/huishouden-en-inrichting-2016-00079/152627/>

²⁴⁴ Reclame Code Commissie 20 December 2019, nr. 2019/00696, <https://www.reclamecode.nl/uitspraken/boerderijchips/voeding-en-drank-2019-00696/260894/>

²⁴⁵ See Article 3 RSM. See e.g. Reclame Code Commissie 10 February 2022, nr. 2021/00312, <https://www.reclamecode.nl/uitspraken/actieve-inspanning-rsm/voeding-en-drank-2021-00189/304924/>, or Reclame Code Commissie 17 October 2019, nr. 2019/00576, <https://www.reclamecode.nl/uitspraken/resultaten/reizen-en-toerisme-2019-00576/256482/>

²⁴⁶ See Article 6 RSM.

²⁴⁷ See Article 6 RSM; Reclame Code Commissie 24 February 2020, nr. 2019/00778, <https://www.reclamecode.nl/uitspraken/resultaten/recreatie-amusement-cultuur-en-sport-2019-00778/263132/>; College van Beroep Stichting Reclame Code 6 August 2019, nr. 2019/00179, <https://www.reclamecode.nl/uitspraken/voeding/gezondheid-2019-00179-cvb/246134/>

²⁴⁸ See Explanatory Note to Article 3 RSM.

²⁴⁹ Reclame Code Commissie 24 February 2020, nr. 2019/00778, <https://www.reclamecode.nl/uitspraken/resultaten/recreatie-amusement-cultuur-en-sport-2019-00778/263132/>

A “relevant relationship” may already be known or assumed by consumers.²⁵⁰ If that is not the case, that relationship must be revealed in the post. Under Article 3 subparagraph a, of the RSM, advertising via social media must be recognisable as such. In addition, pursuant to Article 3 subparagraph b of the RSM, the statement must “explicitly” mention if a disseminator has received a payment in cash or in kind (for example, a free airline ticket²⁵¹ or discount on a bed²⁵²) from an advertiser.

According to Article 3 subparagraph c of the RSM, this information obligation can be fulfilled if the content and nature of the “relevant relationship” is clearly and accessibly disclosed. The RSM offers a few examples (such as “#ad” or “received from @[advertiser]”, but does not prescribe one particular method.²⁵³ In each case the RCC will determine whether it is made sufficiently clear that an advertisement is involved. For example, in a case about product placement the RCC ruled that a statement “under the description of the [YouTube] video” was placed in “an inconspicuous place” and therefore did not meet the requirement of recognisability.²⁵⁴ In addition, in a decision regarding a YouTuber who received a botox treatment “as a gift” from the advertiser, the RCC considered it important that the statement itself explicitly (verbally) mentioned that the disseminator received the services concerned “free of charge”.²⁵⁵ Also, according to the RCC, a mention in the comments under the video is not sufficient: In the present expression, there is no question of an explicit statement of the fact that the influencer received the handlebars for free (...). The fact that the influencer later, in reaction to the post under the video by the complainant, did mention that she received the handlebars and the pedals for free does not make this different because this must be mentioned immediately, from the moment the video is visible.²⁵⁶

In addition to Article 3 of the RSM, Article 4 of the RSM stipulates that it is prohibited to edit messages or other expressions on social media in such a way that the average consumer may be misled by them.²⁵⁷ Although the RCC has not (yet) ruled on this, it appears from the explanation of Article 4 that this is also the case if an advertiser displays consumer-generated content in a selective manner, so that only positive statements come to the fore.²⁵⁸

²⁵⁰ See Appendix associated with the Reclame Code Social Media & Influencer Marketing (RSM) – Explanation.

²⁵¹ Reclame Code Commissie, 26 October 2017, nr. 2017/00650, <https://www.reclamecode.nl/uitspraken/rsm/reizen-en-toerisme-2017-00650/200389/>

²⁵² Reclame Code Commissie 17 March 2016, nr. 2016/00079, <https://www.reclamecode.nl/uitspraken/gezondheid/huishouden-en-inrichting-2016-00079/152627/>

²⁵³ See Explanatory Note to Article 3 RSM.

²⁵⁴ Reclame Code Commissie 17 August 2017, nr. 2017/00494, par. 3, <https://www.reclamecode.nl/uitspraken/rsm/persoonlijke-verzorging-en-uitendel-2017-00494/288146/>

²⁵⁵ Reclame Code Commissie 23 December 2016, nr. 2016/00896, par. 2 & 5, <https://www.reclamecode.nl/uitspraken/vlogger/gezondheid-2016-00896/178059/>

²⁵⁶ Reclame Code Commissie 24 February 2020, nr. 2019/00778, <https://www.reclamecode.nl/uitspraken/resultaten/recreatie-amusement-cultuur-en-sport-2019-00778/263132/>

²⁵⁷ See Article 4 RSM.

²⁵⁸ See Explanatory Note to Article 4 RSM.

It is also not permitted to directly encourage children of 12 years and younger to advertise products or services on social media.²⁵⁹ In this respect it is important that the RCC ruled that there is only a violation of Article 5 of the RSM if, in the video, other children are encouraged to advertise themselves via their own social media channels for, in this case, Bijenkorf, in exchange for a reward.²⁶⁰ The provision does not prohibit children of 12 years or younger from playing a role in an advertisement.

3.3.3. Conclusion

As shown above, the legal framework concerning online advertising by influencers in the Netherlands consists of both legislation and self-regulation. The RSM, which is a form of self-regulation, is very relevant in this context. Self-regulation offers an alternative to legislation in the world of online advertising because the (technological) developments in this area take place at a rapid pace and self-regulation can react to these developments more quickly. The RSM is linked to legislation in two ways. On the one hand, the RSM further defines the open standards in the legislation. On the other hand, Article 3.6 of the Media Act obliges influencers, who are considered to be a “provider of a commercial media service on demand”, to join the Advertising Code Foundation and to comply with the rules of the RSM. This means that influencers must always be transparent about a “relevant relationship” and must comply with the ban on manipulation, especially with regard to children.

²⁵⁹ See Article 5 RSM.

²⁶⁰ Reclame Code Commissie 17 August 2017, nr. 2017/00494, <https://www.reclamecode.nl/uitspraken/bijenkorf/kleding-schoenen-en-accessoires-2017-00494/195184/>.

4. Targeted advertising

This section deals with the regulation of targeted advertising. Targeting allows advertisers to show their advertisements only to those individuals of the audience for whom the advertisement is relevant. This allows advertisers to increase the likelihood that their ads result in a sale and, as advertisers argue, ensures consumers do not see ads that are irrelevant to their interests. Nevertheless, targeting also brings new risks to which regulators have become increasingly sensitive. Targeting can for example strengthen advertising's manipulative power by allowing advertisers to take unfair advantage of individual consumers' vulnerabilities.²⁶¹ The lack of transparency about the functioning of targeting algorithms can also prevent regulators, individuals, and advertisers themselves from knowing how advertisements are shown to users. Finally, targeted advertising requires data about the individuals being targeted in order to function.

The need for rules about the way personal data is processed was the focal point of early regulatory discussions about online advertising.²⁶² More recently, attention has shifted to the need for enforcement, and additional rules that address online platforms' role in targeted advertising. Section 4.1 first analyses the implementation and enforcement of the GDPR in two member states, Spain and France. Section 4.2 analyses how the DSA is set to impose further restrictions on online intermediaries in the context of online advertising. Finally, it should be noted that the EU's proposal for political advertising regulation imposes further restrictions on the processing of personal data in the context of online advertising. These rules are discussed in section 5.2.3 of the chapter on advertising and democracy.

4.1. Data protection law and targeted advertising

Data protection law has traditionally been the home of targeted advertising legislation. Following the entry into force of the GDPR, the focus on data protection law has shifted to determining how its rules must be enforced, and where they must be supplemented. The following sections describe the legal developments and guidance issued by national data protection authorities in Spain and France in the context of targeted advertising. Both countries have been relatively active in enforcing data protection law. The French data protection authority has placed particular emphasis on the enforcement of data protection law in the context of online marketing and targeted advertising, and has developed a number of guidelines on the issue. Spain has seen a constitutional conflict over the

²⁶¹ Helberger et al., "Choice Architectures in the Digital Economy".

²⁶² Chen, *Data Protection Principles Governing OBA*; Lynskey, "Track(Ing) Changes".

permissibility of targeted political advertising, and has consistently been among the member states issuing the most fines under data protection law.²⁶³

In addition to these more elaborate descriptions, it should be noted that on 2 February 2022 the Belgian DPA issued a decision regarding a popular tool with which publishers obtain consent for targeted advertising.²⁶⁴ The DPA held that the organisation offering this tool, the Interactive Advertising Bureau Europe (IAB), was a joint controller with “CMPs [Consent Management Platforms], publishers, and participating adtech vendors”.²⁶⁵ As such, IAB was required (and had failed) to comply with the GDPR’s provisions on the need for a legal basis, transparency, accountability, data protection by design and default, confidentiality, and security. IAB was fined EUR 250 000 and ordered to establish a legal basis for their processing of personal data, prohibit participating organisations from using their legitimate interest as a legal basis, and vet participating organisations to ensure they comply with the GDPR. IAB has appealed the decision.²⁶⁶

4.1.1. France

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The normative framework regulating online advertising in France has been shaped by applicable European legislative instruments, that is to say, the GDPR and the ePrivacy Directive and corresponding national legislation. A key way (though not the only way)²⁶⁷ in which the French Data Protection Authority, the CNIL (*Commission nationale de l’informatique et des libertés*), has aimed to regulate online advertising is by determining how the important role of consent in the EU legal framework can be adapted to complex

²⁶³ Daigle B. and M. Khan, “The EU General Data Protection Regulation: An Analysis of Enforcement Trends by EU Data Protection Authorities”, 2020, *Journal of International Commerce & Economics* 1(15), <https://heinonline.org/HOL/Page?handle=hein.journals/jice2020&id=1&div=&collection=>; Ruohonen J. and K. Hjerpe, “The GDPR Enforcement Fines at Glance”, 2022, *Information Systems* 106, , <https://doi.org/10.1016/j.is.2021.101876>. See also p. 15 of Daigle and Khan for a brief description of specific enforcement decisions by the French data protection authority in the context of targeted advertising.

²⁶⁴ “Beslissing Ten Gronde 21/2022 van 2 Februari 2022” (Gegevensbeschermingsautoriteit, 2 February 2022), <https://www.gegevensbeschermingsautoriteit.be/publications/beslissing-ten-gronde-nr.-21-2022.pdf>. The Belgian DPA published an unofficial English translation of the decision: <https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-21-2022-english.pdf>.

²⁶⁵ “Beslissing Ten Gronde 21/2022 van 2 Februari 2022”, para. 407.

²⁶⁶ See Veale M., M. Nouwens, and C. Santos, “Impossible Asks: Can the Transparency and Consent Framework Ever Authorise Real-Time Bidding After the Belgian DPA Decision?”, 2022, *Technology and Regulation*, <https://doi.org/10.31235/osf.io/mj7xu>.

²⁶⁷ See for instance CJEU, Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximilian Schrems*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0311> on data transfers as confirmed by the French Council of State, 28 January 2022, 10th-9th ch, ECLI:FR:CECHR:2022:449209.20220128, <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-01-28/449209>. See also CNIL, “Alternatives to third-party cookies: what consequences regarding consent?”, 2021, <https://www.cnil.fr/en/alternatives-third-party-cookies-what-consequences-regarding-consent>.

online advertising techniques. Article 82 of Law no. 78-17 of 6 January 1978 on information technology, files and freedoms²⁶⁸ transposes the consent principles laid down by Article 5(3) of Directive 2002/58/EC.²⁶⁹ In particular, it provides for the obligation, with some exceptions, to obtain the consent of Internet users before any operation to write or read cookies and other types of trackers. In this context, consent refers to the definition and the conditions provided for in Articles 4(11) and 7 of the GDPR. This means that consent must be free, specific, informed, unambiguous and that users must be able to withdraw it at any time and with the same simplicity as when they granted it.

In 2019, the CNIL admitted the inefficiency of its existing guidelines on the regulation of consent for online advertising published in 2013, and initiated the process to revisit them. The CNIL adopted guidelines²⁷⁰ and recommendations²⁷¹ on 17 September 2020, with the aim to clarify applicable rules for consent in the field of online advertising. The recommendation functions as a practical guide intended to inform actors using trackers on the concrete methods for lawfully obtaining user consent. These documents are addressed to both the professional online advertising sector and to simple users, as they aim to ensure control over online trackers.

Throughout the process, the CNIL attempted to articulate and address the challenges associated with the protection of personal data in online advertising, specifically with the use of trackers and cookies. “How can Internet users exercise an informed choice, in complete transparency, to maintain control over their personal data as we live in an increasingly connected world?”²⁷²

The recent guidelines and recommendations aim to provide an answer to this question, while considering the professional online advertising sector and enhancing user control. In the following, we provide an overview of these principles as formulated by the CNIL.

²⁶⁸ Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000886460/>.

²⁶⁹ “Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.”

²⁷⁰ CNIL, Délibération n° 2020-091 du 17 septembre 2020 portant adoption de lignes directrices relatives à l'application de l'article 82 de la loi du 6 janvier 1978 modifiée aux opérations de lecture et écriture dans le terminal d'un utilisateur (notamment aux « cookies et autres traceurs ») et abrogeant la délibération n° 2019-093 du 4 juillet 2019, https://www.cnil.fr/sites/default/files/atoms/files/lignes_directrices_de_la_cnil_sur_les_cookies_et_autres_traceurs.pdf.

²⁷¹ CNIL, Délibération n° 2020-092 du 17 septembre 2020 portant adoption d'une recommandation proposant des modalités pratiques de mise en conformité en cas de recours aux « cookies et autres traceurs ».

²⁷² See CNIL, “Publicité ciblée en ligne : quels enjeux pour la protection des données personnelles ?”, 2020, <https://www.cnil.fr/fr/publicite-ciblee-en-ligne-quels-enjeux-pour-la-protection-des-donnees-personnelles>.

First, the CNIL highlights that its guidelines concern all operations aimed at accessing by means of electronic transmission information already stored in the terminal equipment of the user of an electronic communications service or writing information on that device.²⁷³ Then, the guidelines provide clarifications (1) on user consent and consent management, (2) on user information, and (3) on tracker exemption rules.

4.1.1.1. User consent

The qualification of user consent as free follows the GDPR's rules (Recital 42 and Article 4 GDPR). This means that making the provision of a service or access to a website subject to consenting to write or read operations on the user's terminal (so-called "cookie wall" practice) is likely to infringe, in certain cases, on freedom of consent. Consent needs to be specific. As such, consent to these operations cannot be validly collected via a global acceptance of general conditions of use. Consent needs to be clear.

The CNIL focuses on the need for consent to be unambiguous. This means that continuing to browse a website, using a mobile application or scrolling down the page of a website or an application mobile does not constitute a clear affirmative action amounting to consent.²⁷⁴ The mere continuation of navigation on a site can no longer be considered as a valid expression of user consent. People must consent to the insertions of tracers with a clear positive act (such as clicking on "I accept" in a cookie banner). In the absence of such valid consent, the user must be considered to have refused access to their terminal or the storing of any type of trackers, and no non-essential tracker for the operation of the service may be deposited on their device.

After laying out the legal framework regulating consent as applied in cookies, the CNIL issues clarifying recommendations on how consent can be requested, received, and managed. The CNIL strongly recommends that consent be obtained on each of the sites or applications concerned by this navigation monitoring, in order to guarantee that the user is fully aware of the scope of their consent. All recommendations aim to improve transparency. For instance, the CNIL highlights that access to the full list of controllers and actors using trackers on each site is important. It recommends that this list be prominent on each website, and laid down in a user-friendly manner which prioritises accessibility, accuracy, and simplicity of the information necessary to consent. In general, the CNIL encourages the development of consent design choices that encourage the collection of lawful consent, and of standardised interfaces operating in the same way and using a standardised vocabulary, in order to facilitate the understanding of users in their navigation on the sites or mobile apps.

In order to ensure the free nature of the consent given, the CNIL recommends asking users for their consent independently and specifically for each distinct purpose. However, the CNIL considers that this does not preclude the possibility of offering users global

²⁷³ Article 1: Sur le champ d'application des lignes directrices.

²⁷⁴ The Commission cites in that regard the CJEU *Planet 49* decision (CJEU, Oct. 1, 2019, C-673/17) stating that the use of pre-ticked boxes cannot be considered as a positive act clearly intended to give consent.

consent to a set of purposes, subject to prior presentation to users of all the purposes pursued. Finally, the CNIL highlights how refusal and withdrawal of consent are foundational building blocks of a lawful consent mechanism and design. For instance, the CNIL strongly recommends that the mechanism for expressing a refusal to consent to read and/or write operations be accessible on the same screen and with the same ease as the mechanism for expressing consent.

4.1.1.2. User information

Attempting to further fulfil its purpose to encourage transparency, the CNIL issued the following recommendations in ensuring that users are adequately and sufficiently informed before consenting to online trackers.

It first highlights that all users must be clearly informed about the purposes of the trackers before consenting, as well as the consequences associated with accepting or refusing the trackers. They should also be fully informed about the identity of all actors using trackers subject to consent. In this context, organisations using trackers must be able to provide, at any time, proof of valid collection of the users' free, informed, specific and unequivocal consent.

At a minimum, it is necessary according to the CNIL to provide the following information to users before obtaining their consent: the identity of the person(s) responsible for processing the reading or writing operations; the purpose of the reading or writing operations; the process and method in accepting and refusing trackers; the consequences attached to a refusal or acceptance of trackers; and finally, the existence of the right to withdraw consent.

4.1.1.3. Tracker exemption

Some trackers are exempt from obtaining consent under the CNIL's guidance. These concern for example trackers intended for authentication with a service, those intended to store the contents of a shopping cart on a merchant site, and certain trackers intended to generate traffic statistics, or even those allowing paid sites to limit free access to a sample of content requested by users.

The purposes of each tracker must be presented to users before they are offered the opportunity to consent or refuse. They must be formulated in an intelligible way, that is to say, in an appropriate language that is clear enough to allow users to understand precisely what they consent to. In order to make it easier to read, the DPA recommends that each purpose be highlighted in a short title, accompanied by a brief descriptive and that the possibility be given to users to obtain further information on the purposes with other design choices.

According to the CNIL, the content of this additional information may, for example, specify that the display of the advertisement encompasses different technical operations contributing to the same purpose. These also include display capping (sometimes called

"advertising capping", consisting in not presenting the same advertisement to a user too repetitively), the fight against "click fraud" (detection of publishers claiming to achieve a higher advertising audience than the reality), invoicing billboard service, and measurement of targets with more appetite for advertising to better understand the audience, etc.

The CNIL recommends that audience measurement trackers exempt from obtaining consent be placed after sufficient disclosure of their placement. For instance, users can be informed of the implementation of these trackers via privacy policies. The lifespan of these trackers should be limited to only the necessary amount of time and the information collected through these trackers is to be kept for a maximum period of 25 months. In general, the shelf life mentioned above should be subject to periodic review.

4.1.2. Spain

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During the past years Spain has witnessed several surprising events in relation to the processing of data for targeted advertising purposes. From the legalisation of a Cambridge-Analytica-like provision, later declared unconstitutional, to the greenlighting of the expression "if you continue browsing, we consider that you accept cookies", afterwards invalidated, to the first Code of Conduct post-GDPR, to being the member state with the highest number of fines imposed under the GDPR.

In the next few pages, we will summarise the main developments and outcomes.

4.1.2.1. Political microtargeting declared unconstitutional

Spain passed its national Data Protection Act transposing the GDPR in December 2018 (Organic Law on Data Protection and Guarantees on Digital Rights [Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales²⁷⁵] or LOPDgdd by its initials in Spanish).

Amongst other things, it contained a controversial provision concerning targeted advertisement for electoral propaganda. Specifically, the LOPDgdd Third Final Provision modified Article 58 bis of the Spanish Electoral System Act [Ley Orgánica 5/1985 del Régimen Electoral General²⁷⁶] (LOREG) allowing the processing of personal data through technological means in electoral activities.

Under this provision, political parties could collect personal data regarding the political ideology of citizens from social networks and the Internet to personalise electoral

²⁷⁵ Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales, BOE-A-2018-16673, <https://www.boe.es/eli/es/lo/2018/12/05/3>.

²⁷⁶ Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General., BOE-A-1985-11672, <https://www.boe.es/eli/es/lo/1985/06/19/5/con>.

propaganda based on the public interest. The rationale of the provision mentioned the aim to prevent cases such as the Cambridge Analytica one.

To provide some context, this Final Provision was introduced by an amendment of a parliamentary group in the last phase of the legislative process, hence tailor-made by the political parties themselves and approved by unanimity in Parliament.

Leaving aside the national constitutional arguments, this provision infringed the GDPR in different ways. First, the processing of personal data for these purposes was based on Recital 56 of the GDPR, which requires the establishment of “appropriate safeguards”. An earlier draft of the provision contained some safeguards, but these were removed from the final version. The lack of appropriate safeguards was the main driver of the declaration of unconstitutionality.

Second, under the GDPR, the most appropriate lawful ground for the processing would have been Article 9.2.g), which allows the processing of special categories of personal data based on “substantial public interest”. The challenged provision only mentioned a general (in other words, non-substantial) public interest. In addition, it failed to identify which interest it was.

As a result, several groups of legal professionals – including this author – spontaneously organised themselves to draft an appeal of unconstitutionality against paragraph one of the provision. These drafts were submitted to the Spanish Ombudsman in late February 2019, and a few days later, on 4 March 2019, the Ombudsman filed an appeal before the Constitutional Court, which was admitted.

On 22 May 2019 – that is, in record time, due to upcoming general elections and legal deadlines – the Constitutional Court unanimously declared under STC 76/2019²⁷⁷ the unconstitutionality of Article 58 bis paragraph 1 of the Spanish Electoral System Act, which was therefore declared null and void.

4.1.2.2. Code of conduct on the processing of data for advertisement purposes

In November 2020, the Spanish Data Protection Authority (AEPD) passed the first code of conduct under the GDPR.²⁷⁸ It tackled the processing of data in advertising activities, and was created by Autocontrol, the Spanish Association for the Self-Regulation of Commercial Communication and later greenlighted by the AEPD.

Its main contribution is the establishment of an extrajudicial dispute resolution system regarding personal data within the scope of advertising activities. It is intended to be an agile way for consumers and serve as an alternative to the ordinary administrative processes.

²⁷⁷ Tribunal Constitucional, decision STC 76/2019, 22nd May 2019, <https://www.boe.es/buscar/doc.php?id=BOE-A-2019-9548>.

²⁷⁸ Autocontrol, Código de Conducta: Tratamiento de datos en la actividad Publicitaria, 2020, <https://www.autocontrol.es/wp-content/uploads/2020/11/codigo-de-conducta-proteccion-de-datos.pdf>.

Furthermore, the code provides general guidance in light of the GDPR on topics such as how to obtain consent or probe a legitimate interest for the processing, how to comply with information requirements, or the need to observe the principles of data protection by design and by default. Additionally, it contains indications on the use of cookies or similar technologies for advertisement purposes.

4.1.2.3. Guidelines on the use of cookies

In November 2019, the Spanish DPA (AEPD) issued guidelines on the use of cookies, which were drawn up together with the industry.

The guidelines referred to the use of cookies and similar technologies such as web beacons or fingerprinting, and covered issues such as transparency relating to the information provided, the roles of controllership, and established consent as the only lawful basis.

The two most notable aspects of the guidelines regarded what could be considered a valid manifestation of consent and the lawfulness of cookie walls.

First, the guidelines validated expressions like “if you continue to browse this website, you accept cookies”, but only when accompanied with an option to reject cookies. With this formula, the guidelines did not authorise a pre-ticked-box option (which would have been deemed ambiguous): the option to reject cookies gives users two options to choose from, rendering the consent unambiguous and complying with the requirement that withdrawal of consent should be as easy as providing it.

However, soon after that, in May 2020, the EDPB released its Guidelines 05/2020 on Consent, which contained a ban on notions such as continued browsing as a manifestation of valid consent. Therefore, the AEPD, drawn up again together with the industry, updated the guidelines on the use of cookies in July 2020²⁷⁹ – now considering such expressions to not constitute valid consent.

The second controversial topic contained in the initial guidelines was the permission to, in certain cases, deny access to the service if the user refused to consent to cookies. Again, the EDPB contradicted this criterion, and established that, in order for consent to be freely given, access to services and functionalities should not be made conditional upon the user's acceptance of the use of cookies. As a consequence, the updated version of the guidelines banned the so-called cookie walls when websites do not offer an alternative to consent. In such cases, both alternatives must be genuinely equivalent.

The Spanish DPA granted a three-month transition period for adaptation to these new guidelines.

²⁷⁹ Agencia Española de Protección de Datos, Guía sobre el uso de las cookies, 2020, <https://www.aepd.es/sites/default/files/2020-07/guia-cookies.pdf>.

4.1.2.4. Technical note on users' control over ad customisation on Android

In May 2019, the AEPD published a note on users' control over ad customisation on Android.²⁸⁰

The note determines what the advertising identifiers on Android devices are, what they are used for and what options the user has to control them. All devices have an Android Advertising ID (AAID), a unique identifier for sending personalised ads that can be changed or disabled.

Disabling the AAID communicates to advertising entities the user preference, but they are not obliged to abide by it.

The note highlights the example of Facebook, concluding that when users disable advertising based on their likes and interests, the social network does not return personalised ads, but continues collecting user data, associating it with an advertising identifier and building a profile based on the applications being run.

4.1.2.5. Sanctioning proceedings

In the past years, the Spanish Data Protection Authority (AEPD) has consistently been amongst the authorities imposing the highest number of fines. As regards targeted advertisement sanctions, three procedures are worth mentioning.

In October 2019, the AEPD fined Vueling²⁸¹ EUR 30 000 for using the formula "if you continue browsing, we consider that you accept cookies", without giving the option to reject cookies. Despite the fact that at this time the judgment in Case C-673/17 - *Planet49* of the CJEU²⁸² had been published, this formula was still in force under the cookie guidelines approved by the AEPD, as mentioned above.

Soon after that, in December 2019, the AEPD fined Ikea²⁸³ EUR 10 000 for installing analytical, preferences and behavioural advertising cookies before users had provided consent.

²⁸⁰ Agencia Española de Protección de Datos, Nota técnica. Control del usuario en la personalización de anuncios en Android, 2019, <https://www.aepd.es/sites/default/files/2019-09/nota-tecnica-android-advertising-id.pdf>.

²⁸¹ Agencia Española de Protección de Datos, PS-00300-2019, <https://www.aepd.es/es/documento/ps-00300-2019.pdf>.

²⁸² Court of Justice of the European Union, Grand Chamber, Case C-673/17 *Planet49 GmbH*, 1 October 2019. ECLI:EU:C:2019:801, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=C21C6676D1DB1AB1BFC8C22E6F723CE9?text=&docid=218462&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5697404>.

²⁸³ Agencia Española de Protección de Datos, PS-00127-2019, https://www.aepd.es/resoluciones/PS-00127-2019_ORI.pdf.

On February 2020, the AEPD fined Twitter²⁸⁴ EUR 30 000 for installing cookies without sufficient information or allowing the option to reject cookies. The procedure was initiated by a user complaint just a few days before the entry into application of the RGPD.

4.2. The Digital Services Act (DSA)

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Online advertising plays a central role in the digital economy: over the last decades, online advertising has grown in relevance and complexity, becoming the business model underlying the profits and power of the most successful platforms, and of most of the Internet today. The dominant online advertising practices, essentially based on intrusive tracking and profiling of users, have come under severe criticism over the last couple of years due to the plethora of individual and societal issues they pose. Specifically, by prioritising users' engagement, and rewarding viral content, the most common online advertising practices seem to be contributing to very serious issues, including discrimination, manipulation, systemic violation of the fundamental right to privacy and the protection of personal data, and, more generally, a degradation of the democratic sphere.

Ahead of the presentation of the European Commission's Digital Services Act (DSA) proposal,²⁸⁵ a lively debate started on the need to regulate more strictly the domain of online advertising, with a view to rein in some of the major risks and harms associated with a business model often labeled as toxic.

While the provisions related to online advertising might seem, at first sight, a relatively minor aspect of the future EU content moderation rulebook, questions around the regulation of online advertising quickly became some of the most problematic issues in the DSA negotiations.

This section provides an overview of the DSA provisions on online advertising, as set forth in the Commission proposal presented in December 2020 and in the final text agreed at the end of the trilogues in April 2022.²⁸⁶ It also provides some context on the political discussion around the DSA and online advertising, starting from late 2020 (when the European Parliament adopted three resolutions which called for a ban on tracking-

²⁸⁴ Agencia Española de Protección de Datos, PS-00299-2019, <https://www.aepd.es/es/documento/ps-00299-2019.pdf>.

²⁸⁵ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

²⁸⁶ At the time of writing, the finalisation of the DSA political process is expected to take place in the summer of 2022. The analysis of the final text in this IRIS *Special* is based on the version of the DSA voted on by the European Parliament's Internal Market and Consumer Protection (IMCO) Committee on 16 June 2022, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf.

based ads), to the debate which unfolded between the presentation of the proposal and the inter-institutional negotiations.

4.2.1. The ads-related provisions in the original DSA proposal

Recital 52 of the DSA proposal refers to the important role of online advertising in the context of online platforms' services. It acknowledges, however, that "online advertising can contribute to significant risks, ranging from the publication of advertisement that is itself illegal content, to contributing to financial incentives for the publication or amplification of illegal or otherwise harmful content and activities online, or the discriminatory display of advertising with an impact on the equal treatment and opportunities of citizens". Moreover, as observed in Recital 56, VLOP services are "generally optimized to benefit their often advertising-driven business models and can cause societal concerns".

On online advertising, the DSA Commission's proposal imposes a set of due diligence obligations on the online platforms displaying advertising on their interfaces. The ad-related provisions in the DSA proposal, which revolve around transparency, are addressed at two types of actors: i) online platforms, defined as hosting services providers which, at the request of the users, store and disseminate information to the public;²⁸⁷ and ii) very large online platforms (VLOPs), which provide their services to a number of average monthly active users which equals or exceeds 45 million.

Specifically, Article 24 of the DSA proposal requires online platforms to provide users with specific information on the advertisements they visualise, "in a clear and unambiguous manner and in real time". In particular, users must be provided with the following information:

- a) information making clear that the display amounts to an advertisement;
- b) "the natural or legal person on whose behalf the advertisement is displayed";
- c) "meaningful information about the main parameters" applied to determine the users to whom the advertisement is shown.

Article 30 of the proposal introduces additional ad-related transparency obligations for the VLOPs.²⁸⁸ It mandates that they establish and make available to the public via APIs a repository of the information relating to a specific ad.²⁸⁹ The repository, which must be publicly available until one year after the last appearance of the ad on the platforms, must include information about the content of the ad, the advertiser, when the ad was displayed, how it was targeted, and its reach. The repository is discussed in detail in section 5.3.

²⁸⁷ Article 2(h) DSA proposal.

²⁸⁸ The DSA provisions applicable to VLOPs are discussed in the following section.

²⁸⁹ For a discussion, see Leerssen P., *Platform Ad Archives in Article 30 DSA*, <https://dsa-observatory.eu/2021/05/25/platform-ad-archives-in-article-30-dsa/>.

In October 2020, the European Parliament adopted three resolutions on the forthcoming DSA proposal.²⁹⁰ Among other things, all three European Parliament resolutions focused on the dynamics and implications of online advertising, particularly micro-targeted and behavioural advertising,²⁹¹ as the central business model of online platforms. Acknowledging that these practices rely on pervasive user tracking and are associated with major societal problems (such as amplification of viral and harmful content, disinformation and manipulation), the resolutions recommended stricter regulation of tracking-based advertising (including through a phasing out, followed by a prohibition), and argued that alternative, fundamental rights-compliant, forms of advertising (such as contextual advertising) should be promoted instead.²⁹²

The Commission's proposal does not go as far as the European Parliament's recommendations on online ads. This policy choice of the Commission – of opting for a basic transparency approach, while excluding more severe restrictions on online advertising systems – is not evident from the explanatory memorandum accompanying the proposal. In particular, the European Commission does not explain why transparency alone would be the most effective²⁹³ and appropriate tool in addressing the problems which come with online advertising (and that the EC itself refers to, for instance, in recital 50 or in Article 27 DSA on mitigation measures).

It is possible that the European Commission believed that questions connected to online advertising systems relying on the intrusive collection of personal data should better be addressed through the framework of the GDPR (and the future e-Privacy regulation).²⁹⁴ At the same time, the Commission probably gave consideration to the argument that restrictions on the platforms' online advertising practices might affect the SMEs which rely on these ad systems.

²⁹⁰ European Parliament, Resolution on improving the functioning of the Single Market (2020/2018(INL)); European Parliament, Resolution on adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL)); European Parliament, Resolution on the Digital Services Act and fundamental rights issues posed (2020/2022(INI)).

²⁹¹ Resolution on improving the Single Market, para 33; Resolution on the DSA and fundamental rights, para 9; Resolution on adapting commercial and civil law rules, para 14.

²⁹² Resolution on adapting commercial and civil rules, para 15; Resolution on improving the Single Market, para 33.

²⁹³ The effectiveness of the transparency approach chosen by the Commission can be questioned, as recent empirical research indicates that transparency labels (such as sponsorship disclosures on digital political advertisements) remain mostly unnoticed by users. See Dobber, T. et al, *Effectiveness of online political ad disclosure labels: empirical findings*, 2021, https://www.uva-icds.net/wp-content/uploads/2021/03/Summary-transparency-disclosures-experiment_update.pdf.

²⁹⁴ Buri I. and J. van Hoboken, "The Digital Services Act (DSA) Proposal: A Critical Overview", 2021, https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf.

4.2.2. The European Parliament and the Council's negotiating positions

In November 2021, the Council approved its final general-approach text on the DSA.²⁹⁵ The Council negotiating position was far less innovative than the European Parliament's, as the changes to the original European Commission provisions were rather limited.²⁹⁶ With regard to online advertising, the Council's text did not contemplate any additional restrictions and left the Commission proposal on transparency standards substantially unchanged.

The Council's documents relating to the DSA negotiations – and in particular the consolidated comments of the member states on Chapter 3 DSA – reveal that the question of introducing potentially stricter restrictions on online advertising had been almost ignored in the Council-level discussions.²⁹⁷ The only member state which raised doubts about the sufficiency of the EC's transparency obligation was Germany. In the comments on Article 24, the German government observed that the Commission's rules did not go far enough in tackling the questions connected to the dominant online advertising systems: “[s]ome online platforms rely on a business model of comprehensive tracking and profiling of users in order to generate revenue through personalised advertising. Instead of personalised advertising, however, platforms could generate revenue with context-based advertising or with new technological solutions. Users should at least have a right to use online platforms without personalised advertising. We should ban personalised advertising in particular towards minors.”²⁹⁸

The European Parliament adopted its final negotiating position in a plenary session in January 2022.²⁹⁹ The final IMCO compromise text is significantly less ambitious than the three European Parliament DSA resolutions approved in October 2020 when it comes to imposing limits on online advertising. On that occasion, the European Parliament invited the Commission to introduce stricter restrictions to tracking-based ads, consisting in “a phase-out, leading to a prohibition” of this type of ad, a move also supported by the EDPS and the EDPB in their opinions on the DSA.

MEPs and civil society organisations which campaigned for a ban on tracking-based ads did not achieve their goals with the final IMCO report. Actually, by the time of the adoption of the preliminary IMCO report, in May 2021, the idea of the ban had already

²⁹⁵ “Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC - General Approach”, Pub. L. No. 13203/21 (2021), <https://data.consilium.europa.eu/doc/document/ST-13203-2021-INIT/en/pdf>.

²⁹⁶ Buri I. and J. van Hoboken, “The General Approach of the Council on the Digital Services Act”, <https://dsa-observatory.eu/2021/12/07/the-general-approach-of-the-council-on-the-digital-services-act/>.

²⁹⁷ “Digital Services Act: Consolidated Comments on Chapter 3 and Respective Recitals” (Council of the European Union, 18 May 2021), <https://councildsa.reset.tech/documents/wk05155-re02/>.

²⁹⁸ “Digital Services Act: Consolidated Comments on Chapter 3 and Respective Recitals”, 276.

²⁹⁹ Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.pdf.

disappeared.³⁰⁰ The IMCO Committee rapporteur on the DSA, MEP Christel Schaldemose, in the weeks preceding the final vote, had to acknowledge the lack of political support to proceed in the direction of a ban on tracking-based practices.

However, in the plenary session of January 2022, the majority of the European Parliament upheld an amendment prohibiting the processing of personal data of minors and of special categories of personal data for the purposes of online advertising.

4.2.3. The final agreement on the DSA

The DSA trilogue negotiations kicked off in January 2022 and finished at the end of April 2022. During the inter-institutional negotiations, online advertising remained one of the most controversial issues on the table. The co-legislators reached a political agreement on the main points of the DSA at the end of April 2022, and in the following two months several details of the regulation were fine-tuned in technical meetings. A provisional deal was approved by the Council and by the IMCO Committee in mid-June 2022³⁰¹ (with a plenary vote in the European Parliament scheduled for early July).

Article 24 of the agreed text imposes obligations on all online platforms that present advertising to their users. It requires online platforms to ensure that users can identify, for each specific advertisement: i) that the information at issue does in fact constitute advertising; ii) the natural or legal person “on whose behalf the advertisement is presented” or who paid for the advertisement; iii) “meaningful information about the main parameters used to determine the recipient to whom the advertisement is presented” and how to change those parameters where possible. Also, platforms must make available to users a specific functionality, to indicate whether the content they provide is or includes commercial communication. Platforms must ensure users can identify that content contains advertising if the uploader has declared it.³⁰² In addition to the requirement that the funder of the advertisement is made transparent, this mechanism with which uploaders declare advertising is the main addition to the user-oriented transparency measures in the DSA.

Notably, in contrast to the original Commission proposal, Article 24(3) of the agreed text also prohibits advertising based on user profiling which results from using sensitive personal data (according to the definition of Article 4 and 9 GDPR). The recitals clarify that this ban is intended to address manipulative targeting techniques that may have a

³⁰⁰ According to a report of the Corporate Europe Observatory, which refers to the testimonies of parliamentary insiders, the massive corporate lobbying which attended the legislative process had a crucial role in undermining the EU’s momentum on banning surveillance advertising. Corporate Europe Observatory, “How corporate lobbying undermined the EU’s push to ban surveillance ads”, 2022, <https://corporateeurope.org/en/2022/01/how-corporate-lobbying-undermined-eus-push-ban-surveillance-ads>.

³⁰¹ DSA provisional text voted on by the European Parliament’s Internal Market and Consumer Protection (IMCO) Committee on 16 June 2022, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf.

³⁰² See a similar requirement that platforms enable uploaders to declare uploaded content contains advertising, art. 28b(3)(c) AVMSD.

particularly negative effect as a result of being tailored to individuals' interests or vulnerabilities. Such effects include societal harms, for example when advertising is used to discriminate or spread disinformation.³⁰³ Moreover, the final text prevents online platforms from presenting advertising based on profiling "where they are aware with reasonable certainty that the recipient of the service is a minor".³⁰⁴ The text and recitals provide little indication on when platforms can be considered to have reasonable certainty that the recipient of the service is a minor. Recital 52b indicates a platform is "considered to be accessible to minors" when it allows minors to use the service under its terms and conditions, when the service is directed at minors, or when the service otherwise knows some of its users are minors, for example due to the data it collects for other purposes. However, art. 24b(2) provides that platforms are not required to process additional data in order to identify minors.

The provisional deal also adds some elements to the information that has to be provided by VLOPs in the repository under Article 30. New information to be added to the repository includes: the commercial communications declared by uploaders using the mechanism in Article 24; the indication of the person who paid for the advertisement; the parameters (if any) applied to exclude users from seeing an advertisement; and limited information about advertisement platforms removed for violating the law or terms of service. Section 5.3 provides a full overview of the information contained in this repository under the DSA as well as proposed political advertising legislation that expands on art. 30 DSA.

Due diligence provisions in Chapter III of the DSA, such as the VLOPs' obligations in relation to risk assessment and mitigation of systemic risks (set forth by Articles 26 and 27), are also relevant for online advertising. Under Article 26, VLOPs are required to carry out an assessment of the systemic risks resulting "from the design, including algorithmic systems, functioning and use made of their services", once a year and in any case before deploying functionalities that are likely to impact those risks.

When assessing the risks listed by Article 26, VLOPs must consider how those risks are impacted by a number of factors, such as recommenders and content moderation systems, terms and conditions, "systems for selecting and presenting advertising" and VLOPs' "data-related practices". A number of possible mitigation measures can be adopted by VLOPs, under Article 27, to address the identified systemic risks. Among those measures, the final text lists "adapting their advertising system and adopting targeted measures aimed at limiting or adjusting the presentation of advertisements". The recitals further specify that advertising systems "can also be a catalyser for the systemic risks", and mitigation measures may include cutting off advertising revenue for "specific information", or structurally adapting advertising systems.³⁰⁵

Another DSA due-diligence provision with a potential impact on online advertising is the one on researchers' access to platform data (Article 31). Under very specific conditions, (concerning, among others, the necessity and proportionality of data access,

³⁰³ DSA recital 52a

³⁰⁴ DSA article 24b(1b).

³⁰⁵ DSA recital 58b.



researchers' independence and affiliation with a research institution, as well as limits concerning privacy, trade secrets, the security of platforms' service, and platforms' access to the data) this article will enable vetted researchers to perform some level of scrutiny of the VLOPs' compliance with the DSA and of the systemic risks associated with their services, which can include risks connected to advertising systems and data-related practices.³⁰⁶

³⁰⁶ Recital 64 specifies that civil society organisations that conduct research “with the primary goal of supporting their public interest mission” may also qualify as vetted researchers.

5. Advertising and democracy

EU law and policy are increasingly engaging with advertising's impact on the democratic process. This area of advertising was long left to member states – the EU regulatory framework presented in section 2.2 focuses on advertising's impact on consumers and business users, rather than citizens. This reflects the EU's general focus on the internal market, and its traditionally limited competences with regard to democratic processes and values.

The Commission's 2018 Communication on disinformation started off a push for increased (self-)regulation on the European level addressing advertising's impact on democratic processes and values.³⁰⁷ The Communication emphasised the danger associated with the use of advertising services to fund disinformation (i.e. through ads placed on websites disseminating disinformation) and spread disinformation (i.e. through ads containing disinformation).³⁰⁸ To combat this threat, the Commission emphasised the need to create "[a] more transparent, trustworthy and accountable online ecosystem". To achieve this goal, it emphasised the need to "[s]ignificantly improve the scrutiny of advertisement placements", and "ensure transparency about sponsored content, in particular political and issue-based advertising".³⁰⁹

Four years later, the EU has produced a number of new measures to address advertising's impact on the democratic system. This section analyses three aspects of the regulatory framework. Section 5.1 analyses the relation between disinformation and online advertising, and highlights how media literacy initiatives are used to address disinformation. Section 5.2 focuses on the specific issue of political advertising. Political advertising was initially largely addressed on the EU level as part of the broader approach to disinformation.³¹⁰ In the 2020 European Democracy Action plan, however, political advertising is treated as a separate issue, requiring a distinct regulatory approach.³¹¹ This approach has since materialised in a proposal for regulation of the transparency and targeting of political advertising (RPA Proposal). Finally, section 5.3 focuses on a relatively new measure in advertising regulation, namely ad libraries. Ad libraries were introduced by

³⁰⁷ "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Online Disinformation: A European Approach" 2018, European Commission, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

³⁰⁸ "Communication on Tackling Online Disinformation", 5, 7.

³⁰⁹ "Communication on Tackling Online Disinformation", 7.

³¹⁰ Nenadić I., "Unpacking the 'European Approach' to Tackling Challenges of Disinformation and Political Manipulation", 2019, Internet Policy Review, 8(4), <https://policyreview.info/articles/analysis/unpacking-european-approach-tackling-challenges-disinformation-and-political>; Van Hoboken J. et al., "Het Juridisch Kader Voor de Verspreiding van Desinformatie via Internetdiensten En de Regulering van Politieke Advertenties", 2019, Amsterdam: Instituut voor Informatierecht, https://www.parlementairemonitor.nl/9353000/1/j4nvgs5kjq27kof_j9vvij5epmj1ey0/vl8se3ct32ns/f=/blg933387.pdf.

³¹¹ European Commission, "On the European Democracy Action Plan", 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>.

Facebook, Google, and Twitter in response to regulatory scrutiny over the ways in which their advertising systems were used to influence the 2016 US election and Brexit referendum. They have since been codified in the DSA and RPA Proposal.³¹²

5.1. Disinformation and media literacy

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5.1.1. Online disinformation

Although definitions vary, disinformation is typically defined with regard to its nefarious intent; that is, false information that is created or disseminated with the intention to deceive.³¹³ In contrast, misinformation is false information that is shared without an intention to deceive, in the form of, for example, errors or typos in the reporting of information. Although the problem predates the Internet, digital technologies have made it much easier to propagate disinformation including large-scale efforts to manipulate public opinion.³¹⁴ Worldwide, online disinformation is implicated in the resurgence of vaccine-preventable diseases, the distortion of politics, and the amplification of social divisions. At a societal level, resilience to disinformation appears to be weakened by factors relating to the media environment (e.g. low trust in news, weak public service media, large advertising markets, and high social media use) and the political environment (e.g. populism and political and affective polarisation)³¹⁵.

Developing effective countermeasures for online disinformation is a challenging goal. There are conceptual challenges surrounding the definition of the problem, practical challenges arising from the scale of online content distribution, and ethical challenges relating to interventions in free, legal speech.³¹⁶ Each of these challenges is compounded by major evidence gaps as research on disinformation and its countermeasures is in its infancy. Globally, policy responses range from new laws prohibiting the spread of disinformation, investment in research and educational initiatives, and new regulatory proposals for online platforms and practices. To protect freedom of expression, democratic

³¹² DSA article 30; RPA Proposal article 7(6).

³¹³ Wardle, C. & H. Derakhshan, "Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making", 2017, Council of Europe.

³¹⁴ Bradshaw, S., U. Campbell-Smith, A. Henle, A. Perini, S. Shalev, H. Bailey and P.N. Howard, "Country case studies - Industrialized disinformation: 2020 global inventory of organized social media manipulation". https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/127/2021/03/Case-Studies_FINAL.pdf.

³¹⁵ Humprecht, E., F. Esser and P. Van Aelst, "Resilience to Online Disinformation: A Framework for Cross-National Comparative Research" *The International Journal of Press/Politics*, 25(3), pp. 493–516. <https://doi.org/10.1177/1940161219900126>.

³¹⁶ Culloty, E. and J. Suiter, "Disinformation and Manipulation in Digital Media", 2021, New York: Routledge.

states typically characterise disinformation as “harmful but legal”³¹⁷. Consequently, democratic states place emphasis on actions that increase transparency and accountability in the digital environment such as co-regulatory mechanisms with online platforms and actions that aim to build resilience among populations such as media literacy initiatives.

5.1.2. Online disinformation and advertising

Online advertising may enable disinformation and undermine the information environment in different and overlapping ways.

First, online advertising can be exploited directly to target false information at segments of the population. By tracking online behaviour, using technologies such as cookies, digital platforms gather data about users’ habits, practices, and attitudes. This data can then be used to segment people into distinct groups for advertising based on their demographic, psychographic, geographic, or behavioural information. In the context of political advertising, the capacity to micro-target personalised messages at segments of the online audience is a practice for which there is little transparency on the part of the platforms that sell the advertising or the political actors who buy it.³¹⁸ Current EU proposals to restrict or ban microtargeting for political purposes are under review. Under the 2018 EU Code of Practice on Disinformation, major platforms had already committed to providing transparency information for political advertising, but their public archives have been heavily criticised for inconsistencies and errors.³¹⁹ In the US, the Honest Ads Act, originally proposed in 2017 with bipartisan support, proposes to impose broadcast disclosure rules on platform advertising and would require platforms to verify who is funding political ads.

Second, potential earnings from online advertising create an incentive to produce sensational and false information. As disinformation stories draw traffic to websites, they generate revenue through advertising on those websites. In particular, there is an incentive to target wealthier markets. For example, during the 2016 US presidential election, young people across the Balkans generated income in this way by targeting US voters. In 2019, the Global Disinformation Index estimated that advertising on disinformation websites generated some EUR 200 million annually.³²⁰

Third, the online advertising system provides revenue for disinformation websites. Online advertising is dominated by three platforms: Alphabet (Google), Amazon, and Meta

³¹⁷ Bontcheva, K. et al., “Balancing Act: Countering Digital Disinformation while Respecting Freedom of Expression”, 2020, Geneva: International Telecommunication Union.

³¹⁸ “Report on disinformation: Assessment of the implementation of the Code of Practice”, 2020, Brussels: European Regulators Group for Audiovisual Media Services (ERGA).

³¹⁹ “Report on disinformation: Assessment of the implementation of the Code of Practice”, 2020, Brussels: European Regulators Group for Audiovisual Media Services (ERGA).

³²⁰ “The Quarter Billion Dollar Question: How is Disinformation Gaming Ad Tech?”, 2019, London: Global Disinformation Index.

(Facebook).³²¹ Typically, these platforms fail to screen the websites for which they provide advertising services. Consequently, the platforms and major brands inadvertently fund disinformation. It is estimated that Google provides USD 3 out of every USD 4 in ad revenue earned by disinformation sites.³²² In addition, major brands unwittingly fund disinformation as their adverts are placed on disinformation sites. For example, during the Covid-19 crisis, adverts from major healthcare brands, including Merck and Johnson & Johnson, were placed on disinformation sites promoting Covid-19 conspiracy theories.³²³

Fourth, the online advertising system has greatly undermined the business models of legitimate information publishers. In particular, news media have struggled to adjust to the digital environment where they have encountered increased competition from new media sources, changing patterns of audience consumption, and a dramatic decline in revenue. Historically, news media relied heavily on advertising revenue, but advertisers now have access to a wider range of online sources and online advertising is dominated by just three platforms. In addition, the nature of the online advertising industry undermines publishers because tracking-based advertising allows legitimate publishers' audiences to be profiled and micro-targeted cheaply on low-value and disinformation websites.³²⁴ Thus, ad buyers are able to target their preferred audiences more cheaply to the benefit of disinformation actors and the detriment of legitimate publishers.

5.1.3. Online disinformation, advertising, and media literacy

Concerns about online disinformation have prompted a renewed interest in media literacy by policy-makers.

In the European Union, the importance of media literacy is illustrated by the inclusion of legal obligations on EU member states in Article 33a of the Audiovisual Media Services Directive (AVMSD),³²⁵ which requires members to promote and take measures for the development of media literacy skills.

Although there is no universally agreed definition of media literacy, there is broad agreement that the main tenets of media literacy include: understanding and critically evaluating media; accessing and using media; and creating and participating in media.

³²¹ <https://digiday.com/marketing/the-rundown-google-meta-and-amazon-are-on-track-to-absorb-more-than-50-of-all-ad-money-in-2022/>.

³²² "Ad Tech Fuels Disinformation Sites in Europe – The Numbers and Players", 2020, London: Global Disinformation Index, https://www.disinformationindex.org/files/gdi_adtech_eu.pdf.

³²³ Ibid.

³²⁴ Ryan, J., "Sustainability without surveillance: ICCL review of sustainable publishing and tracking-based advertising", 2021, Dublin: Irish Council for Civil Liberties.

³²⁵ European Union, Audiovisual Media Services Directive, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>.

The revised Audiovisual Media Services Directive³²⁶ (AVMSD) includes an updated definition of media literacy which refers to the “skills, knowledge and understanding that allow citizens to use media effectively and safely ... Media literacy should not be limited to learning about tools and technologies, but should aim to equip citizens with the critical-thinking skills required to exercise judgment, analyse complex realities and recognise the difference between opinion and fact (European Union 2018, para 59)”.

Since 2007, UNESCO has championed media and information literacy as an umbrella concept that incorporates competencies relating to media, information, and digital technologies.

Media literacy education rests on the reasonable assumption that developing analytical skills and knowledge about media structures should help people make more informed judgements about the content they consume.

Acknowledging that technological developments are a factor in the changing shape of media literacy, the ERGA report “Improving Media Literacy Campaigns on Disinformation”³²⁷ notes that media literacy “should not be primarily about technology per se, but about developing ‘civic competence’: it should relate to broader themes like diversity, ethics, sustainability and social inclusion (ERGA 2021, page 3)”.

The ever-changing definitions of media literacy make it especially difficult to measure the long-term impacts of media literacy interventions. Researchers have, however, developed and tested educational materials aimed at improving disinformation resilience. Results are mixed. Some studies find that exposure to media and information literacy education predicts resilience to political misinformation,³²⁸ but other studies caution that media literacy endows individuals with a false sense of confidence.³²⁹

Although emerging research suggests that media and information literacy may have a role in countering or reducing the influence of misinformation, there are some notable challenges surrounding literacy-based interventions. First, these interventions have largely focused on children and young people through delivery via formal education institutions.³³⁰ Less attention has been given to the media and information literacy needs of adults and to the kinds of interventions that might be effective for older age groups.³³¹

³²⁶ European Union, Audiovisual Media Services Directive, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>.

³²⁷ ERGA, “Improving Media Literacy Campaigns on Disinformation”, [ERGA-SG2-Report-2020-Improving-Media-Literacy-campaigns-on-disinformation.pdf](https://erga-online.eu/ERGA-SG2-Report-2020-Improving-Media-Literacy-campaigns-on-disinformation.pdf) (erga-online.eu)

³²⁸ Kahne, J., and Bowyer B., “Educating for Democracy in a Partisan Age: Confronting the Challenges of Motivated Reasoning and Misinformation”, 2017, *American Educational Research Journal*, 54(1), pp. 3–34, <https://doi.org/10.3102/0002831216679817>.

³²⁹ Bulger, M., and P. Davison, “The Promises, Challenges and Futures of Media Literacy”, 2018, *Journal of Media Literacy Education*, 10(1), pp. 1–21.

³³⁰ Petranová, D., Hossová M. and Velický P., “Current development trends of media literacy in European Union countries”, 2017, *Communication Today*, 8(1), p. 52.

³³¹ Lee, N. M. “Fake news, phishing, and fraud: a call for research on digital media literacy education beyond the classroom”, 2018, *Communication Education*, 67(4), pp. 460–466, <https://doi.org/10.1080/03634523.2018.1503313>.

Part of the reason less attention has been paid to adult media literacy may be because media literacy interventions were traditionally focused on young people, and pursued the twin aims of protection (from the influence of media advertising, stereotypes, and bias) and empowerment (to participate in media creation and self-expression).³³² In contrast, targeting adults is more difficult due to the absence of a convenient delivery system (such as the formal education system for young people).

To address this, researchers have investigated how to deploy news literacy messages on social media.³³³ A large-scale study evaluating the effectiveness of media literacy interventions in the United States and India found that relatively short, scalable interventions could be effective in fighting misinformation.³³⁴ For their part, social media platforms already provide media literacy interventions for users, but they generally fail to provide any information about their uptake or impact.³³⁵

Until recently, securing funding for media literacy projects was challenging, particularly in the absence of national policies or strategies for media literacy. More recently, however, substantial, new funding opportunities have become available for media literacy projects designed to counter disinformation, in an attempt to help build resilience to disinformation. However, it would be a mistake to see media literacy as a complete solution in itself.

Information disorder is embedded in the infrastructure and economics of the supply side of the information ecosystem. Long-term solutions are likely to require changes on both the supply and demand side.

Being media literate is about developing and maintaining the constantly evolving range of skills and knowledge required to effectively function in a society where digital technology is deeply integrated into all aspects of life. Developing media literacy skills may be a good, long-term, first line of defence against many of the issues facing individuals and societies right now, and what is likely to come in the future.

³³² Hobbs, R., "Media literacy in action: Questioning the media", 2021, Rowman & Littlefield Publishers.

³³³ Tully M., Vraga E.K. and Bode L., "Designing and Testing News Literacy Messages for Social Media", 2020, *Mass Communication and Society* 23(1), pp. 22–46, doi: [10.1080/15205436.2019.1604970](https://doi.org/10.1080/15205436.2019.1604970).

³³⁴ Guess A. M., Lerner M., Lyons B., Montgomery J.M., Nyhan B., Reifler J. and Sircar, N. "A digital media literacy intervention increases discernment between mainstream and false news in the United States and India", 2020, *Proceedings of the National Academy of Sciences*, 117(27), pp. 15536–15545, <https://doi.org/10.1073/pnas.1920498117>.

³³⁵ Culloty E., Park K., Feenane, T., C. Papaevangelou, C., Conroy A. and Suiter, J. "CovidCheck: Assessing the Implementation of the EU Code of Practice on Disinformation in relation to COVID-19", 2021, <https://doras.dcu.ie/26472/>.

5.2. The EU's proposed political advertising regulation

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The RPA Proposal represents the EU's first effort to regulate political advertising.³³⁶ This is a sensitive space – EU regulation has so far focused on commercial advertising, and the European Court of Human Rights has traditionally afforded member states considerable discretion to regulate political advertising. The Court motivated this decision by pointing to the differences between member states' electoral systems, and the lack of a consensus on the rules that should apply to political advertising.³³⁷

Nevertheless, the RPA Proposal does not come out of the blue. The danger that targeted advertising is misused to interfere with elections by exploiting voters' vulnerabilities gained much attention following the 2018 Cambridge Analytica scandal. Though political microtargeting's actual impact on voters remains controversial, the EU has put forward a wide variety of policy documents emphasising the need to better enforce and update data protection law, prevent advertising from being misused to interfere with the democratic process, and generally safeguard European democracy from global and digital threats.³³⁸ In December 2021, this policy pressure resulted in a proposal for a new regulation on political advertising (RPA Proposal). There is urgency behind the legislative process. The Commission aims to have the regulation in place one year before the European elections, and has (somewhat unusually) already included a date for its entry into force (1 April, 2023).

The RPA Proposal's obligations are spread across two chapters, which this section will address in turn: a chapter addressing the transparency of all forms of political advertising, and a chapter specifically addressing targeted political advertising. First,

³³⁶ RPA Proposal article 20.

³³⁷ *Animal Defenders International v United Kingdom*, No. 48876/08 (ECtHR 22 April 2013); *TV Vest*, No. 21132/05 (ECtHR 11 December 2008).

³³⁸ "Commission Guidance on the Application of Union Data Protection Law in the Electoral Context: A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19-20 September 2018", Brussels: Commission, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0638>; "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Online Disinformation: A European Approach"; "Guidelines 8/2020 on the Targeting of Social Media Users", 2021, Brussels: EDPB, https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf; EDPS, EDPS, "Opinion on Online Manipulation and Personal Data", 2018, https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf; Judit Bayer et al., "Disinformation and Propaganda: Impact on the Functioning of the Rule of Law and Democratic Processes in the EU and Its Member States", 2021 Update, ; Tom Dobber et al., "Do (Microtargeted) Deepfakes Have Real Effects on Political Attitudes?", 2021, *The International Journal of Press/Politics* 26(1), pp. 69–91, <https://doi.org/10.1177/1940161220944364>. "Communication on Tackling Online Disinformation"; European Commission, "European Democracy Action Plan"; "Commission Guidance on the Application of Union Data Protection Law in the Electoral Context: A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19-20 September 2018, Brussels: Commission, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0638>; Bayer et al., "Disinformation and Propaganda".

however, the next section will describe the scope of the RPA Proposal, and its impact on the ability of member states and the Commission to further regulate political advertising.

5.2.1. The scope and background of the Political Advertising Regulation Proposal

The RPA Proposal aims to capture the entire complex value chain of actors involved in political advertising. It introduces a number of new concepts to do so. At the centre is a new definition of political advertising. This is defined in Article 2(2) as “the preparation, placement, promotion, publication or dissemination, by any means, of a message” that is either (1) liable to influence voting behaviour or the legislative process or (2) by, for, or on behalf of a political actor (unless the message is purely private or commercial). This definition will bring a single standard to replace the current fragmented regulatory landscape. For example, some member states do not define political advertising (e.g. the Netherlands), others focus on specific media, electoral periods, or actors (e.g. Germany or Croatia), or on the advertisement’s purpose (e.g. Denmark).³³⁹

When it comes to defining what advertising is *political*, the RPA Proposal takes both an issue- and actor-based approach. Article 2(4) lists eight types of political actors. These cover (representatives of) political parties, campaigns, and alliances, as well as candidates, elected officials, and unelected members of government at the European, national, regional, or local level. Messages by such political actors are presumed to influence the political debate, unless they are of a purely private or commercial nature.³⁴⁰ However, the advertisements by non-political actors can also constitute political advertising, as long as they are liable to influence the legislative process or voting behaviour. Whether this is the case depends on factors such as the message’s content, language, context, objective, and means of dissemination. The RPA Proposal does not require political advertisements to explicitly concern a candidate or election; the recitals point out that messages on societal or controversial issues may also fall within its scope.³⁴¹

The RPA Proposal takes a similarly wide approach to define what *advertising* falls under its scope. Political advertising covers not only the publication, but also the preparation and promotion of political messages. Recital 1 points out that the regulation is intended to cover a wide range of actors, including influencers, political consultancies, data analytics companies, and ad-tech platforms.³⁴² Chapter 2, which covers the transparency of political advertising, imposes most of its obligation on political advertising service providers. The concept of political advertising services adds an economic component to political advertising. Political advertising services are defined as economic activities,

³³⁹ ERGA, “Notions of Disinformation and Related Concepts”, 2021, 45, <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>. RPA proposal p. 1, 11.

³⁴⁰ RPA proposal recitals 16, 22-24

³⁴¹ RPA proposal recital 17

³⁴² RPA proposal recital 1, 33



normally provided for remuneration, consisting of political advertising.³⁴³ Remuneration may also cover a benefit in kind, such as gifts or trips provided to online influencers in return for posting a political message.³⁴⁴ Conversely, political views expressed without remuneration in broadcasting or print do not constitute political advertising services. Similarly, services provided by online intermediaries without a consideration fall outside the scope of the RPA Proposal, unless the user is paid. Facebook therefore performs a political advertising service when it is paid to promote political messages, but not when it allows users to upload political messages for free. Of course, users who are paid to post political messages on platforms (such as influencers) do perform a political advertising service.³⁴⁵

The RPA Proposal prohibits member states from introducing or maintaining diverging rules “on grounds related to transparency”.³⁴⁶ In other words, the provisions on transparency relate to maximum harmonisation, but member states remain free to impose additional rules regarding the use of political advertising services.³⁴⁷ These can focus on, for example, the content of political advertising or the period during which political advertising can be disseminated.³⁴⁸ Furthermore, the scope of the RPA Proposal is restricted to political advertising services and targeting and amplification techniques used in the context of political advertising.³⁴⁹ Regulation of aspects of the political process that fall outside this scope, such as transparency of the funding of political parties, is therefore likely not precluded by the RPA Proposal.

In contrast to the other legislation discussed in this publication, the Commission will have the power to amend the transparency requirements that apply to political advertising through delegated acts.³⁵⁰ Delegated acts allow the Commission to amend parts of a regulation in view of, for example, quickly changing factual circumstances or scientific insights. There are limits on the Commission’s power to adopt delegated acts. Under Article 290 TFEU, delegated regulation must be sufficiently specific and not affect the essence of the underlying legislation. In practice, this means that the Commission may not amend the RPA Proposal in a way that involves political choices that fall under the responsibility of the legislator.³⁵¹ The RPA Proposal itself further limits the Commission’s power to adopt delegated acts until two years after the next European election (which will take place in

³⁴³ RPA proposal articles 2(1) and 2(5); article 57 TFEU.

³⁴⁴ “These Are Not Political Ads: How Partisan Influencers Are Evading TikTok’s Weak Political Ad Policies” (Mozilla), accessed 15 February 2022, https://assets.mofoprod.net/network/documents/TikTok-Advertising-Report_e5GrWx5.pdf.

³⁴⁵ RPA proposal article 2(5), recital 19, 29.

³⁴⁶ RPA proposal article 3.

³⁴⁷ Weatherill S., “The Fundamental Question of Minimum or Maximum Harmonisation”, 2020, SSRN Scholarly Paper, Rochester, NY: Social Science Research Network, 25, <https://papers.ssrn.com/abstract=3660372>.

³⁴⁸ RPA proposal articles 7, 11, recitals, 13, 25.

³⁴⁹ RPA proposal article 1(1).

³⁵⁰ RPA proposal articles 7(8), 12(8), 19.

³⁵¹ Türk A.H., “Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces”, *European Law Journal* n/a, no. n/a: 6, accessed 26 January 2022, <https://doi.org/10.1111/eulj.12400>; Chamon M., “Limits to Delegation under Article 290 TFEU: The Specificity and Essentiality Requirements Put to the Test”, 2018, *Maastricht Journal of European and Comparative Law*, 25(2), pp. 241, <https://doi.org/10.1177/1023263X18760548>.

2024). The RPA Proposal establishes how the Commission may amend the transparency requirements: it may remove, modify, and, unless they concern targeting, add transparency requirements. This may be done in light of technological developments in scientific research and developments in supervision for the chapter on targeting, and otherwise when this is necessary for the advertisement's wider context to be understood, in light of technological developments. Finally, and arguably most importantly, there is a political limit: both specific delegated acts as well as the Commission's power to adopt delegated acts are subject to a veto by both the European Parliament and the Council.³⁵²

5.2.2. The transparency of political advertisements

The RPA Proposal requires different actors in the value chain to collaborate to ultimately make political advertising more transparent. Firstly, providers of advertising services must request sponsors (or advertising service providers acting on behalf of sponsors) to declare whether they are requesting a political advertising service. Sponsors and the political advertising services acting on their behalf have an obligation to make this declaration.³⁵³

Once an actor knows they are providing a political advertising service, they are required to keep records on the service they provide. These records concern: (1) the political advertisement or campaign to which their service(s) are connected; (2) the specific service(s) they provided; (3) the value of these services (both the amount they invoiced and the value of any other benefits they received in exchange for the services); (4) the identity and contact details of the sponsor where applicable.

The RPA Proposal provides regulators and interested actors with a right to request these records. Interested actors are defined as academic researchers, members of a civil society organisation, political actors, electoral observers, or journalists. The RPA Proposal imposes an authorisation requirement on each category. The authorisation can be provided by national, European, or international law/bodies, depending on the category. Article 31 of the DSA contains a similar data access right. Its personal scope is smaller: the right only applies to vetted researchers, and only entitles them to request data from very large online platforms.³⁵⁴ The data access right under the RPA Proposal is granted to a wider group of actors (including journalists and political actors), and covers a wider group of companies. However, in contrast to Article 31 of the DSA, the RPA Proposal lists explicitly what information interested actors may request. Political advertising service providers may furthermore charge the administrative costs involved in responding to repetitive requests,

³⁵² RPA Proposal articles 7(8), 12(8), 19.

³⁵³ RPA Proposal article 5(1).

³⁵⁴ DSA article 31, recital 64. Among other requirements, vetted researchers must be affiliated with a research organisation such as a university or a civil society organisation conducting scientific research with the primary goal of supporting their public interest mission. The analysis in this *Special* is based on the version of the DSA voted on by the European Parliament's Internal Market and Consumer Protection Committee on 16 June 2022, at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf

reject unfounded, unclear, or excessive requests, and aggregate amounts to protect their legitimate commercial interests.³⁵⁵

In addition to providing data to regulators and interested entities who request it, political advertising service providers must also transmit the information they collect to the political advertising publisher. The publisher is defined as the party that brings advertising to the public domain, through any medium.³⁵⁶ Importantly, online platforms can also be considered political advertising publishers.³⁵⁷ The RPA Proposal does not clarify how the two concepts (political advertising publisher and political advertising service provider) relate to one another. However, Article 9(3) states that political advertising publishers can provide political advertising services, and Article 11(1) states that political advertising service providers can be political advertising publishers.³⁵⁸ In practice, it is difficult to imagine a political advertising publisher which is not also a political advertising service provider, given that both definitions cover actors who publish political advertisements.

Article 7 RPA Proposal requires political advertising publishers to combine all the information provided by the various political advertising services that have worked on a political advertisement or campaign, and relay this information to the public. They must do so in a way that ensures the transparency information remains with the political advertisement when it is further disseminated. For example, online platforms can use labelling techniques that stay in place when a political advertisement is shared by social media users.

Under Article 7, three pieces of information must be available with the political advertisement: a disclosure that it is a political advertisement; the identity of the sponsor and the entity ultimately controlling the sponsor; and a transparency notice.³⁵⁹ This transparency notice contains a wide variety of further information about especially the funding, dissemination, and elections or referenda related to the advertisement. Chapter 3 of the RPA Proposal adds further information about the personal data and targeting of the advertisement.³⁶⁰ Political advertising publishers must also make this information available to regulators and interested actors who request it, and (depending on their size) include information on the value of the political advertising services they provide in their annual financial statement.³⁶¹

³⁵⁵ RPA Proposal articles 10-11.

³⁵⁶ RPA Proposal article 2(11).

³⁵⁷ RPA Proposal article 7(6).

³⁵⁸ RPA Proposal article 9(3). Article 9(3) is the first provision of article 9, likely due to a drafting error. This section follows the proposal's original numbering to avoid confusion.

³⁵⁹ RPA Proposal article 7(1). Article 12(3)(c) furthermore requires that information necessary to understand the way an advertisement is targeted or amplified (if applicable) is provided with the advertisement. It is however not clear from the text whether this information must be visible whenever a user sees a targeted ad, or whether it can be included in the transparency notice.

³⁶⁰ See for a full list of the information to be included in the transparency notice the annexes to the RPA Proposal,

https://eur-lex.europa.eu/resource.html?uri=cellar:9cec62db-4dcb-11ec-91ac-01aa75ed71a1.0001.02/DOC_2&format=PDF.

³⁶¹ RPA Proposal article 8; strictly speaking, only medium enterprises in the sense of art. 3(3) dir. 2013/34/EU are excluded from this obligation, and small and micro undertakings are not excluded.

Finally, political advertising publishers have an enforcement obligation. They must enable individuals to notify them when a political advertisement violates the RPA Proposal, and must themselves make “reasonable efforts” to ensure the information they communicate to the public is complete. Where a political advertisement violates the RPA Proposal or does not include all the necessary information, it must be removed.³⁶²

The RPA Proposal takes a novel approach to the transparency of advertising. It complements the publisher’s traditional obligation to make advertising transparent with an obligation on every other actor in the value chain to provide information the publisher needs to make available.³⁶³ This is arguably necessary to ensure access to the wide variety of information (e.g. about the amount spent on advertising) the RPA Proposal covers. At the same time, imposing obligations on such a wide variety of actors creates an enforcement challenge. The AVMSD in contrast, traditionally took a more centralised approach to responsibility. It targeted audiovisual media service providers that control the content that is published *and* how this content is organised. Where multiple actors exercise control, regulators have assigned responsibility to the actor with the most influence (or allowed the parties to allocate responsibility contractually). This ensured a single actor could be held responsible when programs were broadcast that violated the AVMSD.³⁶⁴ In contrast, the RPA Proposal imposes obligations on a wide variety of actors, and provides no clear obligation on any single central actor to ensure political advertising is transparent. Political advertising publishers are under an obligation to make reasonable efforts to ensure the information provided is complete, but do not have to assess its accuracy. Similarly, advertising service providers are not under an obligation to verify whether the information sponsors provide to them is correct, or whether a sponsor is in fact a political actor. The interlocking obligations in the RPA Proposal, in other words, primarily rely on the voluntary cooperation of the different actors involved in political advertising. This is likely to create a significant enforcement challenge for national regulators.

5.2.3. Targeted political advertising

The RPA Proposal imposes additional obligations when personal data is processed to target or amplify a political advertisement. The RPA Proposal’s recitals highlight the “power and the potential for the misuse of personal data of targeting”, and particularly the danger that voters’ vulnerabilities are exploited by exposing them to information to which they are particularly sensitive.³⁶⁵ It also refers to the possibility that targeted advertising is used to segment voter groups. This could, for example, prevent voters from seeing political

³⁶² RPA Proposal articles 9, 7(3).

³⁶³ As well as directly to regulators and private actors authorised to request information.

³⁶⁴ Weinand J., *Implementing the EU Audiovisual Media Services Directive: Selected Issues in the Regulation of AVMS by National Media Authorities of France, Germany and the UK*, 2018, Baden-Baden: Nomos Verlag; Castendyk O., Dommering E. and Scheuer A., 2008, *European Media Law*, Kluwer Law International B.V).

³⁶⁵ RPA Proposal recitals 5, 47; Brkan M., “EU Fundamental Rights and Democracy Implications of Data-Driven Political Campaigns”, 2020, *Maastricht Journal of European and Comparative Law*, 27(6), pp. 774–90, <https://doi.org/10.1177/1023263X20982960>.

advertisements on issues or from parties that do not match their interests, or make it more costly for political parties to reach out to voters who do not engage with their messages.³⁶⁶

To address concerns over potentially manipulative political microtargeting, the RPA Proposal restricts the extent to which targeting or amplification techniques are allowed in the context of political advertising, by tightening the GDPR's ban on the use of sensitive data (e.g. data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or sexual orientation).³⁶⁷ Art. 9(2) GDPR contains 10 exceptions to this ban. These exceptions for example enable the processing of sensitive data in specific contexts (e.g. public health or social security), or where another justification applies (e.g. where data is manifestly made public by the data subject or is necessary for reasons of substantial public interest). When sensitive data is used to target or amplify political advertising, the RPA Proposal limits the available exceptions to two. These are the exceptions for processing based on consent, and processing carried out by a non-profit organisation with a political, philosophical, religious or trade union aim in relation to (former) members or persons who have regular contact with it.

It has been argued that these were already the only two exceptions organisations could realistically rely upon to use sensitive data for political microtargeting.³⁶⁸ The European Data Protection Supervisor makes this point explicitly, arguing that "in practical terms, Article 12 of the Proposal does not appear to offer any additional protection."³⁶⁹ Regardless, the current draft of the RPA Proposal would remove any legal uncertainty on this point. This would potentially make it easier for national authorities to enforce data protection law in the context of political microtargeting, something the Commission also argued for in its Democracy Action Plan.³⁷⁰ Nevertheless, given the criticism that the RPA Proposal fails to meaningfully address political microtargeting's implications for democracy, the need for further restrictions on targeted political advertising will likely form an important part of the legislative debate on the RPA Proposal.³⁷¹ This is particularly true

³⁶⁶ Kreiss D. and Barrett B., "Democratic Tradeoffs: Platforms and Political Advertising", 2020, p. 506, <https://kb.osu.edu/handle/1811/92273>. Zuiderveen Borgesius F.J. et al., "Online Political Microtargeting: Promises and Threats for Democracy", 2018, *Utrecht Law Review*, 14(1), pp. 82–96, <https://doi.org/10.18352/ulr.420>; Ali M. et al., "Ad Delivery Algorithms: The Hidden Arbiters of Political Messaging", 2019, *ArXiv:1912.04255 [Cs]*, <http://arxiv.org/abs/1912.04255>.

³⁶⁷ RPA Proposal article 12(1)(2).

³⁶⁸ Dobber, Fathaigh, and Borgesius, "The Regulation of Online Political Micro-Targeting in Europe", 6; Bennett C.J., "Voter Databases, Micro-Targeting, and Data Protection Law: Can Political Parties Campaign in Europe as They Do in North America?", 2016, *International Data Privacy Law*, 6(4), p. 266, <https://doi.org/10.1093/idpl/ipw021>; Blasi Casagran C. and M. Vermeulen, "Reflections on the Murky Legal Practices of Political Micro-Targeting from a GDPR Perspective", 2021, *International Data Privacy Law*, 11(4), pp. 348–59, <https://doi.org/10.1093/idpl/ipab018>. Bennett argues that the exemption in art. 9(2)(e) GDPR, which applies to data manifestly made public by the data subject, was relevant in the context of political microtargeting. If so, this is an exemption that is no longer available under the RPA Proposal.

³⁶⁹ "Opinion 2/2022 on the Proposal for Regulation on the Transparency and Targeting of Political Advertising", 2022, Brussels: EDPS, 9, https://edps.europa.eu/system/files/2022-01/edps_opinion_political_ads_en.pdf.

³⁷⁰ European Commission, "European Democracy Action Plan", 4.

³⁷¹ See e.g. Helberger N., Dobber T., and de Vreese C., "Towards Unfair Political Practices Law: Learning Lessons from the Regulation of Unfair Commercial Practices for Online Political Advertising", 2021, *JIPITEC*, 12(3),

given that the DSA was amended after the RPA was proposed, in order to fully prohibit online platforms from processing sensitive data to profile individuals for advertising purposes.³⁷²

Apart from tightening the ban on the use of sensitive data for political advertising, Articles 12(3-8) and 13 include additional transparency obligations. These build on the transparency system established in chapter 2 of the RPA Proposal. Chapter 2 primarily required political advertising service providers to keep records, and transmit these to political advertising publishers, regulators, and interested entities. In Chapter 3, this role is fulfilled by controllers using targeting or amplification techniques. Controllers using targeting and amplification techniques must: adopt, implement, and retain an internal policy describing the use of such techniques; keep records about the mechanisms, techniques, parameters, and sources of personal data used for targeting and amplification; and provide information necessary for individuals to understand the way they are targeted with the advertisement. Advertising services must provide the controller with the information they need to comply with these obligations.³⁷³

The obligation to provide the information the controller is required to collect to other parties is split between the controller and the political advertising publisher. Controllers are under an obligation to relay the information that falls under chapter 3 of the RPA Proposal to interested actors who request it.³⁷⁴ They are also under an obligation to provide individuals with information about the targeting. This appears to be another piece of information (in addition to the advertising label, identity of the sponsor, and link to the transparency notice) that must be provided with the advertisement itself when a viewer sees it. Publishers, conversely, must include information about the targeting of political advertisements in the transparency notice. Where the publisher and the controller are not the same actor, the controller must supply this information to the publisher.

It is possible for multiple actors to determine the purpose and means of targeting and amplification techniques.³⁷⁵ For example, Blasi Casagran and Vermeulen point to

<http://www.jipitec.eu/issues/jipitec-12-3-2021/5338>; Ó Fathaigh R. et al., "Microtargeted Propaganda by Foreign Actors: An Interdisciplinary Exploration", 2021, *Maastricht Journal of European and Comparative Law*, 1023263X211042471, <https://doi.org/10.1177/1023263X211042471>; Van Drunen M.Z. et al., "Transparency and (No) More in the Political Advertising Regulation" 2022, *Internet Policy Review*, <https://policyreview.info/articles/news/transparency-and-no-more-political-advertising-regulation/1616>.

³⁷² Art. 24 DSA (version of the DSA voted on by the European Parliament's Internal Market and Consumer Protection Committee on 16 June 2022, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf and the RPA proposal of 25 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A731%3AFIN&qid=1637871780636>).

³⁷³ RPA Proposal article 12(3), 12(7).

³⁷⁴ Regulators only have a right to request information (art. 10) that falls under chapter 2 (which deals with general transparency requirements), but not to request information that falls under chapter 3 (which deals with targeting and amplification of political advertising). RPA proposal article 10, rec. 54, 61.

³⁷⁵ "Commission Guidance on the Application of Union Data Protection Law in the Electoral Context: A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19-20 September 2018", 4; "Guidelines 8/2020 on the Targeting of Social Media Users", 2021, Brussels: EDPB, pp. 14–16, https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf.

guidance by data protection authorities and national and EU caselaw to argue that platforms and political actors are both controllers when advertising is distributed by platforms to custom audiences delivered by the political actor. However, where advertising is targeted based on audience attributes provided by the platform, the platform is the only controller.³⁷⁶ The RPA Proposal does not clarify how its obligations must be complied with when there are multiple controllers. Article 26 GDPR, which requires joint controllers to collaborate to determine their respective responsibilities, only applies to their obligations under the GDPR. The European Data Protection Supervisor accordingly called for this point to be clarified during the RPA Proposal's legislative process.³⁷⁷

5.3. Ad libraries

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5.3.1. The emergence of ad libraries in advertising regulation

Ad libraries are publicly available databases containing copies of and additional information about advertisements distributed on platforms.³⁷⁸ They are a relatively recent addition to advertising law and policy, having been introduced in the summer of 2018 by Facebook (24 May), Twitter (28 June), and Google (15 August). They started off as self-regulatory measures. The platforms introduced ad libraries without a legal obligation to do so, but in the face of considerable public and regulatory pressure.³⁷⁹

In the EU, the most relevant policy context is the Communication on Disinformation, in which the Commission stated it would support a self-regulatory code of practice requiring platforms and the advertising industry to, among other things, create "repositories where comprehensive information about sponsored content is provided".³⁸⁰ However, the Code of Practice on Disinformation launched in 2018 does not include an obligation to create these

³⁷⁶ Blasi Casagran and Vermeulen, "Reflections on the Murky Legal Practices of Political Micro-Targeting from a GDPR Perspective", 353.

³⁷⁷ "Opinion 2/2022 on the Proposal for Regulation on the Transparency and Targeting of Political Advertising", p. 20.

³⁷⁸ Leerssen P. et al., "Platform Ad Archives: Promises and Pitfalls", *Internet Policy Review*, 2019, 8(4), <https://doi.org/10.2139/ssrn.3380409>.

³⁷⁹ "Shining a Light on Ads With Political Content", *Meta* (blog), 2018, <https://about.fb.com/news/2018/05/ads-with-political-content/>; "Ads Transparency", accessed 8 February 2022, <https://business.twitter.com/en/help/ads-policies/product-policies/ads-transparency.html>; "Google Releases a Searchable Database of US Political Ads", *TechCrunch* (blog), accessed 8 February 2022, <https://social.techcrunch.com/2018/08/15/google-political-ad-library/>; "Twitter Launches Its Ads Transparency Center, Where You Can See Ads Bought by Any Account", *TechCrunch* (blog), accessed 8 February 2022, <https://social.techcrunch.com/2018/06/28/twitter-ads-transparency-center/>.

³⁸⁰ "Communication on Tackling Online Disinformation".

repositories. In its 2021 guidance on the way the Code of Practice on Disinformation should be strengthened, the Commission reemphasised the need for ad libraries.³⁸¹

Article 30 of the DSA and 7(6) of the RPA Proposal would impose a legal obligation on very large online platforms to create ad libraries.³⁸² In the impact assessments of both regulations, the Commission points to criticisms that insufficient data is made available in the ad libraries platforms created voluntarily, and the fact that since access to data can be removed at platforms' discretion, this precludes investment in long-term research projects.³⁸³ Accordingly, the DSA requires very large online platforms to create advertising libraries which contain a basic set of information for all advertisements. The RPA Proposal builds on this provision by requiring that very large online platforms include further information about political advertisements in these ad libraries in order to counter systemic risks to the electoral process. The RPA Proposal leaves platforms' obligations to address systemic risks under the DSA unaffected.³⁸⁴

5.3.2. The goals of ad libraries

Ad libraries aim to recreate the transparency that is lost when advertising is targeted. Advertising transmitted through mass media such as print or television is by its nature visible to everyone. In contrast, targeted advertisements on platforms are only visible to the person who receives them.³⁸⁵ As a result, platform providers themselves are (in principle) the only actors that have a comprehensive overview of which advertisements are shown to which audiences on their service.³⁸⁶ Through ad libraries, platforms provide access to (some

³⁸¹ "EU Code of Practice on Disinformation", 2018, Brussels: European Commission, 7, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454; "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Commission Guidance on Strengthening the Code of Practice on Disinformation", 2021, European Commission, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:262:FIN>.

³⁸² This analysis is based on the version of the DSA voted on by the European Parliament's Internal Market and Consumer Protection Committee on 16 June 2022, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_provisionalagreementAnnexe_EN.pdf and the RPA proposal of 25 November 2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A731%3AFIN&qid=1637871780636>.

³⁸³ "Impact Assessment Report 1/2 Accompanying the DSA", 2020, European Commission, 17; "Impact Assessment Report Accompanying the Proposal for a Regulation of the European Parliament and of The Council on the Transparency and Targeting of Political Advertising", 2021, Brussels: European Commission, pp. 69, 104, 107, https://ec.europa.eu/info/sites/default/files/4_1_177594_pol-ads-ia_en_0.pdf.

³⁸⁴ RPA Proposal p 3, recitals 32, 70, article 1.

³⁸⁵ Bodó B. et al., "Tackling the Algorithmic Control Crisis – the Technical, Legal, and Ethical Challenges of Research into Algorithmic Agents", 2017, *Yale Journal of Law and Technology*, 19(1), <http://digitalcommons.law.yale.edu/yjolt> <http://digitalcommons.law.yale.edu/yjolt/vol19/iss1/3>.

³⁸⁶ It should be noted there are workarounds – researchers can for example ask platform users to install extensions that gather information about the advertisements they see. Persily N. and Tucker J.A., "Conclusion: The Challenges and Opportunities for Social Media Research", 2020, in *Social Media and Democracy: The State of the Field, Prospects for Reform*, ed. J.A. Tucker and Persily N.; SSRN, *Anxieties of Democracy*, 2020, Cambridge: Cambridge University Press, pp. 313–31, <https://www.cambridge.org/core/books/social-media-and->

of) this data about the way advertisements are distributed and available through a publicly accessible database. Ad libraries are thus a form of transparency aimed at the public, complementing transparency measures aimed at public authorities (such as supervisory authorities' investigatory powers) and individual users (such as advertising labels).³⁸⁷

Broadly speaking, ad libraries are expected to fulfil two purposes.³⁸⁸ Firstly and most immediately, ad libraries aim to enable accountability of platforms and advertisers. In particular, as outlined above, ad libraries were introduced to address concerns over targeted advertising's impact on the electoral process. The RPA Proposal in particular continues to emphasise the potential for targeted political advertising to be used to segment voters and exploit their vulnerabilities.³⁸⁹ However, ad libraries potentially enable accountability with a wide range of norms, many of which have little to do with targeting. For example, they make it possible to determine whether a political party spends more on advertising than campaign finance regulation allows, as well as whether advertisements distributed on a platform contain disinformation, are harmful to minors, or contain illegal comparative advertising. In short, by increasing the transparency about the advertisements that are distributed on platforms, ad libraries aim to make it easier to enforce the wide variety of norms that apply to advertising.

Secondly, ad libraries are intended to enable a better understanding of the impact of online advertising. Online advertising is associated with a wide array of risks, ranging from foreign interference in the electoral system to discriminatory access to employment or housing opportunities offered through targeted advertising.³⁹⁰ How (or even if) targeted advertising contributes to such risks remains the subject of debate, in part because the data needed to provide more conclusive answers was not available. By providing access to this data, ad libraries ideally allow for a better understanding of the traditional risks with which online advertising is associated, as well as the identification of emerging risks. This is in turn necessary for evidence-based regulation and a well-informed public debate on the responsibilities of platforms and advertisers.³⁹¹ In particular, DSA article 27(2)(a) frames advertising libraries as a source of information with which systemic risks (concerning e.g. the dissemination of illegal content or negative effects on electoral processes) on very large online platforms may be identified.

The fact that ad libraries are publicly accessible means that regulators are not the only actors who can scrutinise online advertising on platforms. In contrast, the DSA and

[democracy/conclusion-the-challenges-and-opportunities-for-social-media-research/232F88C00A1694FA25110A318E9CF300](https://democracy.conclusion-the-challenges-and-opportunities-for-social-media-research/232F88C00A1694FA25110A318E9CF300).

³⁸⁷ Leerssen P., "The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems", 2020, SSRN Scholarly Paper, Rochester, NY: Social Science Research Network, <https://doi.org/10.2139/ssrn.3544009>.

³⁸⁸ See in further detail section 5.2.3. DSA recital 63, RPA Proposal recital 42.

³⁸⁹ RPA Proposal recital 5, 47. Dobber et al., 'Do (Microtargeted) Deepfakes Have Real Effects on Political Attitudes?' Kreiss and Barrett, 'Democratic Tradeoffs', 506. Borgesius et al., 'Online Political Microtargeting'; Ali et al., "Ad Delivery Algorithms".

³⁹⁰ "Communication on Tackling Online Disinformation". DSA recital 52, 63.

³⁹¹ Ausloos J., P. Leerssen and ten Hije P., "Operationalizing Research Access in Platform Governance: What to Learn from Other Industries?", 2020, AlgorithmWatch, p. 15, <https://hdl.handle.net/11245.1/90e4fa77-d59a-49f1-8ccd-57d0725122bd>.

RPA Proposal point to the need to enable public supervision of the risks posed by online advertising on platforms. The RPA Proposal in particular highlights that it makes data publicly available in order to “facilitate the work of interested actors including researchers in their specific role to support free and fair elections or referendums and fair electoral campaigns including by scrutinising the sponsors of political advertisement and analysing the political advertisement landscape.”³⁹² The emerging evidence about the way ad libraries are used indicates journalists use ad libraries in particular to more easily identify and write stories about controversial ads.³⁹³ At the same time, the public nature of ad libraries also allows them to be used for purposes that are completely unrelated to platform governance. Companies can, for example, use ad libraries to learn about the groups their competitors are targeting, and the messages they use to do so.

5.3.3. What information can be found in ad libraries?

The usefulness of ad libraries to researchers, supervisory authorities, journalists, and competing companies depends on the information they contain. Much of the criticism of the ad libraries that platforms have voluntarily made available focuses on their limited scope. The lack of (precise) information about the way advertisements are targeted and the audiences that are reached is particularly contentious.³⁹⁴ Additionally, criticism has focused on the way ad libraries function. Researchers have argued that information is presented in a manner that makes it difficult to aggregate, that advertisements are removed from the database, and that political advertisements are often not correctly identified.³⁹⁵

Table 2 provides an overview of the information that the DSA and RPA Proposal now require platforms to include in ad libraries. The information on political advertising remains provisional, as the RPA proposal has not been formally adopted, and the Commission has the power to amend the transparency requirements in the RPA Proposal

³⁹² DSA recital 63; RPA Proposal recital 42.

³⁹³ Leerssen P. et al., “News from the Ad Archive: How Journalists Use the Facebook Ad Library to Hold Online Advertising Accountable”, 2021, *Information, Communication & Society*, 0(0), pp. 1–20, <https://doi.org/10.1080/1369118X.2021.2009002>.

³⁹⁴ Kreiss and Barrett, “Democratic Tradeoffs”, p. 506; Dubois P.R., C. Arteau-Leclerc and T. Giasson, “Micro-Targeting, Social Media, and Third Party Advertising: Why the Facebook Ad Library Cannot Prevent Threats to Canadian Democracy”, 2021, SSRN Scholarly Paper, Rochester, NY: Social Science Research Network, <https://papers.ssrn.com/abstract=3817971>; Rieke A. and Bogen M., “Leveling the Platform: Real Transparency for Paid Messages on Facebook”, Upturn, accessed 16 November 2021, <https://www.upturn.org/static/reports/2018/facebook-ads/files/Upturn-Facebook-Ads-2018-05-08.pdf>.

³⁹⁵ Leerssen et al., “News from the Ad Archive”. Edelson et al., “An Analysis of United States Online Political Advertising Transparency”, 9. Edelson L., Lauinger T. and McCoy D., “A Security Analysis of the Facebook Ad Library”, 2020, in *2020 IEEE Symposium on Security and Privacy (SP)*, p. 667, <https://doi.org/10.1109/SP40000.2020.00084>. Leerssen et al., “Platform Ad Archives”; Medina Serrano J.C., Papakyriakopoulos O., and Hegelich S., 2020, “Exploring Political Ad Libraries for Online Advertising Transparency: Lessons from Germany and the 2019 European Elections”, in *International Conference on Social Media and Society*, SMSociety’20, New York, NY, USA: Association for Computing Machinery, p. 118, <https://doi.org/10.1145/3400806.3400820>.

until 2026 through delegated acts. Nevertheless, the contours of what the ad libraries will include have become visible.

The information outlined in Table 2 would bring the transparency of advertisements distributed on platforms more in line with the transparency that was present in traditional media by making it easier to determine which advertisements are distributed on platforms, and by which actors. Additionally, ad libraries make further information available to account for the way in which advertisements are disseminated on platforms. In particular, they contain more specific information about the way advertisements are targeted, and the groups of individuals they have reached. Finally, ad libraries contain more information about political advertisements intended to address the specific threats to the democratic process that inspired the creation of ad libraries. In particular, ad libraries contain information about how much funding has been directed at political advertisements, and by whom, , and which election they were intended to influence. However, as the experience with ad libraries to date has shown, the usefulness of ad libraires depends greatly on the way these definitions are operationalised, the granularity of the specific information which is provided, and the functionalities they offer to researchers. In particular, the RPA and DSA Proposal impose only limited obligations on platforms to make fine-grained information about targeting and amplification available, or to identify political advertisements that should be included in the ad library. The interpretation, operationalisation, and enforcement of the legal obligations imposed on platforms to create ad libraries is therefore likely to be an important next step in ensuring targeted advertising on platforms is transparent to the public.³⁹⁶ In that context, it is important to note that the Commission is empowered to issue guidelines on the structure, organisation and functionalities of ad libraries. As the Commission also has the exclusive power to enforce the obligations that apply to very large online platforms, including the provision on ad libraries, these guidelines may be an important indicator regarding what ad libraries require in practice.³⁹⁷

Finally, it should be noted that the DSA imposes three limits on the information contained in ad libraries. First, it requires platforms to ensure ad libraries do not contain any personal data of the recipients of the advertisement. This may occur when, for example, the information about the way an advertisement was targeted is so precise it is possible to reverse-engineer whether an individual was exposed to an ad. Second, platforms are required to remove information about the content, advertiser, and funder from the ad library if they delete an advertisement because it violates the law or terms of service. Instead, platforms must include information from the order-for-removal they received from the member state under article 8 DSA (e.g. why the content was illegal and which authority issued the order) and the statement of reasons for removal they provide to the uploader (e.g. why the content violated the terms of service, and whether the ad was detected automatically, by a third party, or on platforms' own initiative).³⁹⁸ Finally, the DSA only

³⁹⁶ Van Drunen et al., "Transparency and (No) More in the Political Advertising Regulation"; "Guidance on Strengthening the Code of Practice on Disinformation".

³⁹⁷ DSA article 30, 44a(1a). Additionally, the interoperability of ad libraries and transmission of data to ad libraries by advertising intermediaries is not regulated explicitly in the DSA, and is subject to voluntary standards and codes of conduct (article 34(1)(e), 36(2)(b) DSA proposal).

³⁹⁸ DSA article 30(2a).

requires platforms to include advertisements in their ad library until one year after they were last displayed. Afterward, they may be removed.³⁹⁹ Because the RPA Proposal requires that further information be added to the existing ad libraries required under the DSA, these requirements likely apply to the RPA Proposal as well. However, the RPA provides no definitive answer on this point.

Table 2. An overview of the information included in ad libraries under the proposed DSA and RPA Proposal. Disclosures required under the RPA Proposal that overlap with the requirements under the DSA have been omitted.

Type	Information	Legal basis
Content	The content of the advertisement, including the name of the product, service, or brand, and subject matter.	Art. 30(2)(a) DSA
	Advertisements declared by uploaders (e.g. influencers).	Art. 30(2)(da) DSA
	A copy of or link to the advertisement.	Annex I (a) RPA
Origin	The natural or legal person on whose behalf the advertisement is presented.	Art. 30(2)(b) DSA
	The sponsor's address, telephone number and electronic mail address.	Art. 7(2)(a), annex I (b) RPA
Timing	The dissemination period.	Art. 30 DSA
	The (intended) dissemination period and whether the advertisement has run in the past.	Art. 7(2)(b), annex I (c), II (b) RPA
Reach	The total number of recipients reached, and (where applicable) aggregate numbers for the group(s) at whom the advertisement was targeted.	Art. 30(2)(e) DSA
	Indications of the size of the targeted audience within the relevant electorate.	Annex II (b) RPA
Targeting	Whether the advertisement was intended to be targeted, the main parameters used to target and/or exclude groups.	Art. 30(2)(d) DSA
	The specific groups targeted, the targeting goals, the categories of personal data used for targeting, the mechanism and logic of the targeting, including the inclusion and exclusion parameters and their reasons.	Annex II (a) RPA

³⁹⁹ DSA article 30(1).



	The source of personal data used for targeting (including whether it was inferred, derived, or from a third party) and the data protection notice of this source.	Annex II (c) RPA
Funding	The natural or legal person who paid for the advertisement, if different from the advertiser.	Art. 30(ba) DSA
	The provisional and actual amount (or the value of other benefits) spent on the preparation, placement, promotion, publication and dissemination of the specific advertisement and the advertising campaign.	Art. 7(2)(c), annex I (e-g) RPA
	The source of these funds.	Annex I (f) RPA
	The methodology for calculating the funding amount.	Annex I (g) RPA
Electoral context	Any election or referenda to which the advertisement is linked.	Annex I (d) RPA
	A link to official information about how to participate in the election or referendum to which the political advertisement is linked.	Annex I (i) RPA
Legal rights	A link to the advertising library.	Art. 7(2)(e), annex I (h) RPA
	A link to a notice-and-takedown mechanism.	Art. 7(2)(f), annex I (j) RPA;
	A link to effective means where individuals can exercise their rights regarding targeted political advertising under the GDPR.	Annex II (d) RPA

6. Conclusion

The past four years have seen (among other developments) the significant expansion of platform regulation, the addition of political advertising to the EU regulatory framework, and a revision of the Audiovisual Media Services Directive (AVMSD), as well as increasing enforcement of existing data protection norms. These initiatives have adapted legislation tailored to offline advertising to address changes in the online advertising ecosystem, and expanded regulation of targeted advertising beyond its traditional focus on personal data.

A significant part of the revision of European advertising law has focused on including more of the actors involved in the increasingly complex advertising ecosystem. Online platforms have been particularly important targets of new advertising obligations. They have been incorporated into the existing framework that applies to video advertising under the AVMSD, and have also been subjected to new obligations established by the AVMSD. At the same time, the influencers who distribute information on platforms are also increasingly subject to obligations under media and consumer law. To a limited extent, regulatory scrutiny has also turned to service providers who are not directly involved in the dissemination of advertising. The RPA Proposal in particular imposes obligations on political advertising service providers ranging from political consultancies and advertising agencies to ad-tech platforms and data brokers. Additionally, the gradual expansion of the controller concept (used to determine which actors must comply with data protection law) threatens to capture actors involved in targeted advertising.

In large part, the revision of the legal framework that applies to online advertising has relied on familiar legal measures. Obligations in, for example, the AVMSD, the DSA and the RPA Proposal have been updated to ensure advertising remains transparent and does not contain illegal content regardless of whether it is published by broadcasters, print media, or online platforms and influencers. The need for consent and limits on the use of sensitive data also continues to play an important role in the regulation of targeted advertising. National authorities have emphasised the need to ensure targeted advertising remains transparent and is based on explicit consent, while EU regulation has imposed further restrictions on the use of sensitive data in the context of political advertising.

However, there are also newer tools in the advertising arsenal. These measures include, for example, the obligation imposed on platforms under the DSA and RPA Proposal to create ad libraries containing copies of (and further information about) the advertisements that have run on their service. These complement the advertising transparency measures aimed at individuals and supervisors with a publicly accessible database intended to enable researchers, journalists, and other actors to better scrutinise online advertising on platforms.⁴⁰⁰ Related to this, the political advertising regulation imposes record-keeping obligations on actors throughout the online advertising value chain to make the use of political advertising more transparent. Finally, the rules that should address the impact of targeted advertising remain a point of significant contention.

⁴⁰⁰ Leerssen, "The Soap Box as a Black Box".

The DSA continues to generate a question that has so far been primarily explored in consumer and data protection law, namely under what conditions targeted advertising should be considered manipulative and prohibited.⁴⁰¹ In the end, the DSA provisions targeting online advertising directly focus on making advertising more transparent, and limiting targeted advertising that uses sensitive data or is presented to minors. The ways in which these restrictions, as well as other norms that limit targeted advertising in the DSA, RPA Proposal, data protection, and consumer law should be interpreted is set to be a particularly important area of EU advertising law.

Looking forward, the enforcement of the EU legal framework that applies to online advertising poses a significant challenge to public authorities. The online advertising ecosystem is complex, and the legal framework that applies to it covers multiple different legal areas. In practice, this means that the regulation of online advertising is the responsibility of the multiple different supervisory authorities empowered to enforce media law, data protection law, consumer law, platform regulation, and specific legislation on, for example, political advertising. This creates the risk of enforcement that is inconsistent, fails to adequately safeguard all the different values at stake, or is not prioritised by any one of the different competent supervisory authorities. This issue is not restricted to online advertising, but applies also to the digital media system more generally. Supervisory authorities have already begun to grapple with this issue by setting up cooperation networks between for example consumer, media, and data protection authorities.⁴⁰² The DSA builds on these initiatives by requiring the creation of a digital service coordinator empowered with the task to facilitate collaboration between multiple competent supervisory authorities.⁴⁰³ The ways in which this enforcement develops will be an important factor determining how the new advertising framework set up over the past years will be applied.

⁴⁰¹ Helberger et al., "Choice Architectures in the Digital Economy".

⁴⁰² Reyna A., "Breaking Down Silos in Public Enforcement: Lessons from Consumer-Facing Markets", 2021, SSRN Scholarly Paper, Rochester, NY: Social Science Research Network, <https://doi.org/10.2139/ssrn.3838697>.

⁴⁰³ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC art. 38.

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