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### Online advertising

Fourberg, Niklas; Serpil, Tas; Wiewiorra, Lukas; Goldovitch, Ilsa; DE STREEL, Alexandre; Jacquemin, Herve; Hill, Jordan; Nunu, Madalina; Bourguignon, Camille; Jacques, Florian; Ledger, Michele; Lognoul, Michael

*Publication date:*  
2021

*Document Version*  
Publisher's PDF, also known as Version of record

#### [Link to publication](#)

*Citation for published version (HARVARD):*

Fourberg, N, Serpil, T, Wiewiorra, L, Goldovitch, I, DE STREEL, A, Jacquemin, H, Hill, J, Nunu, M, Bourguignon, C, Jacques, F, Ledger, M & Lognoul, M 2021, *Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice*. European Parliament, Luxembourg.

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# Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice



Policy Department for Economic, Scientific and Quality of Life Policies  
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PE 662.913 - June 2021



# Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice

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## **Abstract**

In this research paper, we provide a comprehensive overview of online advertising markets and we analyse the challenges and opportunities concerning digital advertising. We review the degree to which existing and proposed legislation at EU level addresses the identified problems, and identify potential solutions, with reference to experience from EU Member States and third countries. We conclude with a synthesis and specific policy recommendations, drawing on stakeholder interviews.

This document was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the committee on the Internal Market and Consumer Protection (IMCO).

This document was requested by the European Parliament's committee on the Internal Market and Consumer Protection.

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Original: EN

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Manuscript completed: May 2021

Date of publication: June 2021

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This document is available on the internet at:

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For citation purposes, the publication should be referenced as: Fourberg, N., Taş, S., Wiewiorra, L., Godlovitch, I., De Streel, A., Jacquemin, H., Hill, J., Nunu, M., Bourguignon, C., Jacques, F., Ledger, M., and Lognoul, M., 2021, *Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice*, Publication for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

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## LIST OF ABBREVIATIONS

<b>AAT</b>	Ad-Avoidance Technologies
<b>AC</b>	Audiovisual Council
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law
<b>ACMA</b>	Australian Communications and Media Authority
<b>ADR</b>	Alternative Dispute Resolution
<b>AI</b>	Artificial Intelligence
<b>API</b>	Application Programming Interface
<b>ARPP</b>	Autorité de régulation professionnelle de la publicité (French regulatory authority for advertising)
<b>ASA</b>	Advertising Standards Authority
<b>ASAI</b>	Advertising Standards Agency for Ireland
<b>AVMS</b>	Audiovisual Media Services Directive
<b>B2B</b>	Business-to-Business
<b>B2C</b>	Business-to-Consumer
<b>BBBNP</b>	BBB National Programs
<b>CAP</b>	Committee of Advertising Practice
<b>CCPC</b>	Competition and Consumer Protection Commission
<b>CJEU</b>	Court of Justice of the European Union
<b>CMA</b>	Competition and Markets Authority
<b>CNIL</b>	Commission Nationale de l'Informatique et des Libertés (French Data Protection Authority)
<b>CPA</b>	Consumer Protection Act
<b>CPA</b>	Cost-Per-Action
<b>CPC</b>	Cost-Per-Click
<b>CPI</b>	Cost-Per-Impression
<b>CPM</b>	Cost-Per-Mille
<b>CPS</b>	Core Platform Services
<b>CRD</b>	Consumer Rights Directive
<b>CSA</b>	Conseil Supérieur de l'Audiovisuel (French Broadcasting Authority)

<b>DITRDC</b>	Department of Infrastructure, Transport, Regional Development and Communications
<b>DMA</b>	Digital Markets Act
<b>DPA</b>	Data Protection Act
<b>DPIA</b>	Data Protection Impact Assessment
<b>DSA</b>	Digital Services Act
<b>DSC</b>	Digital Service Coordinator
<b>DSP</b>	Demand Side Platform
<b>EASA</b>	European Advertising Standards Alliance
<b>EC</b>	European Commission
<b>EDPD</b>	European Data Protection Board
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>FAQs</b>	Frequently Asked Questions
<b>FLoC</b>	Federated Learning of Cohorts
<b>FTC</b>	Federal Trade Commission
<b>GAA</b>	German Advertising Association
<b>GBP</b>	British pound sterling
<b>GDPR</b>	General Data Protection Regulation
<b>GMP</b>	General Media Panel
<b>GPS</b>	Global Positioning System
<b>IAB</b>	Interactive Advertising Bureau
<b>ICC</b>	International Chamber of Commerce
<b>ICPEN</b>	International Consumer Protection Enforcement Network
<b>ID</b>	Identifier
<b>IP</b>	Internet Protocol
<b>ISBA</b>	Incorporated Society of British Advertisers
<b>ISP</b>	Internet Service Provider
<b>MS</b>	Member State
<b>NCA</b>	National Competition Authority
<b>NCIF</b>	National Commission for Informatics and Freedoms
<b>NTS</b>	National Trading Standards

<b>OAIC</b>	Office of the Australian Information Commissioner
<b>OBA</b>	Online Behavioural Advertising
<b>ODR</b>	Online Dispute Resolution
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>P2B</b>	Platform to Business
<b>PII</b>	Personally Identifiable Information
<b>QIDs</b>	Quasi-Identifiers
<b>ROI</b>	Return on Investment
<b>RTB</b>	Real-Time Bidding
<b>SMEs</b>	Small and medium-sized enterprises
<b>SMS</b>	Short Message Service
<b>SRI</b>	Syndicat des Régies Internet (Syndicate which aims to ensure the professionalisation and development of digital advertising in France)
<b>SSP</b>	Supply Side Platform
<b>TV</b>	Television
<b>UCPD</b>	Unfair Commercial Practices Directive
<b>UK</b>	United Kingdom
<b>US</b>	United States
<b>USD</b>	United States Dollar
<b>UWG</b>	Gesetz gegen den unlauteren Wettbewerb (German Law against unfair competition)
<b>VLOP</b>	Very Large Online Platform
<b>VSP</b>	Video-sharing Platform
<b>WFA</b>	World Federation of Advertisers

## EXECUTIVE SUMMARY

### Background

Online advertising is expanding at a significant rate<sup>1</sup>, and the sector is expected to take on increased importance as progress towards digitisation accelerates in the wake of the COVID-19 pandemic. In this context, consumers and SMEs as “end-users” of advertising are likely to become increasingly exposed to online advertising which is targeted on the basis of their behavioural patterns, raising important questions about privacy, and the potential for misleading or exploitative marketing or discrimination. At the same time, concerns are emerging about the challenges faced by smaller companies which may be seeking to provide or rely on these forms of advertising, but lack full information or the required bargaining power to ensure their products are fairly represented.

### Aim

The European Commission has recently released two legislative proposals, the Digital Services Act<sup>2</sup> and the Digital Markets Act<sup>3</sup>, which include provisions which are relevant to online advertising. In addition, there are other legislative measures targeted towards digital services<sup>4</sup>, as well as horizontal rules<sup>5</sup> regarding consumer protection, privacy and advertising which apply to the sector.

This study aims to inform the IMCO Committee about emerging challenges resulting from online advertising practices, as well as identifying potential areas where legislative proposals could be improved, or new initiatives taken.

### How do online advertising markets work?

There are three main types of online advertising: search advertising, display advertising and classified advertising. Online advertising has created a unique opportunity to tailor advertisements to reflect the interests or needs of consumers. Targeting can be done based on the content of the visited website or search query. However, targeting can also be based on information gathered about the consumer e.g. via cookies or other tracking technologies. This type of targeted advertising - called behavioural advertising - can involve extensive processing of consumers’ data. The provision of advertising can involve a number of different players, including not only the advertiser and the consumer, but also the “publisher” (the party which provides advertising space) and potentially an intermediary which acts to provide a matching service between the advertiser and the publisher, often with the aid of data analysis.

### Challenges and opportunities concerning digital advertising

Online targeted advertising can generate benefits for both consumers and SMEs, specifically by tailoring advertisements to match consumers’ interests and even by enabling the protection of certain

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<sup>1</sup> In 2019, Europe accounted for 19.9% of the global market for online advertising. Recent trends include a shift from desktop to mobile content and associated advertising. Source: Statista, 2020, *Digital Advertising Report*.

<sup>2</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 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, COM(2020) 825 final, 2020/0361 (COD).

<sup>3</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374 (COD).

<sup>4</sup> For example, the Platform to Business Regulation, and ePrivacy Directive and its proposed successor for an ePrivacy Regulation.

<sup>5</sup> These include the UCPD, Directive on misleading and comparative advertising, CRD, GDPR and Better Enforcement Directive.

consumers e.g. by screening out advertisements which may be unsuitable for minors. However, targeted advertising can also raise a number of concerns. Issues impacting consumers include:

- A lack of understanding by consumers that their data are being used to target advertising;
- Targeting which exploits the vulnerability of certain groups of consumers;
- Consent forms and other design features which seek to steer consumers to make decisions against their interests (dark patterns);
- Challenges to seek redress in cases where advertising or data collection / consent methods are inappropriate due to the range of bodies involved; and
- The potential for the algorithms used to target advertising to result in intentional or unintentional harmful discrimination.

Meanwhile the significant reach of the largest platforms, their access to extensive datasets (which enable targeting) and participation at multiple levels of the advertising value chain (which can be associated with bundling or self-preferencing practices) can create challenges for SMEs seeking to advertise or develop a competing advertising platform.

### **How far does existing EU legislation go in addressing the problem?**

Digital advertising is covered by a wide range of existing EU legislation including legislation specific to digital platforms and services such as the eCommerce Directive, P2B Regulation, ePrivacy Directive and Audiovisual Media Services Directive as well as horizontal measures such as the Unfair Commercial Practices Directive, Directive on misleading and comparative advertising, Consumer Rights Directive and General Data Protection Regulation. Moreover, competition law applies to all digital platforms. However, the diversity of measures can make the legal framework complex to understand and apply. Moreover, the legal framework is also fragmented across the EU27, especially since the older Directives such as the eCommerce Directive are minimal harmonisation instruments, and some Member States have introduced more far-reaching rules. Important gaps remain. For example, there are no obligations to ensure that consumers are informed that they are being subject to targeted advertising, and to allow them to change the parameters under which they are being targeted or to opt out. In addition, there are no general rules which prevent minors from being subject to harmful targeted advertising. Moreover, the complexity of the rules and diversity of players along the value chain risks creating a vacuum in which the different players may not be aware of their responsibility to meet certain obligations.

Some of these issues may be addressed within the proposed Digital Services Act (DSA) and Digital Markets Act (DMA) as well as the proposed Artificial Intelligence Act (AIA). However, gaps remain, notably regarding the treatment of “dark patterns”, algorithmic discrimination, how to ensure that the relevant players take responsibility for their content and targeting methods, and how to enable consumers to seek redress in an increasingly complex system. The DSA, the DMA and the AIA do include provisions which aim to increase transparency towards consumers and purchasers of advertising. However, these could be further strengthened and extended.

### **Conclusions and recommendations**

Based on an analysis of the problems and their causes, as well as legislative gaps, we have identified the following potential solutions that may be relevant to protect consumers and SMEs and facilitate the development of the single market for advertising in the context of the DSA and DMA as well as other legislative and soft law instruments.



#### a. Informing consumers about being targeted and improved consent mechanisms

The DSA could contain a requirement for meaningful transparency concerning the existence of targeted advertising, alongside a requirement that information about targeted advertising should be conveyed in a manner which is clear to consumers. If these measures are insufficient, an opt-in to targeted advertising could be encouraged through the self and co-regulatory measures provided for in Article 36 of the DSA.

#### b. Addressing “dark patterns” through guidelines

EDPB guidelines cover the issue of “dark patterns” to some extent. However, further action could be taken such as defining design guidelines, among others, for cookie banners and consent forms and providing a user-friendly tool enabling consumers to report websites that may not comply<sup>6</sup>.

#### c. Preventing discrimination and improving algorithmic transparency

The DSA could further contribute to ensuring that rules regarding discrimination are adhered to in the context of digital advertising by enforcing greater meaningful transparency concerning the existence of targeted advertising and the parameters used. In addition, regular vetting of systems and training data by accredited researchers could offer new insights on how to mitigate systemic risks and reduce information asymmetries.

#### d. Ensure that minors are not subject to targeted advertising which exploits their vulnerabilities

The AVMS Directive already includes obligations to protect minors from harmful content in advertising<sup>7</sup>. However, the provisions apply only to video sharing platforms. The DSA could include a similar provision to that in Article 28b, paragraph 3 AVMS, to clarify that minors (and potentially other vulnerable customer groups) should be protected from harmful targeted advertising.

#### e. Ensuring responsibility for targeted advertising when multiple actors are involved

Actors which are responsible for targeted advertising solutions may not fall under the scope of the DSA, which is limited to intermediation services. A possible solution may be to clarify that Article 5.3 of the DSA proposal, which removes the liability exemption of the hosting platforms, could also apply to platforms which may lead a reasonably well-informed consumer to believe that advertising is provided by the online platform itself or by a recipient of the service who is acting under its authority or control. This would ensure that the platform has an incentive to comply with all the transparency rules.

#### f. Improving consumers’ access to redress

The proposed DSA sets out a generic mechanism for users to flag illegal content and to seek redress. However, this may not help consumers to identify how to make complaints and ensure that they reach the right enforcement body. The Digital Service Co-ordinators could be tasked with providing information to consumers on how to seek redress in relation to online advertising (among other areas). Another option would be to adopt a sector-specific directive addressing all consumer protection issues related to online advertising.

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<sup>6</sup> In the US, users can report websites to their respective Attorney General if they feel they are subjected to a dark pattern. Available at: <https://darkpatternstipline.org/report/>.

<sup>7</sup> Article 9(1) of AVMS Directive.

**g. Facilitating the functioning of the internal market**

The risk of legal uncertainty deriving from the potential application of national rules to advertising services could be mitigated by clarifying the meaning of common terms and enforcing cooperation mechanisms between Member States. This could be done, for instance, by amending the eCommerce Directive (possibly through the DSA) by introducing precise deadlines and procedural conditions for the implementation of derogations by Member States<sup>8</sup>. Adopting EU-wide Codes of Conduct which could be 'vetted' by the European Commission to define which types of national restrictions would be compatible with the internal market clause might also be helpful.

**h. Addressing exploitation by platforms which hold a gatekeeper position in digital advertising**

Smaller firms in particular may be reliant on large gatekeepers to reach consumers, potentially allowing exploitation. The proposed DMA includes provisions which aim to shine a light on potential exploitation by requiring information on advertising prices and performance to be shared with advertisers. Alongside approving the DMA provisions, potential exploitation could be addressed by taking advantage of this information to pursue case by case enforcement under competition law.

**i. Increase transparency concerning advertising auctions and the performance of advertising**

The distribution of ads via ad-auctions is marked by a lack of transparency towards both advertisers and publishers. The current DMA proposal provides for some useful transparency provisions, but could be extended to require transparency for the criteria used by the ad-tech platform services in the auction process, including details of the price components as well as other factors which are taken into account in the auction process and their weighting.

**j. Tackling bundling and tying by gatekeeper intermediaries of premium advertising space**

Ad-inventory of vertically integrated large intermediaries (e.g., Facebook, YouTube, Google) is considered very valuable from an advertiser's perspective but is often exclusively marketed via their own Ad-Network or Ad-Exchange. This could raise entry barriers and impede competition in the provision of advertising intermediary services. It may be appropriate to encourage the European Commission to closely monitor competition across the online advertising value chain, and if necessary consider separating intermediary services from the ad-inventory of their publisher's sites.

**k. Addressing asymmetric access to consumer data**

Large providers of advertising services like Google and Facebook can access a huge amount of data that other companies do not have access to. Large providers may directly prohibit or introduce considerable obstacles to the use of the data via a competitor's advertising services. The prohibition on bundling and self-preferencing in the DMA proposal may address the issue to some degree, but further analysis could be conducted to understand whether other measures may be necessary.

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<sup>8</sup> Such recommendations are inspired by the mechanisms laid down in Article 3 of the AVMS Directive (as amended as amended by European Parliament and the Council of the European Union, 2018, Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 in view of changing market realities, OJ L 303/69 of 28.11.2018<sup>3</sup>.

## 1. HOW DO ONLINE ADVERTISING MARKETS WORK?

Online advertising involves the interaction of a number of different players. In addition to the firms that wish to advertise their products and services and the consumers and businesses at the receiving end of the process, the market also involves a number of intermediaries, such as website operators (publishers) and advertising networks.

In this chapter, we provide an overview of the different types of digital advertising, and the main players in the market, as well as on the role played by “targeting” in digital advertising.

### 1.1. Types of digital advertising

There are three main types of digital advertising: **search advertising**, **display advertising** and **classified advertising**<sup>9</sup>.

Advertising firms engaging in **search advertising** pay search engine operators to link their website (on which they sell products or services) in a user’s search results. When a user enters a search query, the specific advert (or sponsored link) is then shown together with the organic search results. The sponsored link is typically presented in short form so as to resemble a search result, however they are usually highlighted as advertisements by a short text identifier or additional colour highlights<sup>10</sup>. The operator of the search engine usually determines which sponsored link is shown to an individual user, and advertising firms compete to receive priority for display based on specific keywords and user segments. Typically, with this advertising method, the dependence on user data is relatively low because the selection of advertisements for presentation is mainly determined by the specific search query. However, in some cases user data can be used to support the matching process<sup>11</sup>.

Search advertising is one of the most successful forms of online advertising in terms of conversion rate, i.e. the percentage of visitors to a website that complete the desired goal of clicking on an ad (a conversion) out of the total number of visitors who sees a specific ad. For example, the average conversion rate of a sponsored search result via Google Ads across all industries is 4.40%, whereas it is only 0.57% for display advertising<sup>12</sup>. The reason for this is that search advertising reaches consumers while they are already willing to make an active purchasing decision, since they have already expressed interest when searching for specific (product related) keywords<sup>13</sup>. Potentially as a result of its effectiveness, search engine advertising is the second largest online advertising segment worldwide in terms of revenue with a share of 43.3% in 2019. In the US and Europe, this segment is heavily dominated by **Google** and its service Google Ads. The ongoing development of search algorithms that will improve the targeting quality of search advertising as well as the emergence of more specialised product related search engines will drive future growth of this market segment. A steady annual growth of 6.7% in this segment is expected over the next years<sup>14</sup>.

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<sup>9</sup> See CMA, 2020, Online platforms and digital advertising, Market study final report.

<sup>10</sup> Autorité de la Concurrence, 2010, No 10-A-29 Opinion, 28: ‘display is reserved for branding objectives and search-based ads for performance objectives.’

<sup>11</sup> See CMA, 2020, Online platforms and digital advertising, Market study final report.

<sup>12</sup> See Wordstream, 2020, Conversion Rate Benchmarks: Find Out How Your Conversion Rate Compares.

<sup>13</sup> See Geradin, D. & Katsifis, D., 2019, ‘An EU competition law analysis of online display advertising in the programmatic age’, *European Competition Journal*, 15:1, 55-96.

<sup>14</sup> See Statista, 2020, Digital Advertising Report 2020.

**Display advertising** refers to advertisements that are displayed on websites or applications in various forms. It includes **social media advertising**, **video advertisements** as well as **banner-advertisements**. Display advertising is the largest segment in the online advertising market behind search advertising and accounts for 51.8% of total online advertising revenue<sup>15</sup>.

**Social media advertising** accounts for the largest share of display advertising revenue. This segment includes advertisements that are shown to users in the context of social networks (e.g., Facebook, Instagram, TikTok, etc.) and business networks (e.g. LinkedIn, etc.), irrespective of whether the advertisement is in the form of a text-based post, a picture or even a video. The advertised content is embedded in an individual user's newsfeed and the operator of the network itself mostly directly markets the advertising space. Users' personal profiles, interactions on the platform (e.g. likes, sharing of content) and browsing behaviour within the social networks provide very rich consumer data to the platform operator. This data can be used to deploy deeper targeting methods for the distribution of advertisements (see Section 1.2). The leading company in this segment is **Facebook** with a market share of between 75-80% in the US and Europe<sup>16</sup>. Furthermore, with the trend towards integrating eCommerce and payment solutions into social networks, social network providers could benefit from new monetisation opportunities in the future. Due to this development, consumer engagement and conversion rates from advertisements on social networks are expected to increase significantly<sup>17</sup>.

**Video advertising** includes all advertisements provided within web- or app-based video-players. The advertising content can be displayed in the form of a video (e.g. pre-roll advertisements), as well as text- or image-based overlays. The increasing popularity of user-generated video content is a key driver for this advertising type. In 2019, the video advertising segment accounted for 9.4% of the global online advertising market<sup>18</sup>. The importance of this advertising type will further expand as developments in mobile infrastructure and the widespread availability of 5G may provide a new boost for this kind of advertising on mobile devices. While the field is dominated in the US and Europe by Google's service **YouTube**, other subscription-based video streaming services may adapt their current business model and become publishers and offer video advertising space in the near future.

**Banner-advertisements** are typically placed on a publisher's website or in an app alongside their original content. The advertisement space is regularly marketed via a complex chain of intermediaries (e.g., Ad-Networks, Ad-Exchanges) that determine the placement of a specific banner-ad based on a real-time auction format (see Section 1.3.2)<sup>19</sup>. Banner-advertising accounted for 15% of global online advertising revenues in 2019. An important innovation in the distribution of these ads was the development and introduction of a system that allows for fully automated and individualised purchases of advertising space, also known as programmatic advertising<sup>20</sup>. This process of "programmatic advertising describes [...] [a] method of buying, displaying, and optimizing of advertising space driven by audience data in order to better target certain potential customers"<sup>21</sup>. Nowadays, the majority of digital ad spending is processed via programmatic advertising<sup>22</sup>.

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> See CMA, 2020, Online platforms and digital advertising, Market study final report.

<sup>20</sup> Bundeskartellamt, 2018, *Online advertising. Series of papers on "Competition and Consumer Protection in the Digital Economy"*.

<sup>21</sup> Statista, 2020, *Digital Advertising Report 2020*, p. 25.

<sup>22</sup> Statista, 2020, *Digital Advertising Report 2020*.

The third main category of online advertising is **classified advertising**. For this type of advertising, advertisers directly purchase an advertising slot on a publisher's website. This allows for the specific targeting of the website's user group and avoids losses that could arise from the extensive scattering of advertising across different settings, which is typical for display advertising. Sectors in which classifieds are frequently observed include recruitment, eCommerce, consumer finance, travel, real estate and cars<sup>23</sup>. Pricing schemes for classified advertisements are relatively transparent and often similar to offline advertisements, such as one-time payments which are independent of the advertisement's success. This segment is the smallest in online advertising and represents only 5.2% of the global market revenue<sup>24</sup>. However, it is interesting to note that, the European market for classified online advertising is the world's largest<sup>25</sup>, and thus this type of advertising plays a larger role in Europe than it does elsewhere.

## 1.2. The role of targeting in digital advertising

Traditional advertising formats in TV, radio, print outlets or billboards have only limited targeting potential and thus advertisers spend money on consumers who are not receptive to the advertised content. In contrast, online advertising presents multiple opportunities for targeting. First, online advertising can be linked to the activity that users are currently engaged in (e.g., searching, browsing, watching videos, etc.) which allows for a segmentation of consumers<sup>26</sup>. Second, it is possible for advertisers to measure the efficacy of their advertising expenditure by analysing data on the visitors directed to their services by the ad, which enables more efficient spending of financial resources<sup>27</sup>. Thus, targeting methods in online advertising should in principle allow more efficient allocation of advertising resources and mitigate scattering losses from uninterested customers.

Exploiting this "value added" is the core business of many intermediary stakeholders, which analyse available user data to offer sophisticated segmentation and targeting of consumer groups. In doing so, they use a range of different targeting methods specific to the respective type of online advertising, which can vary as regards their data requirements and potential efficacy<sup>28</sup>.

In the following sections, we elaborate on **contextual targeting**, **behavioural targeting** and **segmented targeting** of online advertisements.

**Contextual targeting** methods are based on the content of a visited website or the specific search query a user entered into a search engine. For example, a user browsing on a blog about 'running' will likely see ads about 'running shoes' or 'sports apparel'. Thus, it can be characterised as the online equivalent of a tailored print-ad in a niche magazine. The placement of the specific advertisement or sponsored link is therefore only determined by the content of the website and not by information about the user itself. Hence, a record of specific user data or browsing history is not required. Elements of contextual targeting are prevalent especially in classified advertisements and to a lesser degree in search and various forms of display advertisement.

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<sup>23</sup> See CMA, 2020, Online platforms and digital advertising, Market study final report.

<sup>24</sup> See Statista, 2020, Digital Advertising Report 2020.

<sup>25</sup> Ibid.

<sup>26</sup> See Goldfarb, A., 2014, 'What is different about online advertising?', *Review of Industrial Organization*, 44(2), 115-129.

<sup>27</sup> Blake, T., Nosko, C. & Tadelis, S., 2015, 'Consumer Heterogeneity and Paid Search Effectiveness: A Large-Scale Field Experiment', *Econometrica*, 83: 155-174.

<sup>28</sup> European Commission, 2018, Consumer market study on online market segmentation through personalised pricing/offers in the European Union.

In **behavioural targeting**, information that consumers have shared with the platform e.g. posts, likes, written reviews, purchase history, search history, browsing history and technical information about the individual user like e.g. device manufacturer, operating system, browser vendor, screen resolution and IP-address are used to attribute a specific consumer to a consumer group and their interests and needs. Hence, the data requirements to engage in behavioural targeting are relatively high compared to other types of advertising. Data collection is carried out via cookies and other tracking technologies (e.g. browser & canvas fingerprinting, unique device identifiers)<sup>29</sup>. Generally, the matching quality between a consumer and an advertisement increases with the depth of data available and when a narrow segmentation is possible. In practice this targeting method is regularly implemented in the so-called 're-targeting' of consumers who reveal their interest in buying a specific product but leave a seller's website without a purchase. Over the course of a few days such a consumer then experiences an increased frequency of display advertisement of the previously searched product he or she did not buy. Similar methods are also used in search advertising.

In contrast to the previous two types of advertisements, which are based on data on user preferences which has been gathered through the general use of the website or platform, advertisements delivered by **segmented targeting** rely on information that the user has provided voluntarily. This is especially relevant on websites which require a user to register a user profile and enter their name, age, gender and other contact information<sup>30</sup>. Although this information allows for a perfect identification of the user, it needs to be combined with other data to form a clearer picture of a user's interests.

The targeting of online advertisements has become increasingly popular among marketers, because they assume these ads are more effective and have a higher rate of return than standard non-targeted advertisements. Behavioural advertising is a particularly fast-growing segment, with revenues estimated to reach 21.4 billion EUR in Europe by 2020<sup>31</sup>. It is estimated that the click-through rate (the likelihood that a user clicks on a displayed ad) for behavioural advertising is 5.3 times higher than for standard advertising. For re-targeted consumers (for explanation see above) who have previously shown an interest in a product, the click-through rate is estimated to be 10.8 times higher<sup>32</sup>. Nevertheless, it is generally difficult to measure the causal effect of targeted advertisements since one cannot rule out the possibility that a user would have bought a certain product even without seeing the advertisement. However, Blake et al. (2015) have measured the causal efficacy in a controlled experimental setting for search advertisements on eBay<sup>33</sup>. They find that there is a positive effect from search advertising, but this is mainly present for consumers that are new to the website or use it infrequently. The more familiar a user is with the search engine, the more she overlooks sponsored search results.

A study by Bleier & Eisenbeiss (2015) which investigates the efficacy of personalised advertisements in banner advertising, observes a similar effect<sup>34</sup>. Advertisements in the field of retargeting that are substantially personalised (heavily targeted to a specific user) are especially effective in promoting purchases of consumers who are at an early information stage in their purchasing decision process. However, the effectiveness of these personalised ads decreases significantly over time after the last

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<sup>29</sup> Briz, N., 2018, *This is Your Digital Fingerprint*, Mozilla Blog.

<sup>30</sup> European Commission, 2018, Consumer market study on online market segmentation through personalised pricing/offers in the European Union.

<sup>31</sup> European Parliamentary Research Service, 2020, *Digital Service Act: European Added Value Assessment*.

<sup>32</sup> Ibid.

<sup>33</sup> Blake, T., Nosko, C. & Tadelis, S., 2015, 'Consumer Heterogeneity and Paid Search Effectiveness: A Large-Scale Field Experiment', *Econometrica*, 83: 155-174.

<sup>34</sup> Bleier, A., & Eisenbeiss, M., 2015, 'Personalized online advertising effectiveness: The interplay of what, when, and where'. *Marketing Science*, 34(5), 669-688.

visit of an advertiser's online store. Therefore, medium or less personalised (re-targeted) ads outperform their heavily targeted counterparts in the long run. In addition, some studies even show that very high degree of personalisation led to less engagement in the first place. For instance, Tucker (2014)<sup>35</sup> and Aguirre et al. (2015)<sup>36</sup> each conducted field studies on Facebook to examine the effectiveness of personalised ads. The authors considered different levels of personalisation. Although both studies showed that personalised advertising generally has a greater effect on consumers and click-through rates than non-personalised ads, this effect is less pronounced if the personalisation is too precise. Thus, advertising messages that are not entirely generic, but address a user profile and interest in a broader way, were most effective. On the other hand, the most personalised forms of advertising were only effective in specific circumstances. Specifically, the studies found that consumers respond more positively to high levels of personalisation if they have trust in the respective vendor, or if the latter creates openness about how data is collected or/and provides consumers with greater control over their own data<sup>37</sup>.

Usually, ad-networks combine behavioural advertising, which can be highly personalised, and contextualised advertising with lower levels of personalisation in their targeting service. The complementary nature of contextual and behavioural methods has also been recognised in academic literature and it has been found that the combined application of both elements results in significantly higher click-through rates<sup>38</sup>.

From an economic perspective, behavioural targeting affects publishers of advertising space and advertising firms in two different ways. Chen and Stallaert (2014) characterise this as a competitive effect and a propensity effect<sup>39</sup>. The competitive effect is beneficial for advertisers but is negative for publishers. Behavioural targeting enables a more fine-grained segmentation of consumers with the result that fewer advertising firms compete for the same target group. The reduction in fixed advertising prices may be due to this. In contrast, the propensity effect implies that, due to behavioural targeting, the likelihood of a user clicking on an ad is higher. This should result in a higher click-through rate and, thus, more revenue from the success-based price components for publishers. Therefore, the overall effect hinges crucially on the efficacy of behavioural targeting (and other targeting methods), and on which of the two effects dominates.

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<sup>35</sup> Tucker, C. E., 2013, 'Social Networks, Personalized Advertising, and Privacy Controls', *Journal of Marketing Research*, 51 (5):546-562.

<sup>36</sup> Aguirre, E., Mahr, D., Grewal, D., de Ruyter, K. & Wetzels, M., 2015, 'Unraveling the Personalization Paradox: The Effect of Information Collection and Trust-Building Strategies on Online Advertisement Effectiveness', *Journal of Retailing*, 91 (1):34-49.

<sup>37</sup> e.g. Chellappa, R. K., & Sin, R. G., 2005, 'Personalization versus Privacy: An Empirical Examination of the Online Consumer's Dilemma'. *Information Technology and Management*, 6 (2):181-202; Tucker (2013); Aguirre et al (2015); Bleier, A., & Eisenbeiss, M., 2015, 'The Importance of Trust for Personalized Online Advertising', *Journal of Retailing*, 91 (3):390-409.

<sup>38</sup> Lu, X., Zhao, X., & Xue, L., 2016, 'Is combining contextual and behavioral targeting strategies effective in online advertising?', *ACM Transactions on Management Information Systems (TMIS)*, 7(1), 1-20.

<sup>39</sup> Chen, J., & Stallaert, J., 2014, 'An economic analysis of online advertising using behavioral targeting', *Mis Quarterly*, 38(2), 429-A7.

### 1.3. Main actors and business models

The online advertising environment involves different actors across the value chain. While there are subtle differences within each role, the main roles can be identified as **advertisers**, **publishers**, **intermediators** and **consumers**. This classification is based on Cai et al. (2020) and their assessment on the distinction made by the Interactive Advertising Bureau (IAB)<sup>40</sup>. A conceptual description of the online advertising ecosystem is provided in Figure 1. The characteristics of each of the players are described below.

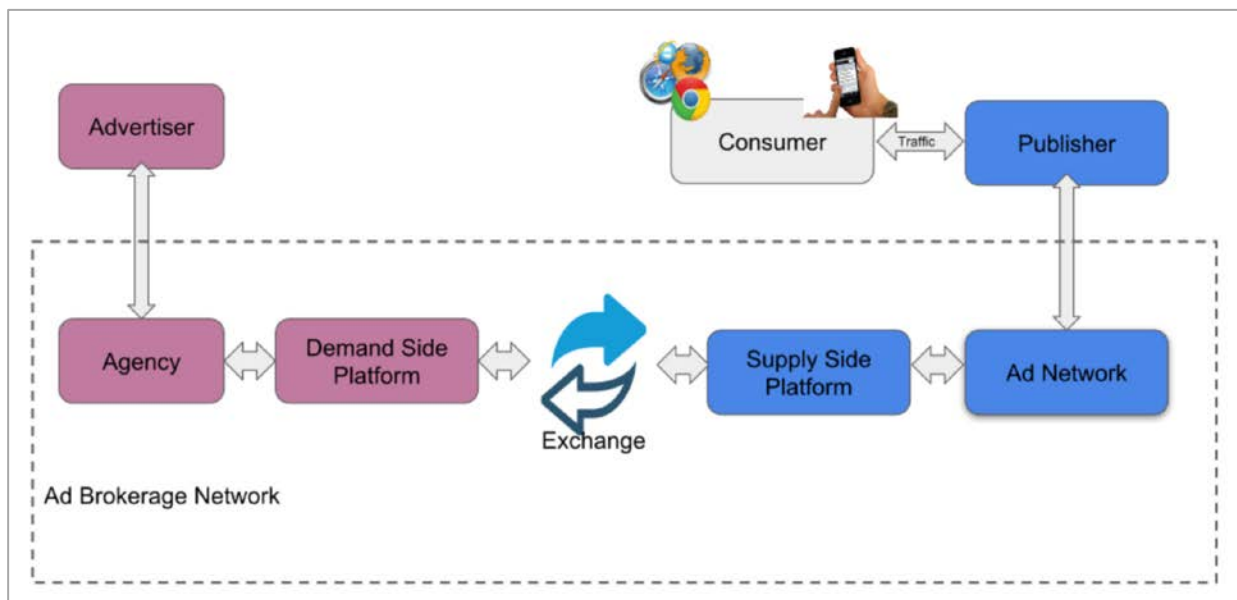
- **Advertisers:** Large businesses or SMEs which are interested in advertising their products or services. They may have a preference for specific target groups, which could give them guidance on where to place their ads. If the chosen advertising type allows for design elements (text, images, etc.), these tend to be designed by the advertisers themselves. Advertisers pay according to a sophisticated success-based measure which usually includes “cost-per-impression” (CPI) and “cost-per-click” (CPC) elements.
- **Publishers:** Platform operators and owners of websites that offer space for advertisements to be shown. Publishers’ dependence on advertising revenue varies significantly as there are websites that are entirely financed by advertising, whereas others rely on advertising only as a supplementary revenue stream.
- **Intermediators:** Companies which engage in the distribution and targeting of advertisements. Market players that fall under this category can be further characterised as either Supply Side Platforms (SSPs), Demand Side Platforms (DSPs) or Ad-Exchanges. While SSPs usually buy advertising spaces on publishers’ websites and sell these on Ad-Exchanges (brokers between both sides), DSPs buy these advertising inventories on Ad-Exchanges to fill them with matching advertisements from interested advertisers they represent. However, there are also large intermediaries who assume a dual role or combine each of the above mentioned three roles in their services. In this case they are referred to as “Ad Brokerage Network” in Figure 1. These intermediaries are also responsible for transferring payments from advertisers to publishers.
- **Users:** Consumers and business users are the recipients of advertisements. They are likely to encounter a range of advertisements (search, display, etc.) during their regular browsing experience. Which specific advertisement is shown to an individual user is determined by sophisticated targeting methods.

The following figure summarises the main actors across the online advertising value chain. We elaborate further below on the business models, with a focus on the intermediary actors who engage in the delivery of the advertisements and discuss how they interact with the other stakeholders involved. We also discuss the specific role played by SMEs and consumers at different points in the value chain.

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<sup>40</sup> Cai, Y., Yee, G. O., Gu, Y. X., & Lung, C. H., 2020, ‘Threats to online advertising and countermeasures: A technical survey’, *Digital Threats: Research and Practice*, 1, 2, Article 11.



Figure 1: Main players of the online advertising value chain<sup>41</sup>

Source: Cai et al. (2020).

### 1.3.1. Ad-Networks

The business model of an intermediary Ad Brokerage Network is based around aggregating advertising space from publishers and matching it against advertisers' demand. It can offer any combination of services that would relate to a Supply Side Platform (SSP), Demand Side Platform (DSP) or Ad-Exchange. Table 1 provides definitions of these roles as described by the Interactive Advertising Bureau (IAB)<sup>42</sup>. Although Ad-Networks in the narrow sense represent only one element in an Ad Brokerage Network's service umbrella, the term is often used as a synonym for the entire sector of intermediaries. For the remainder of the study we refer to "Ad-Networks" in relation to all Ad Brokerage services and refer to the elements of DSPs, SSPs and Ad Exchanges specifically where necessary.

Ad-Networks in their role as intermediaries interact with advertisers and publishers. Advertising firms provide the network with the relevant campaign materials while the publishers offer advertising space on their website to be filled by the network. When planning their advertising campaign, advertisers can typically choose between different targeting options offered by the network. Targeting can for example be based on geolocation, specific keywords which define the contextual environment, time of day, browser type or operation system amongst other options. To identify these different consumer segments, Ad-Networks rely heavily on the analysis of click-stream data from users (i.e. data on the detailed interaction of users with elements of the web-service).

<sup>41</sup> Cai, Y., Yee, G. O., Gu, Y. X., & Lung, C. H., 2020, 'Threats to online advertising and countermeasures: A technical survey', *Digital Threats: Research and Practice*, 1, 2, Article 11.

<sup>42</sup> Ibid.

Table 1: Elements of an ad brokerage network (Ad-network)<sup>43</sup>

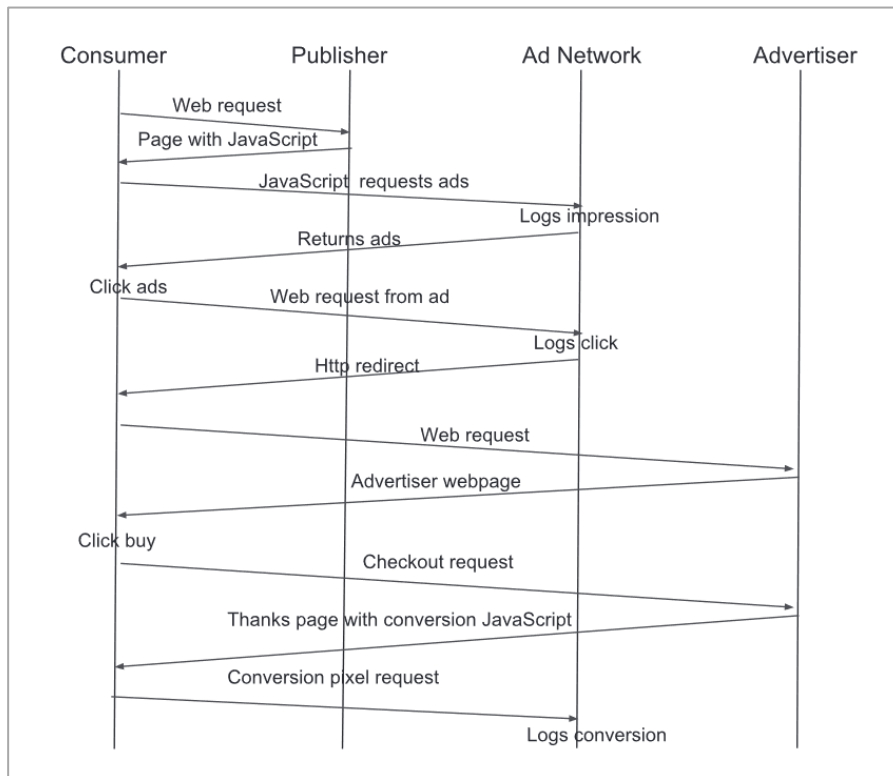
Player	Definition
Agency	An organisation that, on behalf of its clients, plans marketing and advertising campaigns, drafts and produces advertisements, places advertisements in the media. Agencies often use third-party technology (ad servers) and may place advertisements with publishers, ad networks, and other industry participants.
Demand Side Platforms (DSPs)	Organisations that provide centralised (aggregated) media buying from multiple sources including Ad Exchanges, Ad networks, and Supply Side Platforms, often leveraging real-time bidding capabilities of said sources.
Ad-Exchanges	Organisations that provide a sales channel to Publishers and Ad-Networks, as well as aggregated inventory to Advertisers. They bring a technology platform that facilitates automated auction-based pricing and buying in real-time. Ad Exchanges' business models and practices may include features that are similar to those offered by Ad-Networks.
Supply Side Platforms (SSPs)	Organisations that provide outsourced media selling and Ad-Network management services for publishers. Also known as sell-side platforms. Their business models and practices are similar to Ad Networks. SSPs are typically differentiated from Ad-Networks in not providing services for Advertisers. DSPs and Ad-Networks often buy from SSPs.
Ad-Networks	Organisations that provide an outsourced sales capability for publishers and a means to aggregate inventory and audiences from numerous sources in a single buying opportunity for media buyers. Ad Networks may provide specific technologies to enhance value to both Publishers and Advertisers, including unique targeting capabilities, creative generation, and optimisation. Ad Networks' business models and practices may include features that are similar to those offered by Ad Exchanges. Usually, Ad-Networks rely on Content Delivery Networks to server advertising contents.

Source: Cai et al. (2020).

Traditional payment models in advertising have been dominated by one-time (or potentially recurring) up-front payments for ad space, like the rental expenses of billboards or a fixed cost for a printed ad in a newspaper. While this still holds true for the classified sector within online advertising, in search and display advertising, however, performance-based measures such as cost-per-click (CPC), cost-per-mille (CPM – thousand impressions) and cost-per-action (CPA) (the desired action of the advertiser which is usually a purchase) are prevalent. These success-based measures serve to reduce the risk of advertisers of wasting resources on ad spaces which receive limited views or achieve only poor conversion. The delivery process for the example case of display advertising is displayed in Figure 2.

<sup>43</sup> Ibid.

Figure 2: Ad delivery process: impression, click and conversion<sup>44</sup>



Source: Dave et al. (2013).

To improve efficiency in the intermediation process (and to maximise the profits generated by targeting) large Ad-Networks and Ad-Exchanges tend to employ an auction format to determine which advert is shown to a given user. After the Ad-Network/Exchange receives the JavaScript request for the display of an ad, this real-time auction process is triggered and returns the winning advertisement. The successful impression of the winning ad is recorded and the relevant advertiser is billed. Advertisers who are interested in targeting a specific consumer group can choose to do so by preselecting a keyword, industry sector or other identifiable metric.

The largest players in the Ad-Networks space are Google, Facebook and Amazon, who not only act as SSP, DSP (thereby aggregating advertising demand and supply) but also operate an integrated Ad-Exchange. Thus, these firms operate well beyond their self-generated ad spaces and additionally act as market makers, e.g. via Google Ads, Google AdSense, DoubleClick, the Facebook Audience Network or Amazon Advertising. The vertical integration of these large players contrasts with smaller market participants, which typically act only as DSP, SSP or provide Ad-Exchange services. We identify potential problematic practices arising from vertical integration by major players in online advertising in Section 2.

### 1.3.2. Ad-Exchanges and advertising auctions

In contrast to Ad-Networks which aggregate the supply and demand side, Ad-Exchanges are brokerage platforms on which all market players interact. Large publishers may post their available inventory directly and link it to specific keywords to allow filtering and segmentation, while large advertisers provide their marketing material.

<sup>44</sup> Dave, V., Guha, S., & Y. Zhang, 2013, 'Vicerio: Catching click-spam in search ad networks', *Proceedings of the ACM SIGSAC Conference on Computer and Communications Security*. ACM, 765–776.

Other Ad-Networks (DSPs & SSPs) may also use Ad-Exchanges themselves to buy relevant advertising space or offer advertising space from the publishers they represent.

The Ad-Exchange is central to the Real-Time Bidding (RTB) process and hosts the auction in which the demand and supply of advertising space is brokered. Following a user's visit to a website that includes advertisements, the request is sent to the Exchange along with relevant data that further characterises the user, his or her past browsing history, the context of the website, the device being used, and the location of the request among many others. Based on these characteristics, DSPs who represent advertisers that want to target the respective consumer group enter the RTB process and submit their maximum bid. The winning DSP will be determined and fills the inventory space with the advertising materials of their clients<sup>45</sup>.

The auction format of the RTB follows the design of a second-price auction in which the advertisers' maximum bids compete against each other. Under a second-price auction, the winner submitting the highest bid pays a price set by the second highest bid in the auction. These auction formats motivate bidders to increase the level of their bid as, if they win, they pay a lower amount than their bid price. Due to these dynamics, sellers or auction hosts may secure higher revenues under a second price auction than under a first-price auction where the winner pays the amount that they proposed in their own bid.

In these ad auctions, advertisers tend to face higher price competition for popular search keywords and more general characteristics, which may increase incentives to bid for space on more niche keywords or user characteristics to avoid competition from other advertisers. The buyers' maximum bids are usually measured in a CPM (cost-per-mille) price which is charged for each thousand impressions of the advertisement which is equivalent to an auction win in an identified consumer segment. This maximum bid is complemented by specific quality scores of the advertisement material provided. This auction format, equivalent to a stock-market, is easily scalable and Ad-Networks seek to optimise their RTB process such that the advert with the highest success rate (in terms of subsequent conversion) is shown to consumers<sup>46</sup>.

A prime example of the auction process can be seen in Google's so-called "Ad-Manager"<sup>47</sup>. This service is a fully automated auction, also referred to as a "programmatic auction", and receives bids from advertisers based on their targeting settings and advertisers pay less or exactly their maximum bid<sup>48</sup>. Thus from a pricing perspective, the auction format is traditionally that of a second-price auction<sup>49</sup>, although the design has shifted more towards first-price elements recently<sup>50</sup>. The winning bidder, however, is determined not only by the price, but also by other factors which are weighted in a way to ensure the auction maximises the profits of the auction operator. According to Varian (2009) this is achieved through ranking the ads "...by bid times expected click through rates, and those ads with the highest expected revenue are shown in the most prominent positions"<sup>51</sup>. However, users' current propensity to click on an ad is not the only weighting factor that is applied to a submitted bid.

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<sup>45</sup> For more details on the technical implementation of the RTB process the interested reader is referred to Wang, J., Zhang, W., & Yuan, S., 2016, *Display advertising with real-time bidding (RTB) and behavioural targeting*. ArxivPreprint Arxiv:1610.03013(2016).

<sup>46</sup> EDRI, 2019, Real Time Bidding: The auction for your attention.

<sup>47</sup> Google, 2021, Ad Manager.

<sup>48</sup> Ibid.

<sup>49</sup> Edelman, B., Ostrovsky, M., & Schwarz, M., 2007, 'Internet advertising and the generalized second-price auction: Selling billions of dollars worth of keywords'. *American economic review*, 97(1), 242-259.

<sup>50</sup> Despotakis, S., Ravi, R., & Sayedi, A., 2019, *First-price auctions in online display advertising*. Available at SSRN 3485410.

<sup>51</sup> Varian, H. R., 2009, 'Online ad auctions', *American Economic Review: Papers & Proceedings*, 99(2), 430-34.

Measures that indicate an ad's quality may also reflect future adaptations in users' behaviour based on their anticipated positive or negative experiences when clicking on an ad<sup>52</sup>. Minimum bids or reservation prices can also be implemented in the auction process that are either specific to keywords or individual advertisers to increase the realised revenue<sup>53</sup>. All these different elements contribute to a lack of transparency within the automated ad distribution process and give rise to problems which may disadvantage other market players (see Section 2).

Smaller or more unknown advertisers whose adverts are expected to generate only limited click through potential may be at a disadvantage in this process<sup>54</sup>. Due to the design of the auction and weighting of gross bids, those advertisers could be forced to submit higher maximum bids than they would otherwise submit in order to compete for the best advertisement space. This two-class society of advertisers is also reflected in ad-auctions operated by Google. Advertisers have the option to escape competition in the open auction format and enter a so-called "Preferred Deal" or private auction with a more restricted pool of competitors<sup>55</sup>.

### 1.3.3. The role of SMEs

SMEs can participate in all stages of the advertising value chain. However, they most often take on the role of advertisers in their goal to win more customers. Online advertising benefits SMEs in particular as a quick, flexible and relatively effective method to reach a large audience at low (up front) cost, compared to traditional offline media advertising. SMEs can also become publishers themselves in that they can generate and sell their advertising inventory. Both in the role of advertiser and publisher, SMEs are directly affected by their dependence on intermediaries and the advertising targeting mechanisms used.

The market for designated Ad-Networks and Ad-Exchanges is dominated by large, mostly US based, firms and conglomerates. Nonetheless, some smaller EU based firms are also active in the broader intermediation market. Prime examples include the British Ad-Network adnow<sup>56</sup> or the French Ad-Network Criteo<sup>57</sup>.

Lastly, SMEs can also represent a crucial consumer group that other SMEs try to sell to in the context of B2B transactions. As such SMEs can also be "consumers" of advertising.

Along the online advertising value chain, SMEs have also developed complementary consulting services to support different stakeholders. Such business models can involve improving the design of adverts, the strategic choice of keywords and advising publishers on how to effectively monetise their advertisement inventory.

### 1.3.4. Consumers

Consumers are typically on the receiving end of the online advertising value chain. They encounter advertisements in various forms when they use a search engine or visit a website. Depending on the content and the context in which the ad is experienced, the user may view it as potentially valuable,

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<sup>52</sup> Ibid.

<sup>53</sup> Ostrovsky, M., & Schwarz, M., 2011, 'Reserve prices in internet advertising auctions: A field experiment', *Proceedings of the 12th ACM conference on Electronic commerce* (pp. 59-60).

<sup>54</sup> Liu, D., Chen, J., & Whinston, A. B., 2010, 'Ex ante information and the design of keyword auctions', *Information Systems Research*, 21(1), 133-153.

<sup>55</sup> Google, 2021, Ad Manager.

<sup>56</sup> AdNow, 2021, Website.

<sup>57</sup> Criteo, 2021, Website.

providing useful information, which is economically characterised as informative advertising in the sense of Grossman & Shapiro (1984)<sup>58</sup>. In this case, advertisements can help consumers to make purchasing decisions, which better reflect their preferences and are therefore welfare enhancing<sup>59</sup>. However, if adverts are perceived as rather intrusive instead, consumers experience nuisance costs that limit their browsing experience<sup>60</sup>. This effect led to an increase in the use of ad avoidance technologies in recent years.

In addition to their role as recipients of advertisements, consumers which participate in deploying user-generated content, may also enter the advertising value chain themselves as publishers selling their inventory from blogs or online tools. Unless they reach a very large audience group, consumers as publishers tend individually to have very limited bargaining power in relation to other actors in the value chain

#### 1.4. Evolution of the market and implications of COVID-19

The first ever online advertisement was placed in 1994 by AT&T; it was a banner ad displayed on the website of HotWired<sup>61</sup>. Since then, the relevance of online advertising has continued to grow, as has the amount spent by companies on digital advertising. During the last decade, the sector has grown at a compound annual growth rate of about 18%<sup>62</sup>. According to a study conducted in 2017, digital advertising contributes EUR 526 billion to the EU economy every year and supports about 6 million jobs<sup>63</sup>.

As for all branches of the economy, the outbreak of the pandemic has also left its mark on the online advertising industry. Global digital ad spending in 2020 was lower than previously expected. Prior to the outbreak of the pandemic, the global online advertising spend forecasted by Statista for 2020 was in the range of USD 374 billion<sup>64</sup>, but it only amounted to about USD 356 billion<sup>65</sup>, a difference of approximately 5%<sup>66</sup>.

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<sup>58</sup> Grossman, G. M., & Shapiro, C., 1984, 'Informative advertising with differentiated products', *The Review of Economic Studies*, 51(1), 63-81.

<sup>59</sup> Meurer, M., & Stahl II, D. O., 1994, 'Informative advertising and product match', *International Journal of Industrial Organization*, 12(1), 1-19.

<sup>60</sup> Johnson, J. P., 2013, 'Targeted advertising and advertising avoidance'. *The RAND Journal of Economics*, 44(1), 128-144.

<sup>61</sup> Kaye, B. K., & Medoff, N., 2001, Just a Click Away: Advertising on the Internet. Massachusetts: Allyn and Bacon as cited in Evans, D. S., 2009, 'The Online Advertising Industry: Economics, Evolution, and Privacy', *Journal of Economic Perspectives* 23:3, 37-60. Bundeskartellamt, 2018, *Online advertising. Series of papers on "Competition and Consumer Protection in the Digital Economy"*.

<sup>62</sup> Own calculation based on data provided by Zenith, 2020, *Internet advertising spending worldwide from 2007 to 2022, by format*, Statista.

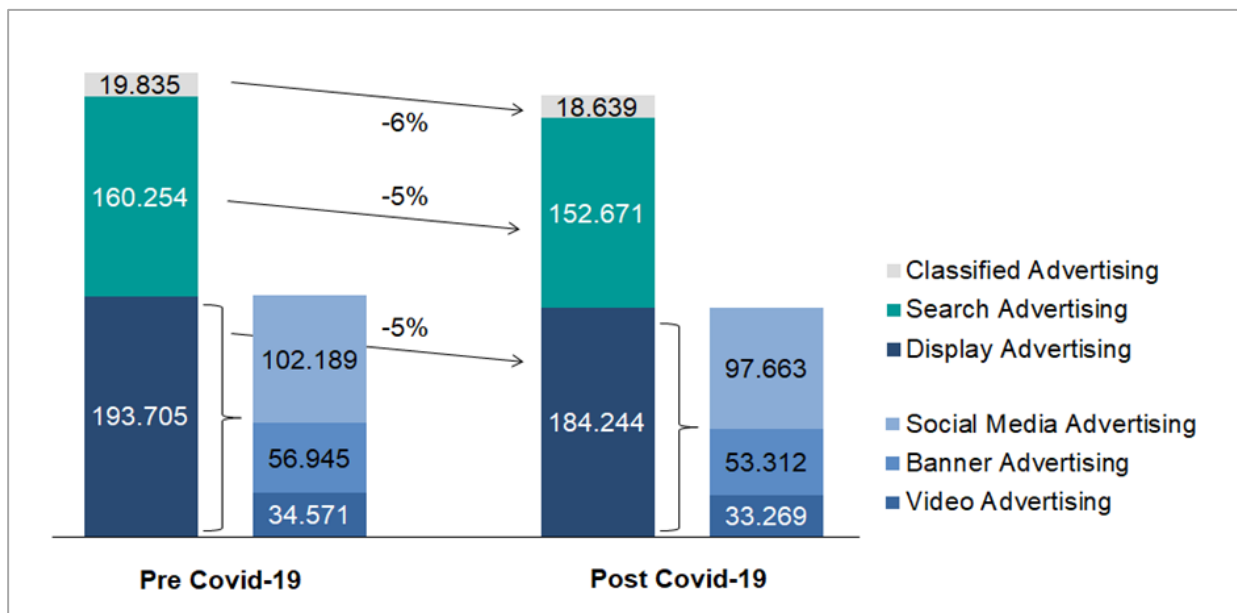
<sup>63</sup> IAB Europe, 2017, *Research report: The economic contribution of online advertising in Europe*.

<sup>64</sup> This corresponds roughly to EUR 295 billion [exchange rate 31.12.2020].

<sup>65</sup> This corresponds roughly to EUR 292 billion [exchange rate 31.12.2020].

<sup>66</sup> Statista, 2020, *Digital Advertising Report 2020*.

Figure 3: Global ad spending forecast in million USD in 2020



Source: Statista, 2020, *Digital Advertising Report 2020*.

This underspend may be due to the fact that companies have faced uncertainties in their operating businesses and, therefore, scaled back on ad spending. Especially in the first month of the pandemic, both publishers and intermediaries experienced a decline in the value of their inventory and service<sup>67</sup>. The pandemic had particularly negative consequences for news publishers, who regularly reported on the pandemic. Since advertisers generally avoid displaying their ad alongside information about natural disasters or tragedies, many advertisers refrain from placing ads on news publishers' websites<sup>68</sup>.

However, the pandemic had a far more dramatic effect on traditional advertising segments than on the digital advertising industry in 2020<sup>69</sup>. According to an article posted by the World Economic Forum (2020), "out-of-home and cinema advertising shrank almost instantly", as did spending on TV and print advertising. On the other hand, spending on online advertising still grew in 2020, albeit less than expected and lower than in previous years. Compared to 2019, global online advertising spending increased by around 7% and is expected to rise again by 12% in 2021, while in Europe online ad spending increased by about 4% in 2020 compared to the previous year. In 2021, expenditure is expected to increase again by 13%<sup>70</sup>. This development is also reflected in the rising costs per 1,000 impressions. Figure 4 shows the development of the global CPM in USD for ads on Facebook and Instagram. The dip in prices from February to April of 2020 is clearly visible. With many pulling out of the advertising business, the availability of programmatic inventory skyrocketed during this time. Those companies that were in a position to keep investing in advertising faced less competition in the auctions, which resulted in greater efficiency and a decrease in CPMs<sup>71</sup>. Nevertheless, Figure 4 also illustrates that prices rose again from around April onwards, and by the end of 2020 had already surpassed the price level recorded in the previous year.

<sup>67</sup> Widawska, I., 2021, *One Year With COVID-19: Programmatic's Performance Prior To And During The Course Of The Pandemic*.

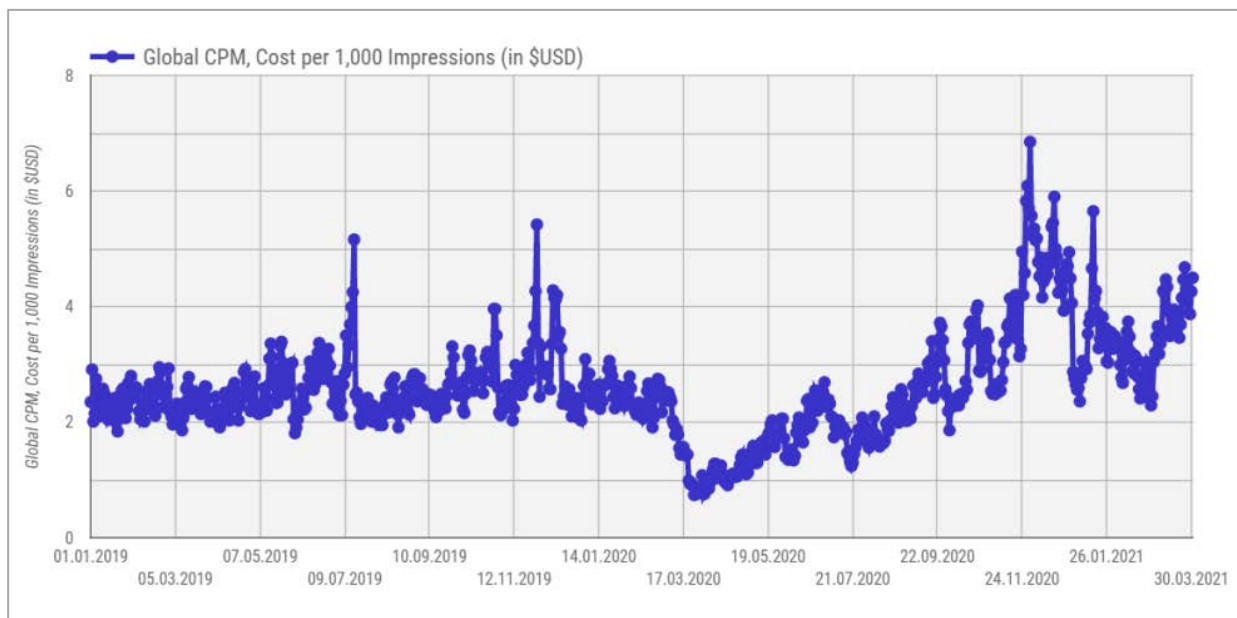
<sup>68</sup> IAB Europe, 2020, *IAB Europe Backs 'Don't Block Quality European Journalism'*.

<sup>69</sup> Statista, 2020, *Digital Advertising Report 2020*.

<sup>70</sup> Statista, 2021, *Digital Markets, Digitale Werbung, Weltweit*; Statista, 2021, *Digital Markets, Digitale Werbung, Europa*.

<sup>71</sup> Comstock, M., 2020, *COVID-19 and Programmatic Advertising*, PMG.

Figure 4: Global CPM in USD – Metrics on Facebook &amp; Instagram



Source: GuptaMedia, 2021, *Understanding the effects of COVID-19 on the Facebook Ads Marketplace*.

Although many companies worked and are still working with tighter budgets, completely pulling away from advertising would do more harm than good, as it could lead to a significant drop in total brand communication awareness and, thus, even fewer sales<sup>72</sup>. Therefore, the goal of advertisers is to improve the allocation of available resources, leading them to adapt to changing consumer behaviour as a result of the COVID-19 crisis. The pandemic has forced citizens to spend most of their time at home<sup>73</sup>. Consequently, digital consumption has increased significantly. According to an article written by Fernandez et al. (2020), digital adoption in Europe jumped from 81% to 94%<sup>74</sup>. Social media and messaging services saw the most growth. ECommerce has also gained in importance<sup>75</sup>. These developments are reflected in the current as well as the future marketing strategies of various companies which prioritise digital advertising. In a survey of marketing executives from various industries worldwide by Criteo (2021), a significant share of marketers confirmed that they plan to spend the same or even more in digital advertising in 2021, despite the impact of the pandemic<sup>76</sup>. More than 40% of the respondents indicated that their budgets for social media advertising, website and content marketing as well as advertising on retail websites and apps is likely to increase in 2021. Video ads will also account for an increasing share of marketing budgets. However, marketers also emphasised that they face some challenges related to digital advertising campaigns. For instance, marketers complain that “campaigns do not always target the right people”, “campaigns are too dependent on Facebook / Google / Amazon”, and “it is difficult to measure the Return on Investment (ROI) of campaigns”. There are also many marketers who plan to diversify their budgets and cover multiple channels<sup>77</sup>. While larger companies and brands have been taking a multi-channel approach for years, smaller enterprises rely more on or tend to use channels that reach a large audience and,

<sup>72</sup> Roberts, K., & Southgate, D., 2020, *Impact Of COVID-19 On Consumer Behaviour, Attitudes and Expectations*, Kantar, iabEurope.

<sup>73</sup> Ford, G. S., 2020, ‘COVID-19 and Broadband Speeds: A Multi-Country Analysis’, *Phoenix Centre Policy Bulletin* 49.

<sup>74</sup> Fernandez, S., Jenkins, P., & Vieira, B., 2020, *Europe’s digital migration during COVID-19: Getting past the broad trends and averages*.

<sup>75</sup> Roberts, K., & Southgate, D., 2020, *Impact Of COVID-19 On Consumer Behaviour, Attitudes and Expectations*, Kantar, iabEurope.

<sup>76</sup> Most insights presented in this paragraph are based on Criteo, 2021, *State of Digital Advertising 2021: i budget e le priorità del marketing in un mondo nuovo*.

<sup>77</sup> Criteo, 2021, *State of Digital Advertising 2021: i budget e le priorità del marketing in un mondo nuovo*.



thereby, enable engagement on a large scale<sup>78</sup>. These companies may become more dependent than ever on large players like Facebook, Google, and Amazon in order to reach their audience.

Publishers are also looking for new ways to improve and adapt their business models. A study found that around 71% of publishers are seeking to diversify their revenue in the future<sup>79</sup>. As a result, they will become less reliant on advertising revenue. Brazzoni (2020) features three potential strategies for publishers. One approach could be to switch to a subscription model, as this offers an additional source of revenue as well as extensive audience data. Publishers could also consider investing in eCommerce. This could include selling products and services online through, for instance, newsletters and ads. Virtual events could also prove successful<sup>80</sup>.

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<sup>78</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report*; Li, C. & Hall, S., 2020, *This is how COVID-19 is affecting the advertising industry*, World Economic Forum.

<sup>79</sup> Brazzoni, A., 2020, *71% of Publishers Seeking to Diversify Revenue After COVID: Here Are the Models They're Considering*. lineup.

<sup>80</sup> Ibid.

## 2. CHALLENGES AND OPPORTUNITIES CONCERNING DIGITAL ADVERTISING

### 2.1. Practices and their impacts

In this chapter, we discuss how different stakeholders including consumers, SMEs and suppliers of advertising services are affected by trends and practices in the online advertising sector. In this context, we identify, with reference to relevant literature and recent competition and consumer protection cases, current issues and practices that are prevalent in the online advertising landscape, distinguishing between practices affecting consumers, purchasers and suppliers of online advertising.

#### 2.1.1. Practices affecting consumers and SMEs as consumers/viewers of advertisement

Online Behavioural Advertising enables the delivery of messages tailored to the interests of individual consumers. As such, it typically provides more useful and relevant information, and prevents consumers from being presented with random ads<sup>81</sup>. This is considered to be one of the main benefits of behavioural advertising for consumers<sup>82</sup>. However, the application of behavioural advertisement typically requires the extensive use of user data, which raises significant privacy concerns. Research shows that consumers' awareness and understanding of how personal behaviour is tracked online is limited. A study for the European Commission which examined consumers' awareness and perception of online personalisation practices showed that around two-third of surveyed participants reported that they have some understanding of how personalisation practices work. However, the results gathered by a complementary behavioural experiment showed that the proportion of respondents who correctly identified targeted adverts or personalised rankings was considerably lower<sup>83</sup>. Another study by Dehling et al. (2019) used semi-structured interviews to examine consumer awareness and perceptions of online behavioural advertising<sup>84</sup>. They document large differences in knowledge about online advertising among consumers. Whereas some interviewees called online behavioural advertising a magic trick of the Internet, others were able to identify an existing connection between different websites or to differentiate between different targeting techniques. While there may be some awareness of personalisation practices, consumers are largely unaware of the volume and granularity of the data that is being collected and used to deliver personalised advertisements. In this regard, *Which?* (2019) found that consumers in general perceive data collection as a series of single bounded transactions, where individual pieces of data are "given" to an organisation in exchange for a specific service<sup>85</sup>. Furthermore, new techniques and technologies are constantly being applied to track behaviour that ordinary consumers are not aware of, making tracking more difficult to block<sup>86</sup>. As such, Kingaby (2020) notes that consumers have little agency within the current online ecosystem and have limited ways to stop or control data exploitation<sup>87</sup>. When consumers are asked directly how they assess

<sup>81</sup> Ham, C., 2017, 'Exploring how consumers cope with online behavioral advertising', *International Journal of Advertising*, 36 (4):632-658.

<sup>82</sup> Strycharz, J.; van Noort, G.; Smit, E. & Helberger, N., 2019, *Consumer View on Personalized Advertising: Overview of Self-Reported Benefits and Concerns*, In: *Advances in Advertising Research X: Multiple Touchpoints in Brand Communication*, edited by E. Bigne & S. Rosengren, 53-66. Wiesbaden: Springer Fachmedien Wiesbaden.

<sup>83</sup> Ipsos, London Economics & Deloitte, 2018, *Consumer market study on online market segmentation through personalised pricing/offers in the European Union – Request for Specific Services 2016 85 02 for the implementation of Framework Contract EAHC/2013/CP/04*. Study prepared for the European Commission.

<sup>84</sup> Dehling, T., Zhang, Y. & Sunyaev, A., 2019, 'Consumer Perceptions of Online Behavioral Advertising', *Proceedings of the 21st IEEE Conference on Business Informatics*.

<sup>85</sup> Which?, 2019, *Control, Alt or Delete? The future of consumer data*.

<sup>86</sup> Ham, C., 2017, 'Exploring how consumers cope with online behavioral advertising', *International Journal of Advertising*, 36 (4):632-658.

<sup>87</sup> Kingaby, H., 2020, *AI and Advertising: A Consumer Perspective*.

behavioural advertising, they recognise the benefits of more relevant ads, but the concerns about privacy and data protection seem to outweigh these advantages. In interviews, terms like manipulative, creepy, intrusive and privacy-invasive are often provided as answers in relation to such marketing techniques<sup>88</sup>. Some even wish not to be targeted at all<sup>89</sup>. However, a recent study by IAB Europe (2021) revealed that most consumers, faced with a choice between a version of the Internet without targeted advertising but with a financial fee for most content, and today's Internet with mostly free content and targeted advertising, would choose the latter<sup>90</sup>.

Protecting user's privacy often implies restricting the potential for behavioural targeting methods. Examples include technical solutions such as those employed by alternative web-browsers based on the Tor routing network<sup>91</sup> or disabling the use of cookies<sup>92</sup>. These possibilities indeed prevent the tracking of users. However, they also prevent any (potentially desired) personalisation based on a derived user profile<sup>93</sup>. Thus, current research has focused on investigating options for a middle ground which offers privacy enhancement compared to the status-quo while also allowing for some kind of imperfect user profiling on the other. One potential solution is so-called private ad ecosystems. These methods employ locally derived user profiles in that they download a wide range of advertisements from an ad-network and store them on an individual user's device<sup>94</sup>. These pre-loaded advertisements are not based on any available user data but rely on random samples drawn from the available advertisements distributed by an ad-network. If a user visits a website that includes advertisements, the targeting method then chooses the most suitable candidate among the pre-loaded ads. In this case, the final display of advertising is only based on the locally derived user profile (and pre-loaded ads) on the end-user device and does not reflect all the available data or the entire user profile. However, an advantage of conducting targeting entirely on the user's device is that it does not require personal data to leave the closed system.

Another privacy enhancing remedy that limits behavioural targeting to some degree but does not prevent the formation of a user profile in general, is the anonymisation of quasi-identifying variables (QIDs). These data variables include information on a user's gender, zip-code or IP-address which can be later used to uniquely identify individuals. If these variables are not gathered at all or are at least aggregated to a higher hierarchical level (e.g., GPS location into a postal code), behavioural targeting based on interests or shopping patterns will remain feasible while an individual user's privacy is simultaneously preserved<sup>95</sup>.

<sup>88</sup> Moore, R., Moore, M., Shanahan, K, Horky, A. & B. Mack, 2015, 'Creepy Marketing: Three Dimensions of Perceived Excessive Online Privacy Violation', *Marketing Management Journal*, 25:42-53.; Strycharz, J., van Noort, G., Smit, E. & Helberger, N., 2019, *Consumer View on Personalized Advertising: Overview of Self-Reported Benefits and Concerns*, In: *Advances in Advertising Research X: Multiple Touchpoints in Brand Communication*, edited by E. Bigne & S. Rosengren, 53-66. Wiesbaden: Springer Fachmedien Wiesbaden.

<sup>89</sup> Turow, J., King, J., Hoofnagle, C., Bleakley, A., & M. Hennessy, 2009, 'Americans Reject Tailored Advertising and Three Activities That Enable It', *SSRN Electronic Journal*; Global Witness, 2021, *Do people really want personalised ads online?*.

<sup>90</sup> IAB Europe, 2021, *What would an Internet without targeted ads look like?*

<sup>91</sup> Dingledine, R., Mathewson, N., & Syverson, P., 2004, 'Tor: The Second-Generation Onion Router', *Proceedings of the 13th USENIX Security Symposium*.

<sup>92</sup> Aggarwal, G., Bursztein, E., Jackson, C., & Boneh, D., 2010, 'An Analysis of Private Browsing Modes in Modern Browsers', *Proceedings of 19th USENIX Security Symposium* (p. 79-93).

<sup>93</sup> Ullah, I., Boreli, R., & Kanhere, S. S., 2020, *Privacy in targeted advertising: A survey*, arXiv preprint arXiv:2009.06861.

<sup>94</sup> Toubiana, V., Narayanan, A., Boneh, D., Nissenbaum, H., & Barocas, S., 2010, 'Adnostic: Privacy preserving targeted advertising', *Proceedings Network and Distributed System Symposium*; Guha, S., Cheng, B., & Francis, P., 2011, 'Privad: Practical privacy in online advertising', *Proceedings of the 8th USENIX Conference on Networked Systems Design and Implementation* (pp. 169-182).

<sup>95</sup> Ullah, I., Boreli, R., & Kanhere, S. S., 2020, *Privacy in targeted advertising: A survey*, arXiv preprint arXiv:2009.06861.

Box 1: Behavioural targeting and privacy concerns

- Behavioural advertising provides more useful and relevant information for consumers and more locally targeted information, thereby improving user experience.
- The higher relevance of behaviourally targeted ads is realised by gathering and analysing personal user data. This data is regularly shared across various players, often without the users' knowledge resulting in significant privacy concerns.
- The extent to which visible ads are delivered based on behavioural targeting methods is widely underestimated and cannot be easily assessed by consumers.
- Technical remedies that protect privacy while providing sufficient potential for behavioural targeting methods are available (e.g., private ad ecosystems, anonymisation of QIDs)

*Perceived benefits of more relevant ads due to behavioural advertising:*



*Perceived costs due to consumers' privacy infringement:*



Source: Authors' own elaboration.

In addition to not understanding how and who collects data about them, consumers may also not recognise when they are being targeted by advertising. For instance, the use of paid personalised rankings could be viewed as a form of nudging to encourage consumers to view and purchase certain offers, which can be especially misleading when platforms present themselves as providing a “neutral” comparison service. Such practices subtly divert consumer attention, thereby negatively impacting consumer choice.

Another case where invisible targeting may limit choice relates to location-based targeting. Location-based targeting can help companies with a more limited geographic footprint to advertise more efficiently and effectively. However, location-based advertising also enables companies to restrict their advertising of services or products, discounts and promotions so that they only reach a certain group of consumers, while others would not even be aware of these offers. Depending on the extent of the application of geo-tracking, it could be a barrier to the EU Single Market. Recent examples from a closely related context are the geo-blocking efforts of some providers. They avoid actively advertising certain products or services outside a predefined geographical area. Duch-Brown and Martens (2016) examined the welfare effects of removing geo-blocking restrictions on cross-border eCommerce based on a dataset of consumer electronics across several European countries for the period 2012-2015<sup>96</sup>. Reviewing different scenarios, the authors conclude that lifting geo-blocking restrictions would be positive and would benefit both consumers and producers. Another more recent study by Procee et al. (2020) assessed the impact of the extension of the scope of the Geo-blocking Regulation with regard to audio-visual and non-audio-visual services, which are currently excluded<sup>97</sup>. The authors considered different industries, and found, at least in some cases, that the removal of geo-blocking could have positive welfare effects.

<sup>96</sup> Duch-Brown, N. & B. Martens, 2016, *The Economic Impact of Removing Geo-blocking Restrictions in the EU Digital Single Market*. Institute for Prospective Technological Studies Digital Economy Working Paper 2016/02. JRC Technical Reports.

<sup>97</sup> Procee, R., Arnold, R., Marcus, J. S., Fina, D., Lennartz, J., Kazakova, S. & E. Lykogianni, 2020, *Study on the impacts of the extension of the scope of the Geoblocking Regulation to audiovisual and non-audiovisual services giving access to copyright protected content – Final Report*. Study for the European Commission.

Furthermore, there has been a lively debate on whether IP addresses and geolocation information should be categorised as personal data<sup>98</sup>. According to Article 4 of the GDPR (Regulation (EU) 2016/679) personal data “means any information relating to an identified or identifiable natural person [...]”; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier [...]”. Recital 30 of the GDPR even explicitly mentions IP addresses as personal data in certain cases. These cases occur when the IP address in combination with other information can serve to identify a person<sup>99</sup>.

Box 2: Obfuscation and location based targeting of advertisements reduce consumer choice

- Advertisements are regularly concealed by presenting them as seemingly neutral product review product comparison sites. These sites effectively narrow consumers’ set of options.
- Location based targeting enables advertisers to display more relevant products or services to consumers in their proximity. However, consumers may be excluded from offers which are made available in other jurisdictions (a form of geo-targeting).

*Perceived benefits of more relevant ads due to location targeting:*



*Perceived costs due to reduced consumer choice due to obfuscation and location targeting:*



Source: Authors’ own elaboration.

In addition to concerns around privacy and restrictions on choice, online advertising can also raise concerns around the exploitation of consumers’ behavioural biases. By targeting behavioural biases, consumers can be subconsciously influenced in the decision-making process. Major biases that impact consumers’ decisions in an online context are: inclination to stick with the default settings (status-quo bias), tendency to focus on short-term implications of decisions by disregarding the long-term implications (present bias or myopia). There are numerous design elements available that can serve to nudge consumers towards behaviours that advantage advertisers, ad intermediaries or other data collection organisations rather themselves<sup>100</sup>. These design practices are also called dark patterns<sup>101</sup>. The objective of dark patterns is to confuse users, make it difficult to express actual preferences or manipulate users into taking certain actions that are not always in their best interest<sup>102</sup>. Different from traditional marketing efforts, which are designed to alter consumer preferences, dark patterns attempt to manipulate consumers into doing something that is inconsistent with their true preferences<sup>103</sup>. The use of dark patterns has been documented by academic research in the fields of social networks, especially in the form of log-ins and consents to data sharing between services<sup>104</sup>.

<sup>98</sup> Clifford, D., 2014, ‘EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour’, *JIPITEC* 194, para 1.

<sup>99</sup> GDPR.EU, 2021, The EU’s GDPR only applies to personal data, which is any piece of information that relates to an identifiable person. It’s crucial for any business with EU consumers to understand this concept for GDPR compliance; Munz, M. and Hickman, T., 2016, *Court confirms that IP addresses are personal data in some cases*. White & Case Technology Newsflash.

<sup>100</sup> CMA, 2020, Online platforms and digital advertising: Market study final report.

<sup>101</sup> See further Brignull, H., 2021, *What are dark patterns*.

<sup>102</sup> Luguri, J. and Strahilevitz, L. J., 2019, *Shining a Light on Dark Patterns*, University of Chicago, Public Law Working Paper. No. 719.

<sup>103</sup> Ibid.

<sup>104</sup> Bösch, Ch., Erb, B., Kargl, F., Kopp, H. & S. Pfattheicher, 2016, ‘Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns’, *Proceedings on Privacy Enhancing Technologies*. 2016 (4): 237–254.

In 2018, the Norwegian Consumer Council (Forbrukerrådet) conducted a study on the prevalence of dark pattern techniques in services of Facebook, Google and Windows 10<sup>105</sup>. They found that privacy intrusive default options increase the effort for consumers to opt-out of the gathering of their user data (e.g., cookie consent screens). Additionally, they found that providers of online advertising presented consent to targeted advertising as exclusively beneficial while also suggesting that consumers would experience a loss of functionality if they decline to give consent. In addition, dark patterns, if recognised, generated backlash and negative feelings among users/consumers<sup>106</sup>. They are also particularly problematic for minors, who use the same interfaces as adults but do not necessarily have the same cognitive abilities to recognise persuasive design techniques.

Box 3: Advertisement designs can exploit consumers' behavioural biases and include dark pattern elements

- Design features within advertisements may aim to exploit consumers' behavioural biases.
- The design elements of interfaces or targeting practices can "nudge" consumers towards certain choices which are contrary to their best interests and preferences. These so-called "dark patterns" are especially prominent in consent forms concerning permissions relating to the provision of personal data.

*Perceived benefits of advertising design/dark patterns that exploit behavioural biases:*

**None**

*Perceived costs of advertising designs/dark patterns that exploit behavioural biases:*



Source: Authors' own elaboration.

The allocation of advertising space is dependent on the design of the Real-Time-Bidding (RTB) processes employed by large intermediary ad-networks. These procedures take large amounts of consumer data into account to identify and segment the consumer base into very precise groups, which results in ads being shown to some consumers and not to others. Thus, RTB designs could result in unintentional, yet structural discrimination. Privacy International argues that RTB enables companies to reach out to vulnerable consumers in ways that are difficult to audit<sup>107</sup>. When combined with techniques to exploit behavioural biases, this could contribute to exacerbating bad habits or emotional weaknesses. For instance, based on past behaviour someone might be shown fast-food ads which may be counterproductive when trying to overcome a poor diet. Adults with earlier gambling problems may be shown gambling ads based on their past online behaviour, making it more difficult to overcome addiction<sup>108</sup>. Moreover, data that predicts when consumers are in particular emotional states is already in use and can be used to target consumers when they are particularly vulnerable or otherwise receptive to certain messages. Research has also shown that social media can influence the mood of its users. In a controversial study, Facebook tweaked the newsfeed of hundreds of thousands of users, skewing the feed to more positive or negative content in an attempt to manipulate their mood. It was found that this technique does have an influence on users<sup>109</sup>.

<sup>105</sup> Forbrukerrådet, 2018, Deceived by Design - How tech companies use dark patterns to discourage us from exercising our rights to privacy.

<sup>106</sup> Luguri, J. and Strahilevitz, L. J., 2019, *Shining a Light on Dark Patterns*, University of Chicago, Public Law Working Paper. No. 719, 2019.

<sup>107</sup> Privacy International, 2019, Why am I really seeing that ad? The answer might be Real Time Bidding (RTB).

<sup>108</sup> Kingaby, H., 2020, AI and Advertising: A Consumer Perspective.

<sup>109</sup> Sullivan, G., 2014, *Cornell ethics board did not pre-approve Facebook mood manipulation study*, Washington Post.

However, the very same data-driven targeting methods can also be put to good use as vulnerable groups can be identified and avoided by specific advertised content. In an interview conducted for this study it was highlighted that these methods are already used to protect consumers, e.g., minors are reliably identified and as a result see less advertisements for alcoholic beverages<sup>110</sup>. Hence, while the amount of data that feeds into behavioural targeting methods bears risks for vulnerable consumers, it can be also used to protect them.

Moreover, due to the large amounts of personal data that is transferred between different actors, there is little control about how the data is shared or whether it is used against consumers in contexts other than advertising. In this vein, EDRI argues that RTB poses challenges to the rights recognised in the GDPR<sup>111</sup>. Similarly, the UK’s Information Commissioner’s Office published a report highlighting the risks with RTB including profiling, combining and matching data from multiple sources, tracking of behaviour and geolocation as well as invisible processing<sup>112</sup>. This is one of the most pertinent challenges as regards online advertising.

Box 4: Potential for discrimination and harmful targeting of vulnerable consumers through Real-Time-Bidding (RTB)

- The data-driven ad distribution through RTB processes could result in structural discrimination or harmful targeting of vulnerable consumers.
- Past browsing behaviour that indicates e.g. bad eating habits or a potential addiction to drinking or gambling, could induce increased exposure to advertisement in these fields. This could pose a serious risk to consumers’ wellbeing.
- The data-driven identification of consumer groups can, however, also be beneficial for vulnerable consumers since the advertisements can be specifically filtered for them (e.g., no advertisements for alcoholic beverages to minors).

*Perceived benefits of more relevant and secure ads for vulnerable consumers:*



*Perceived costs of discrimination and harmful advertising for vulnerable consumers:*



Source: Authors’ own elaboration.

Alongside the potential for nudging and malicious targeting, concerns may also arise around ‘malvertising’ which refers to online ads that spread malware, or illegitimately collect personal data about the consumers’ activities online. If a consumer clicks on an advertisement that has been distributed by a hacker or other cybercriminal, the user is usually transferred to a landing page which automatically downloads a malicious executable or binary file<sup>113</sup>. The increasingly automated distribution of ads plays into hackers’ hands since they only have to submit their malicious ads to a regular ad-network to spread it to an entire ecosystem<sup>114</sup>.

<sup>110</sup> WFA, 2020, Alcohol marketers seek to prevent minors from seeing alcohol ads.

<sup>111</sup> EDRI, 2019, Real Time Bidding: The auction for your attention.

<sup>112</sup> ICO, *Our work on adtech*.

<sup>113</sup> Cai, Y., Yee, G. O., Gu, Y. X., & Lung, C. H., 2020, ‘Threats to online advertising and countermeasures: A technical survey’, *Digital Threats: Research and Practice*, 1, 2, Article 11.

<sup>114</sup> Zarras, A., Kapravelos, A., Stringhini, G., Holz, T., Kruegel, C., & Vigna, G., 2014, ‘The dark alleys of madison avenue: Understanding malicious advertisements’, *Proceedings of the 2014 Conference on Internet Measurement Conference* (pp. 373-380).

Recent malware that was widely spread through malvertising are for instance AdGholas<sup>115</sup> and Ramnit<sup>116</sup> which infested thousands of computers of consumers and SMEs. Although ad-network and ad-exchanges have an incentive to tackle their security issues and have done so already in the past, attackers still have many options to bypass them<sup>117</sup>. Hence, end users such as consumers and SMEs alike must keep their system's anti-virus protection up to date to reduce their risk of exploitation.

Similar issues persist with email advertising, which is still a common marketing channel<sup>118</sup>. Phishing and spam emails continue to present a challenge as roughly 50% of worldwide email traffic in Q2 2020 was spam<sup>119</sup>. The prevalence of spam promotes the spreading of malicious software that harms consumers and ransomware that is targeted at SMEs. With both legitimate advertising and spam becoming more personalised and targeted, some users struggle to correctly identify spam and fraudulent messages<sup>120</sup>. Spear-phishing is a form of spam that targets carefully selected user groups in order to gain access to important information. For this purpose, email messages are usually more personalised<sup>121</sup>. Bullee et al. (2017) conducted an experiment among several hundred employees. The authors sent out two types of phishing emails – general phishing emails and personalised spear-phishing emails – and requested the provision of personally identifiable information (PII). While 19% of the employees provided personal information after receiving a general phishing email, 29 % shared information in the spear phishing condition. One can assume that less technologically savvy users, like elderly and people with language difficulties might be more vulnerable to such practices. Research also indicates that internet users with lower educational attainment are less likely to be able to spot more sophisticated practices than their well-educated counterparts.

More generally, online practices that involve misleading or harmful content can be considered problematic from the perspective that they contribute to undermining consumer trust in digital markets. Trust is a necessary precondition for well-functioning markets. However, as harmful practices continue to evolve, they may work to impede some of the growth potential of the digital economy. In this vein, tackling unfair and problematic online practices has become a focal point in the new EU Consumer Agenda<sup>122</sup>.

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<sup>115</sup> Constantin, L., 2016, The AdGholas malvertising campaign infected thousands of computers per day.

<sup>116</sup> Segura, J, 2017, Canada and the U.K. hit by Ramnit Trojan in new malvertising campaign.

<sup>117</sup> Cai, Y., Yee, G. O., Gu, Y. X., & Lung, C. H., 2020, 'Threats to online advertising and countermeasures: A technical survey', *Digital Threats: Research and Practice*, 1, 2, Article 11.

<sup>118</sup> Statista, 2020, *Digital Advertising Report 2020*, p. 29; Econsultancy, & Upland Adestra, 2019, *2019 Email Marketing Industry Census*, p. 23.

<sup>119</sup> Kaspersky, 2020, Spam and Phishing in Q2 2020.

<sup>120</sup> For example, online and email spam attempts try to appear credible through stating location, IP or browser information.

<sup>121</sup> Truyens, M., Van Eecke, P., 2009, EU study on the legal analysis of a single market for the information society, European Commission.

<sup>122</sup> European Commission, 2020, Communication from the Commission to the European Parliament and the Council, *New Consumer Agenda Strengthening consumer resilience for sustainable recovery*.



Box 5: The prevalence gives rise to threats to cybersecurity in the form of malvertising and spear-phishing

- Widespread online advertising and the increased level of personalisation of email messages makes it difficult for users to detect malvertising and phishing or spam emails.
- The automated distribution of ads through ad-networks/ad-exchanges enables malware to be widely distributed.
- Less technologically savvy people are expected to have their personal or their employers' systems compromised. This can cause significant damage to consumers, companies and reduce trust in legitimate marketing services.

*Perceived benefits of prevalence advertisements and automated widespread distribution of ads:*



*Perceived costs due to subtle distribution of malvertising and resulting damages to consumers and companies:*



Source: Authors' own elaboration.

### 2.1.2. Practices affecting purchasers of advertising including SMEs

Behavioural advertising in general offers new opportunities for advertisers, especially for the implementation of marketing campaigns. According to the Australian Competition and Consumer Commission (ACCC) (2019) "digital platforms have provided a new advertising avenue for small to medium sized businesses that may not have been able to afford advertising on the high-reach of traditional newspapers or commercial television and radio networks. For some small to medium businesses, online advertising has become a significant part of their business models, and many have become successful through an online only focused strategy, building a brand and community of customers entirely through social media"<sup>123</sup>. An advantage for SMEs is that online advertising is usually cheaper than placing traditional/offline ads. According to Top Draw Inc. (2020), "[t]he average cost to reach 1,000 people with online advertising [r]anges from \$3-\$10, while the average cost to reach 1,000 people with traditional/offline advertising is \$22 and up"<sup>124</sup>.

However, online advertising markets are increasingly concentrated amongst a few key players. Google and Facebook dominate the two most commercially important markets, namely the search and the display advertising market, and generate the greatest shares of revenue in the entire advertising sector<sup>125</sup>.

<sup>123</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*.

<sup>124</sup> Top Draw Inc., 2020, *Online Advertising Costs in 2021*.

<sup>125</sup> Datanyze, 2020, *Advertising Networks*; Statista, 2020, *Digital Advertising report 2020*; Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.

The competitive advantage of these companies stems primarily from the following factors: reach<sup>126</sup>, large scale of advertising inventories<sup>127</sup> and vertical integration<sup>128</sup>. Each of these aspects can be positive for advertisers in their own right, as they can enable both strong targeting and the ability to reach a large number of people. In addition, integration can lead to efficiency gains. However, the quasi-duopoly situation raises serious competition concerns, which have been addressed by a number of competition authorities in recent reports<sup>129</sup>.

CMA's market study (2020) on digital advertising devoted some sections to Google's and Facebook's abilities and incentives to exploit market power. Google and Facebook are, in theory, able to manipulate market outcomes such as the price for advertising, even within an auction framework, by determining the quantity and presentation of ads, by controlling the trade-off between price and quality of adverts or certain auction parameters. All this can affect advertisers, for example, in the form of higher costs or lower returns on investment. CMA (2020) noted that several advertisers reported changes in Google's policies on ad load and the presentation of search advertising, which "had the effect of increasing the propensity for users to click on ads rather than organic links"<sup>130</sup>. As a result, businesses that rely primarily on general search may have to bear higher costs for advertising, for example by paying (more) for ads, to maintain the same amount of traffic. Changes in ad-load and presentation of ads are also observable for Facebook<sup>131</sup>. Such practices can also harm consumers by directly affecting the user experience of the platforms. Consumers can receive a poor quality of service, seeing too much advertising or having to disclose too much personal data. In addition, consumer harm can arise indirectly. If businesses have to bear higher costs, these costs will presumably be passed on to consumers, who would have to pay higher prices for goods and services<sup>132</sup>.

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<sup>126</sup> Both Google and Facebook operate services that are popular among a vast majority of Internet users and have high audience numbers. This enables these companies to collect constantly updated, very large and diversified volumes of data. Large data sets combined with great data mining capabilities result in Facebook and Google having great targeting abilities. (Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.)

<sup>127</sup> Both Google and Facebook companies are able to sell ad space of their own services but also advertising inventories of many third-party websites. (Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.)

<sup>128</sup> Facebook and Google are vertically integrated along the advertising value chain. (Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.)

<sup>129</sup> Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*; Bundeskartellamt, 2018, *Online advertising*. Series of papers on "Competition and Consumer Protection in the Digital Economy"; ACCC, 2019, *Digital Platforms Inquiry: Final Report*; CMA, 2020, *Online platforms and digital advertising: Market study final report*.

<sup>130</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report*, p. 237.

<sup>131</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report*.

<sup>132</sup> Ibid.

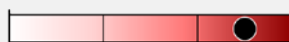
Box 6: Factors that constitute large advertising providers can both harm and benefit advertisers

- Major providers like Facebook and Google benefit from great reach, large scale of advertising inventory and from being vertically integrated. These aspects provide an opportunity for advertisers to advertise more efficiently and effectively and reach a large audience. Small business that operate on a limited budget and might not be able to diversify their advertising effort across different advertising service providers may particularly benefit from the service provided by large players.
- The very same factors may enable those players to manipulate market outcomes, thereby harming advertisers, publishers, and consumers.

*Perceived benefits of greater targeting power and reach as well as efficiency gains:*



*Perceived costs due to exploitation of market power:*



Source: Authors' own elaboration.

Furthermore, the design of advertising auctions itself as well as the entire structure of the advertising value chain has the potential to disadvantage advertisers and publishers. Two of the main problems are lack of transparency and hidden fees. Both ACCC (2019) and CMA (2020) refer explicitly to these issues<sup>133</sup>. In digital behavioral advertising, advertising slots are usually allocated within milliseconds with the help of sophisticated auction systems and algorithms. The functioning of the algorithms in particular remains poorly understood by outsiders. As a result, most advertisers and publishers simply accept the results of the auctions. As noted by the ACCC (2019) "it is often difficult for advertisers and websites to understand how ad tech platforms determine what advertising inventory to buy or sell, how winners in auctions are determined, or how advertising bid requests are passed along the ad tech supply chain"<sup>134</sup>. In some processes, the success of an auction is also determined by various scores that might be beyond the strategic control of the individual market participant. Success in an auction depends on the automatically calculated quality of the ad, quality of the website and the demand for specific keywords or the value of specific target groups. The method of calculating these scores is often a "black-box" for bidders. Although less transparency means that market participants cannot outplay the algorithm, this also makes it very difficult for them to observe whether they are making the right decisions and investments or being exploited<sup>135</sup>. The value chain itself is also a factor in the lack of transparency. We have already described the multitude of players operating along the value chain and their functions in value creation in Chapter 1. Advertisers and publishers are often unable to monitor who is involved and what the intermediaries are doing. This also applies to the so-called "ad tech" fees, which are fees charged by various intermediaries along the advertising value chain<sup>136</sup>. Market participants are kept in the dark when it comes to the calculation of these fees. The lack of transparency leads to businesses making uniformed decisions or being lured into certain actions that can be

<sup>133</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*; CMA, 2020, *Online platforms and digital advertising: Market study final report*.

<sup>134</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*, p. 151.

<sup>135</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report*.

<sup>136</sup> Geradin, D. and D. Katsifis, 2019, 'An EU competition law analysis of online display advertising in the programmatic age', *European Competition Journal*, 15 (1):55-96.

harmful<sup>137</sup>. Morton & Dinielli (2020) argue further that additional costs which advertisers might face could result in companies investing less in brands and products.

After all, if companies expect a lower return on a particular innovation or investment because reaching consumers is more expensive, they are less likely to invest and innovate in the first place<sup>138</sup>.

These problems are highlighted in a paper published by the World Federation of Advertisers (WFA) in April<sup>139</sup>. According to a survey, 65% of global advertisers stated that they had “difficulties accessing data related to the way actions are carried out and prices determined on large online advertising platforms”<sup>140</sup>. Such information is rarely shared. According to WFA, advertisers also have difficulties accessing ad performance data. Access to raw data on impression, viewability, reach, conversion, engagement is rare to non-existent. The possibility of having data validated by independent auditors is also usually restricted.

Less transparency can also be a loophole for fraud. Fraud in digital advertising or ad fraud refers to any practice that involves manipulating views, clicks, pages and other metrics for the purpose of deception. These conducts aim to increase the costs for companies buying advertising space without them getting any real value in return<sup>141</sup>. This direct harm to advertising companies is difficult to quantify but some estimate the annual losses/damage from ad fraud to be in the billions<sup>142</sup>. Ad fraud is a major potential threat to the whole advertising ecosystem<sup>143</sup>. SMEs, often on a tight marketing budget, may be hit particularly hard by these practices. Aside from direct monetary self-interests, ad fraud has also been reported to be used in an anti-competitive way<sup>144</sup>. Fake clicks on competitors’ ads not only waste their overall marketing budget, but can also impact their daily ad auction budgets, thereby capping the competitor’s potential market reach and brand awareness. Thus, small businesses and large companies alike are struggling with ad fraud and some high-profile examples like Uber and P&G have drastically cut their online advertising budgets in response<sup>145</sup>.

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<sup>137</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*.

<sup>138</sup> Morton, F. M. S., & Dinielli, D. C., 2020, *Roadmap for Digital Advertising Monopolization Case Against Google*. Omidyar Network.

<sup>139</sup> WFA, 2021, *WFA global position on advertiser access to data in the digital advertising market*.

<sup>140</sup> WFA, 2021, *WFA global position on advertiser access to data in the digital advertising market*, p 5.

<sup>141</sup> Zhu, X., Tao, H., Wu, Z., Cao, J., Kalish, K. & J. Kayne, 2017, *Ad Fraud Taxonomy and Prevention Mechanisms*, in: *Fraud Prevention in Online Digital Advertising*, SpringerBriefs in Computer Science 19-23.

<sup>142</sup> Juniper Research, 2017, *Ad Fraud to Cost Advertisers \$19 billion in 2018, Representing 9% of Total Digital Advertising Spend*; WFA, 2016, *WFA issues first advice for combatting ad fraud*.

<sup>143</sup> Cf. Haider et al., 2018, ‘An ensemble learning based approach for impression fraud detection in mobile advertising’, *Journal of Network and Computer Applications*, 112, 126-141.

<sup>144</sup> Cf. Gordon et al., 2020, ‘Inefficiencies in Digital Advertising Markets’, *Journal of Marketing*, 85(1), 7-25.

<sup>145</sup> Fou, A., 2020, *Out Of The Darkness (Of Ad Fraud) And Into The Light*. Forbes.

Box 7: Lack of transparency may lead to increased costs and fraud

- Online advertising auctions are highly opaque. Although less transparency means that market participants cannot outplay the algorithm, this also makes it very difficult for them to observe whether they are being exploited.
- Lack of transparency can lead to exploitation of market participants and fraud, raising costs for purchasers of advertising

*Perceived benefits of lack of transparency:*

**None**

*Perceived costs due to lack of transparency, potential exploitation and fraud :*



Source: Authors' own elaboration.

### 2.1.3. Practices affecting suppliers of digital advertising services (publishers and smaller SMEs functioning as Ad-Networks)

Although a large number of companies are active in the online advertising industry, Facebook and Google account for most of the market share. These two companies have a significant market share in both the display and search advertising markets. For instance, Google's share in video- and search advertising market is close to 80%, respectively<sup>146</sup>. The company has a particular advantage in these two segments due to their vertical integration; they operate their own consumer-centric platforms, which allow them to provide their own inventory and collect rich data on their users, as well as selling advertising services. Google operates as a DSP and SSP, as well as being engaged in ad networks/ad exchanges<sup>147</sup>. Although Google's but also Facebook's market position have remained stable over the past few years, Amazon in particular seems to be gaining some momentum recently, mainly by providing advertising on their own website, thereby benefiting from vertical integration as well<sup>148</sup>. Small suppliers of digital advertising services which are not vertically integrated may be at a disadvantage compared with larger players due to the current market conditions and the high barriers for entry and expansion. The dependence on behavioural data is one of the main barriers for smaller competing advertising networks. Larger platforms benefit from extensive volumes of data, which they can gather in the context of their proprietary user-facing services and from third parties using their advertising and data analytics services and tools<sup>149</sup>. This superior access to a combination of first- and third-party data attracts advertisers. Although large advertisers tend to use more than one supplier of digital advertising services to reach consumers, smaller advertisers are more likely to use just one.

<sup>146</sup> Sunderland, J., Herrera, F., Esteves, S., Godlovitch, I., Wiewiorra, L., Taş, S., Kroon, P., Stronzik, M., Baischew, D., Nett, L., Tenbrock, S., Strube Martins, S., de Stree, A., Kalliala, J., Huerta Bravo, J., Maxwell, W., & Renda, A., 2021, *Digital Markets Act: Impact assessment support study: annexes*.

<sup>147</sup> Statista, 2020, *Digital Advertising Report 2020*. Some sources covering the market for ad exchanges/ad networks indicate Google as the clear market leader. According to these sources, Google has the largest market share, followed by other companies such as AppNexus, OpenX and Amazon, which have less than 10% market share. European companies operating in these markets are: Axonix, Netric, and PubNativ. W3Tech, 2021, *Market share yearly trends for advertising networks*; Datanyze, 2021, *Market Share Category – Ad Exchanges Market Share*.

<sup>148</sup> Sunderland, J., Herrera, F., Esteves, S., Godlovitch, I., Wiewiorra, L., Taş, S., Kroon, P., Stronzik, M., Baischew, D., Nett, L., Tenbrock, S., Strube Martins, S., de Stree, A., Kalliala, J., Huerta Bravo, J., Maxwell, W., & Renda, A., 2021, *Digital Markets Act: Impact assessment support study: annexes*.

<sup>149</sup> Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.

As Google and Facebook have the ability to reach a wide audience, smaller advertisers usually opt for these providers<sup>150</sup>.

In this context, bundling or tied sales can have negative consequences for small suppliers of digital advertising services<sup>151</sup>. Concerns in this regard have been raised with the competition authority in France. Stakeholders noted that some companies only provide access to targeting data if it is purchased together with their advertising solutions and services. In addition, suppliers may prohibit purchasers of the data from using it on competitors' advertising services<sup>152</sup>. Even if the option were to exist theoretically, it would likely be very cumbersome to realise. Srinivasan (2020) attributes this to the fact that buying tools employ different user IDs<sup>153</sup>. Therefore, "[a]n advertiser that uses Google's DoubleClick ad server [...] has a harder time using a non-Google buying tool because the two tools operate on different user IDs"<sup>154</sup>. According to Srinivasan (2020), even Google itself uses different IDs for the same user when sharing data with various companies using different IDs, which makes it difficult or impossible for companies to compile records. This practice provides Google with an informational and thus a competitive advantage<sup>155</sup>.

The information disparity between Google and its rivals may widen in the future. In 2020, Google announced that it would withdraw from allowing third-party cookies altogether by 2022. Other browsers like Mozilla's Firefox and Apple's Safari browsers already block third-party cookies by default<sup>156</sup>. These are also likely to be blocked on Google's Chrome, one of the most used browser worldwide, in the future as well<sup>157</sup>. As far as users' privacy is concerned, this development may certainly be welcomed. However it should be noted that, Google recently acknowledged that the current implementation of their Privacy Sandbox technology FLoC "might not be compatible with European privacy law"<sup>158</sup>. Moreover, some experts believe that such a step is likely to harm advertisers, competing exchanges and buying tools more than it will Google<sup>159</sup>. According to Morton & Dinielli (2020) the former will not be able to bid efficiently or deliver payments for effective ads without knowing consumers and how they behave<sup>160</sup>. Publishers' might also lose a substantial share of ad revenue without third-party cookies<sup>161</sup>.

That said, it has become apparent that publishers are taking a proactive approach to the problem and preparing for a future without third-party cookies. A key strategy involves strengthening and improving the collection of first-party data. One popular tool used by individual publishers is the

<sup>150</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report*.

<sup>151</sup> ACCC (2019) identified four different types of bundling and sales practices prevailed in the online advertising market, namely bundling of advertising services, or ad tech services, with a) access to website inventory, b) with access to advertiser demand, c) with data or general bundling of multiple services. Some of these practices are discussed in subsequent paragraphs of this subsection. (ACCC, 2019, *Digital Platforms Inquiry: Final Report*.)

<sup>152</sup> Autorité de la concurrence, 2018, *Sector-specific investigation into online advertising*.

<sup>153</sup> Srinivasan, D., 2020, 'Why Google Dominates Advertising Markets – Competition Policy Should Lean on the Principles of Financial Market Regulation', *Stanford Technology Law Review* 24 (1): 55-175.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> DEUS Marketing GmbH, 2020, *Welche Auswirkungen hat die Abschaffung von Third Party Cookies auf die Werbebranche?*, OnlineMarketing.de

<sup>157</sup> Chrome holds a market share of about 65% on the global browser market. Statcounter.com, 2021, *Browser Market Share Worldwide – Statistic*.

<sup>158</sup> Schiff, A., 2021, *Google Will Not Run FLoC Origin Tests In Europe Due To GDPR Concerns (At Least For Now)*. Adexchanger.

<sup>159</sup> Srinivasan, D., 2020, 'Why Google Dominates Advertising Markets – Competition Policy Should Lean on the Principles of Financial Market Regulation'. *Stanford Technology Law Review* 24 (1): 55-175; Morton, F. M. S., & Dinielli D.C., 2020, *Roadmap for Digital Advertising Monopolization Case Against Google*. Omidyar Network.

<sup>160</sup> F. M. S., & Dinielli D.C., 2020, *Roadmap for Digital Advertising Monopolization Case Against Google*. Omidyar Network.

<sup>161</sup> Rybnik, R., 2020, *How can publishers prepare for the end of the third-party cookies?*; Sluis, S., 2020, *Google Chrome Will Drop Third-Party Cookies In 2 Years*, Adexchanger; Thorpe, E. K., 2020, *RIP third-party cookies: What Google's 'pivot to privacy' means for publishers*.

implementation of registration walls. Publishers benefit from such methods both through a more direct relationship with their audience and the ability to process valuable data themselves<sup>162</sup>. In addition, publishers have been forming new alliances around first-party data and collaborating with each other<sup>163</sup>.

Box 8: Asymmetric access to information and data

- Players like Facebook and Google have a data and information advantage over other players in the market, which naturally makes them more attractive to advertisers. Therefore, certain practices and behaviours, such as tying the sale of data and advertising services or prohibiting/preventing buyers from using data for competitors' advertising services, will weaken the market position of other players (SSPs, DSPs, and ad networks/ad exchanges).
- Prohibiting third-party cookies in Chrome will, at least in the short term, do more harm to other companies in the value chain than to Google and widen the information gap. However, there is potential for the market to develop without relying on third-party cookies.

*Perceived benefits of banning third-party cookies :*



*Perceived costs due to asymmetric access to information and data :*



Source: Authors' own elaboration.

Another kind of bundling and tied sales occurs in relation to Google's approach to YouTube's ad space. According to Morton & Dinielli (2020), YouTube inventory is only available to advertisers via Google's own demand side service. Considering the reach and impact of YouTube ads, advertisers might naturally opt to use Google's services even when they would otherwise choose a competing demand side service. This practice increases entry barriers for new demand side services, as services that are not able to place ads on YouTube would be less useful for advertisers in general. Morton & Dinielli (2020) also provided a real life example of Google's conduct to foreclose rival services from inventory. AppNexus was an expanding service provider signing a major deal with the largest advertising agency worldwide, when Google suddenly cut off AppNexus's ability to place ads on YouTube and other supply that was available through real-time bidding. AppNexus's ad buyers had to set up a contract directly with Google before they were allowed to access Google's inventory again<sup>164</sup>.

<sup>162</sup> Thorpe, E. K., 2020, RIP third-party cookies: What Google's 'pivot to privacy' means for publishers.

<sup>163</sup> Thorpe, E. K., 2020, First-party data has empowered publishers to experiment with personalisation and better advertising.

<sup>164</sup> Kafka, P., 2010, *Google Cuts Off AppNexus, and the Ad Tech World Shudders*. AllThingsD.com; Kincaid, J., 2010, *Google (Temporarily) Blocks AppNexus From Its Ad Exchange*.

Large players, which are mostly vertically integrated, often face accusations of impeding interoperability and self-preferencing. One concern expressed by some stakeholders is that Google could potentially be favouring its own SSP when its DSPs decides where to submit its bids<sup>165</sup>. Another concern relates to SA360<sup>166</sup>. Some stakeholders claimed that Google benefits from greater interoperability between SA360 and Google Search compared to other search engines. According to CMA (2020), Microsoft claimed, among others, that new features from Google Ads are adopted on SA360 much faster than the innovations developed by Bing<sup>167</sup>.


Exclusivity clauses, like agreements requiring third-party websites to source their ads largely or even exclusively from the respective contracting party, can also restrict competition. The inclusion of such clauses in contracts with third party websites was subject to an antitrust proceeding by the European Commission against Google, which was closed in 2019. The European Commission considered Google’s practice to be harmful to competition<sup>168</sup>. Another example that shows that Google takes action that strengthens its competitive position is “Project Bernanke”. According to an article written by Lyons (2021) the company used its ability “to access historical data about bids made through Google Ads, to change bids by its clients and boost the clients’ chances of winning auctions for ad impressions, putting rival ad tools at a disadvantage”<sup>169</sup>.

Box 9: Conducts like exclusive clauses, self-preferencing, bundling and tied sales as well as impediments to interoperability are associated with large players

- Google has been accused of exploiting their market power through various types of practices.
- Several Authorities have taken a closer look at the individual conducts, while some are confirmed, for others it can only be assumed that the companies in question may have incentives to engage in such activities. It is clear, however, that if exercised those conducts would harm competitors and other companies in the value chain.

*Perceived benefits of such practices:*  
**None**

*Perceived costs due to these practices :*



Source: Authors’ own elaboration.

<sup>165</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report. Appendix M: intermediation in open display advertising, p. M108.*

<sup>166</sup> SA360 is a Google-owned search management platform used by agencies and marketers to manage and optimise campaign across multiple search networks and media channels (see CMA, 2020, *Online platforms and digital advertising: Market study final report*; Google, 2021, *Search Ads 360 overview - What’s Search Ads 360*).

<sup>167</sup> CMA, 2020, *Online platforms and digital advertising: Market study final report.*

<sup>168</sup> European Commission, 2019, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising.*

<sup>169</sup> Lyons, K., 2021, *Google reportedly ran secret ‘Project Bernanke’ that boosted its own ad-buying system over competitors.* The information was revealed in unredacted court documents. The Verge.



## 2.2. Steps taken by consumers and commercial providers to address perceived challenges

Consumers who are weary of online advertising and perceive the adverts they see as rather intrusive have the option to improve their browsing experience through the use of **ad-avoidance technologies (AAT)**. Ad-blockers mitigate the nuisance costs from advertisements and promise advertisement-free visits of websites. Approximately 25% of all internet users in the US used such software in 2019<sup>170</sup>. Malloy et al. (2016)<sup>171</sup> analysed a large scale data set consisting of over 2 million users in the US and other key countries that records over a trillion website interactions. They find that ad-block usage amounts to approximately 18% in the US and up to 49% in Germany. They estimate that the effectiveness of ad-blocking software is limited to the extent that they only block roughly half the ads seen by users without ad-blocking software. The consequential losses in monthly ad revenue for the largest 10 scraped publisher websites are estimated to be approximately USD 120,000 to USD 3.9 million<sup>172</sup> (given an assumed average CPM of USD 1)<sup>173</sup>.

However, ad-blocking users might be short-sighted with respect to their own interests. While their behaviour may indeed improve their online browsing experience in the short-run, it might decrease the availability of free, advertising financed content in the long-run. Cutting off the advertising revenue stream constitutes a severe threat to the business models of numerous content providers (publishers) on the Internet. Publishers which employ technologies to exclude ad-blocking users or ask for the AAT to be disabled on their site face commercial challenges as well: 61% of consumers would not return to such a site again and only 38% of polled online users in the US would turn off their ad-blocker if asked to by a website<sup>174</sup>. But, AATs also offer an edge for publisher. Since it is possible to detect whether a visitor uses AAT, it can be interpreted as a signal. Those who use AAT are relatively more sensitive to adverts; while those who do not are not. Aseri et al. (2020)<sup>175</sup> and Despotakis et al. (2020)<sup>176</sup> show that this identification enables publishers to differentiate the advertisement intensity between these different user groups on their site in the form of ad-light website designs and raise aggregate advertising revenues accordingly. Consequently, this also leads to increased ad intensity on websites and online services for non-ad blocking users<sup>177</sup>.

At the same time, developers of ad-blocking tools and privacy enhancing technologies may be doing so to benefit from ad avoidance activities by consumers. So-called **“whitelisting” business models** rely on passing through some advertisements in return for a revenue share of the regained ad revenues of large publishers. These AATs could therefore constitute a new form of gatekeeping role in the open Internet. The recent dispute between Apple and Facebook about new privacy enhancing technologies that restrict ad tracking in Apple’s upcoming operating system update (iOS 14.5) underpins this conclusion<sup>178</sup>.

<sup>170</sup> eMarketer.com, 2020, Ad Blocking Is Slowing Down, but Not Going Away.

<sup>171</sup> Malloy, M., McNamara, M., Cahn, A., & Barford, P., 2016, ‘Ad blockers: Global prevalence and impact’, *Proceedings of the 2016 Internet Measurement Conference* (pp. 119-125).

<sup>172</sup> This corresponds roughly to EUR 113.841 to EUR 3,7 million [exchange rate 31.12.2016].

<sup>173</sup> This corresponds roughly to EUR 0.95 [exchange rate 31.12.2016].

<sup>174</sup> eyeo.com, 2020, Ad-blocking usage report 2019.

<sup>175</sup> Aseri, M., Dawande, M., Janakiraman, G., & Mookerjee, V. S., 2020, ‘Ad-Blockers: A Blessing or a Curse?’, *Information Systems Research*, 31 (2) 627-646.

<sup>176</sup> Despotakis, S., Ravi, R., & Srinivasan, K., 2020, ‘The beneficial effects of ad blockers’, *Management Science*.

<sup>177</sup> Anderson, S. P., & Gans, J. S., 2011, ‘Platform siphoning: Ad-avoidance and media content’, *American Economic Journal: Microeconomics*, 3(4), 1-34.

<sup>178</sup> Warren, T., 2020, Facebook hits back at Apple with second critical newspaper ad. The Verge.

The conflicting interests on advertising companies and publishers on one hand and developers of AATs on the other has led to a cycle of technological developments to circumvent the technologies of the respective opposing party. This is often referred to as the ad-blocking “arms race” in scientific research<sup>179</sup>. Traditional ad-blocking browser extensions maintain so-called filter lists which are run through with every website visit. If a visited website contains advertisements, they are filtered out if their respective script is detected through an entry in the filter list. Hence, ad-blocking filter lists are per definition a lagging tool in that they contain only known ad scripts. Ad-blocking detection, however, evolved quickly over the recent years and works in two ways. Either the detection tool checks whether ads are not downloaded upon a user’s visit or a potential ad blocking extension is detected because it greatly reduces the loading time of the visited website<sup>180 181</sup>. While the academic consensus is that this arms race between ad-block developers and consumers on the one side and advertisers and publishers on the other side will be won finally by the latter party, recent research by Storey et al. (2017) proposes new technological approaches to ad-blocking that employ elements of rootkits to prevent detection by anti-ad blocking scripts and could potentially challenge this view<sup>182</sup>.

Box 10: Widespread advertising facilitates the adoption of ad-blocking software (AAT) by users which threatens the business models of publishers and advertisers

- Ad-blocking usage is increasing worldwide as a means to limit ad exposure while browsing.
- Ad-blocking creates opportunities for publishers to strategically differentiate between ad blocking and non-ad-blocking users and offer different website experiences (e.g. ad-light versions).
- Ad blocking signifies a desire by consumers for greater privacy and can motivate the development of new business models; however
- The short-term relief from intrusive advertisements could undermine advertising based business models and the availability of “free” content in the long-term.
- Developers of AAT could act as a new bottleneck in reaching consumers and capture a fraction of publishers’ advertising revenue.

*Perceived benefits of ATT and the reduced ad exposure and increased privacy for consumers:*



*Perceived costs due to increased adoption levels of ATT for non-users and advertisers/publishers:*



Source: Authors’ own elaboration.

<sup>179</sup> Storey, G., Reisman, D., Mayer, J., & Narayanan, A., 2017, *The future of ad blocking: An analytical framework and new techniques*, arXiv preprint arXiv:1705.08568.

<sup>180</sup> Mughees, M. H., & Qian, Z., 2017, ‘Detecting anti ad-blockers in the wild’, *Proceedings on Privacy Enhancing Technologies*, 2017 (3):127–142.

<sup>181</sup> Nithyanand, R., Khattak, S., Javed, M., Vallina-Rodríguez, N., Falahrastegar, M., Powles, J. E., De Cristofaro, E., Haddadi, H., Murdoch, S.J., 2016, ‘Adblocking and counter blocking: A slice of the arms race’, *Proceedings of the 6th USENIX Workshop on Free and Open Communications on the Internet (FOCI '16)*.

<sup>182</sup> Storey, G., Reisman, D., Mayer, J., & Narayanan, A., 2017, *The future of ad blocking: An analytical framework and new techniques*. arXiv preprint arXiv:1705.08568.

### **2.3. Analysis of costs and benefits of different practices**






In the above Sections 2.1 and 2.2 we identified practices and issues that are either inherent to the online advertising value chain or stem from countermeasures that have already been undertaken as a response. However, the potential harm that might result for one or multiple involved parties does not paint the complete picture. Practices or issues that arose over the last decade have done so because they offer also a range of benefits and advantages in the form of higher efficacy, a reduction in costs or create new revenue streams that enable the provision of content and innovative services.







For this reason, a holistic approach is needed when evaluating specific practices and considering whether a remedial intervention is required. The evaluation of benefits and harms cannot be based on quantitative metrics (i.e. in term of monetary costs or gains), since the plethora of issues is not readily quantifiable without access to proprietary data. However, the concluding boxes in the previous two sections seek to provide a qualitative assessment of the potential harms and benefits associated with each identified issue. The assessment is based on extensive research of the academic and non-academic literature and is also informed by insights from interviews conducted with different stakeholders for this study. This assessment could provide a first indication of the severity of one practice in relation to the other practices identified and, thus, offer guidance as to which should receive priority when considering regulatory intervention.

In Table 2, we summarise the benefits and potential harms associated with each practice and problem. The order in which the practices and issues are listed reflects the sequence in Sections 2.1 and 2.2. Thus, the order of practices shown in the table should not be interpreted as a ranking of potentially harmful practices.



We visualise the severity of associated costs or the potential for harm that originates from an issue in red from moderate (1), somewhat harmful (2) to very harmful (3). Similarly, the associated benefits are visualised in green and classified from moderate (1), somewhat beneficial (2) to very beneficial (3). Please note that these ratings should only be interpreted in an ordinal manner and not as a cardinal scale. Hence, a practice that is classified as being harmful should be more problematic compared to another one whose harms are considered only moderate but it is not twice as harmful as the latter.

Table 2: Cost-benefit assessment

Potentially harmful practice	Benefits	Assessment (moderate (1) to very beneficial (3))	Harm	Assessment (moderate (1) to very harmful (3))
<b>Practices affecting consumers (and SMEs as viewers of advertising)</b>				
Behavioural targeting gives rise to privacy concerns	Behavioural targeting relies on the analysis of profound user data. It offers more relevant advertisement that aligns more with an individual's interests.		In the targeting process personal user data (e.g., IP-address, browsing history, age, gender, etc.) is gathered and analysed. This data is potentially also shared across various market players without the consumers' knowledge or consent. Behavioural targeting methods, thus, raise severe privacy concerns.	
Obfuscation and location based targeting reduces consumer choice	Product reviews on comparison sites are often sponsored content to cover the most popular products. Further, advertisements are often also targeted based on a consumers' location or are not purchasable in specific areas/countries (geo-blocking). This provides the consumer with potentially more relevant offers in their proximity.		The obfuscation of advertisement as neutral product reviews narrows the consumers' focus on the covered products. Location based targeting of advertisement may implicitly foreclose specific products to some consumer segments. Both practices imply a reduced consumer choice.	
Advertising design exploits behavioural biases and includes dark-patterns	Behavioural biases of consumers are used to increase the likelihood that an advertisement is clicked on. Dark pattern elements are employed to nudge consumers to give their consent to share their personal data.	None	Design elements of advertising (dark patterns) that aim at exploiting consumers' behavioural biases lead to consumers behaving in a way that is contrary to their own preferences (e.g., consent to data sharing, clicking on non-avoidable ads).	

Potentially harmful practice	Benefits	Assessment (moderate (1) to very beneficial (3))	Harm	Assessment (moderate (1) to very harmful (3))
Discrimination and harmful targeting of vulnerable consumers through data-driven targeting with RTB	The data-driven targeting implemented in the RTB processes provides more relevant advertisements to users. The effectiveness of behavioural targeting relies on personal data such as the analysis of the browsing history. Based on this, vulnerable groups can also be protected (in not seeing certain ads, e.g., minors and alcoholic beverages).		The data-driven targeting may target vulnerable consumers in a harmful way. Due to their past browsing behaviour, consumers with, e.g., a bad eating habit or gambling problem may be especially exposed to advertisements in these fields. This poses an increased risk to the wellbeing of such consumers.	
Malvertising & Spear-Phishing	Automated distribution of advertising through Ad-Networks and RTB reduces costs and increases the reach of advertising campaigns.		The automated distribution of advertisements makes it easy for cybercriminals to spread malware in the form of malvertising or spear-phishing. This can cause significant damages to affected consumers and SMEs.	
<b>Practices affecting advertisers including SMEs</b>				
Market concentration of intermediaries	Large advertising intermediaries like Facebook and Google offer a great variety of ad inventory and thus a wide reach to advertisers. Due to their extensively gathered data, they can provide profound targeting of ads to increase the ROI for the advertisers. Especially smaller advertisers benefit from the large scale of these intermediaries since they regularly do not have the funds to distribute their marketing efforts across many intermediaries.		The large concentration implies only a marginal competitive pressure among these two large intermediaries. This bears the potential for higher prices towards advertisers and buyer power towards publishers which would in the long run lead to market inefficiencies. Non-transparent price setting in RTB, as well as performance and conversion data of distributed ads is difficult to challenge by rivals.	

Potentially harmful practice	Benefits	Assessment (moderate (1) to very beneficial (3))	Harm	Assessment (moderate (1) to very harmful (3))
Lack of transparency towards advertisers & Ad-fraud.	Details of the inner workings of the ad auctions (RTB) are not disclosed in order to prevent other market participants to game the algorithm.	None	The outcomes of the ad-auctions are non-transparent. Advertisers receive no data on how their bid and ad performed during the auction. Access to performance data of the distributed ads is also not provided to advertisers making it impossible to audit their ad spending and calculate reliable ROI estimates. This foreclosure of data also opens the door for ad-fraud as fraudulent and artificial conversion cannot be detected easily.	
<b>Practices affecting suppliers of advertising space (publishers) and SMEs functioning as Ad-networks</b>				
Asymmetric access to information and data	Large intermediaries such as Facebook and Google have an information advantage over competing ad-networks and publishers. Trends that facilitate this information gap are the phasing out of third-party cookies by Google. This creates new potential for the market to develop without relying on cookies and also improves consumers' privacy.		The information advantage of these large intermediaries makes their services more attractive to advertisers. Their data sets may act as an entry barrier for smaller ad-networks or increase costs for other publishers. The phasing out of third-party cookies by Google may weaken competitor's positions in the long run as the knowledge gap and the dependence on Google's analytics services increases.	
Exclusivity clauses, self-preferencing and bundling		None	Large intermediaries such as Google and Facebook are known to strengthen their market positions through practices of bundling and self-preferencing. The vertical integration of these players leads to bundling practices. Exemplarily, advertising space on YouTube (Google), Facebook (Facebook) are only accessible for advertisers	

Potentially harmful practice	Benefits	Assessment (moderate (1) to very beneficial (3))	Harm	Assessment (moderate (1) to very harmful (3))
			through the respective intermediaries at highly non-transparent costs. This puts other publishers at an disadvantage as they do not have access to this exclusively marketed ad-inventory. Competitive concerns usually associated with these conducts should also apply here.	
<b>Effect of already undertaken countermeasures</b>				
Adoption of Ad-blocking technologies by consumers	Ad-blocking software reduces the exposure to advertisements while browsing. Regularly, these tools also the tracking of users and hence increase privacy. With the adoption consumers can express their demand for less intrusive ads.		The adoption of ad-blockers may threaten advertising based business models of publishers. The provision of content 'for free' in the internet could be in jeopardy. Adopters of ad-blocking exert a negative externality on non-adopters since they are less sensitive to ads and their exposure may increase. Whitelisting practices of ad-block developers could constitute a new gatekeeping role in the internet.	

Source: Authors' own elaboration.

### 3. HOW FAR DOES EXISTING LEGISLATION GO IN ADDRESSING THE PROBLEM?

#### 3.1. Legal framework

##### 3.1.1. Overview of the legal framework

Although there is no overarching legislative framework covering online targeted advertising at the EU level, different legislative measures apply to advertising (including targeted advertising) and provide certain rights to recipients. The current legislative framework is complex and only addresses certain aspects of online targeted advertising and sometimes in an indirect manner.

These instruments do not include a definition of “targeted advertising” or “behavioural advertising” but usually refer to the more general concepts of “commercial communication”, “commercial practice” or “advertising”, which should be interpreted widely according to the Court of Justice of the European Union (CJEU)<sup>183</sup>. It is therefore commonly understood that targeted advertising falls under the scope of these legal instruments.

The main relevant instruments are listed below. Some are specific and their scope is limited to the digital environment, although they may not cover all types of platforms:

- eCommerce Directive<sup>184</sup> (the Services Directive<sup>185</sup> and the Proportionality Test Directive for regulated professions)<sup>186</sup>;
- P2B Regulation<sup>187</sup>;
- ePrivacy Directive<sup>188</sup> (incl. a new proposal of ePrivacy Regulation)<sup>189</sup>; and
- Audiovisual Media Services Directive (AVMS), as amended in 2018<sup>190</sup>.

<sup>183</sup> CJEU, 11 July 2013, C-657/11, *BEST*, EU:C:2013:516, pt. 35.

<sup>184</sup> European Parliament and the Council of the European Union, 2000, 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, OJ L 178 of 17.07.2000 (hereafter the “eCommerce Directive”).

<sup>185</sup> European Parliament and the Council of the European Union, 2006, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27.12.2006.

<sup>186</sup> European Parliament and the Council of the European Union, 2018, Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions, OJ L 173 of 9.7.2018.

<sup>187</sup> European Parliament and the Council of the European Union, 2019, 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, OJ L 186 of 11.7.2019.

<sup>188</sup> European Parliament and the Council of the European Union, 2002, 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, OJ L 201 of 31.7.2002 (Directive on privacy and electronic communications).

<sup>189</sup> European Commission, 2017, 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, COM(2017) 10 final - 2017/0003 (COD).

<sup>190</sup> European Parliament and the Council of the European Union, 2010, 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), OJ L 095 of 15.4.2010.



Others are general and apply to all kinds of advertising, irrespective of the means used to display the message:

- Unfair Commercial Practices Directive (UCPD)<sup>191</sup>;
- Directive on misleading and comparative advertising<sup>192</sup>;
- Consumer Rights Directive (CRD)<sup>193</sup>; and
- General Data Protection Regulation<sup>194</sup> (GDPR).

EU legislation also bans the advertising of certain types of products such as tobacco products, which are not covered in this study<sup>195</sup>.

Moreover, competition law applies to all digital platforms and may have far reaching implications for the provision of online advertising. Several national competition authorities including authorities in France, Germany and the Netherlands have concluded or launched sector enquiries or general investigations into online advertising, while authorities in France<sup>196</sup>, Italy<sup>197</sup>, and the UK<sup>198</sup> have opened or decided individual cases. The European Commission has also opened a case against Google concerning online advertising<sup>199</sup>. Potential competition concerns in the online advertising market include: tying, bundling, exclusivity, leveraging, discrimination, interoperability issues and access to data.

This legal framework is set to be complemented shortly, by the Digital Services Act (DSA)<sup>200</sup> and Digital Markets Act (DMA)<sup>201</sup>, which were proposed by the European Commission on 15 December 2020. These proposals are currently being adopted under the co-decision procedure and as such may be amended.

Annex 1 of the report contains an overview of these legislative measures (including the DSA and DMA proposals), especially with regard to their (i) nature and scope, (ii) substantial measures (relevant for targeted advertising), and (iii) enforcement.

<sup>191</sup> European Parliament and the Council of the European Union, 2005, Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149 of 11.06.2005.

<sup>192</sup> European Parliament and the Council of the European Union, 2006, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376 of 27.12.2006.

<sup>193</sup> European Parliament and the Council of the European Union, 2011, Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304 of 22.11.2011.

<sup>194</sup> European Parliament and the Council of the European Union, 2016, Regulation 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, OJ L 119 of 04.05.2016.

<sup>195</sup> European Parliament and the Council of the European Union, 2003, 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, OJ L 152, 20.6.2003, p. 16-19.

<sup>196</sup> The NCA fined Google €150m for having abused its dominance in search advertising and reiterated Google's obligation to "define the operating Rules of its advertising platform in an objective, transparent and non-discriminatory manner". *Autorité de la concurrence, 2019*, Decision 19-D-26 of 20 December 2019 regarding practices employed in the online search advertising sector.

<sup>197</sup> The NCA investigates whether Google is engaged in an exclusionary abuse of dominance in the online display advertising market, where its ad intermediation services rely on "non-replicable" user data that Google collects within its ecosystem.

<sup>198</sup> The NCA investigates Google's proposals to disable third-party cookies in its Chrome browser and replace them with new tools for targeted advertising (see CMA, 2021, Investigation into Google's 'Privacy Sandbox' browser changes).

<sup>199</sup> Cases AT.40660 and AT.40670.

<sup>200</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 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, COM(2020) 825 final, 2020/0361 (COD).

<sup>201</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374 (COD).

### 3.1.2. Soft Law instruments

*Soft law* instruments have an important influence in this sector. Obviously, the binding force of these instruments is less than legal provisions<sup>202</sup> but they have the advantage of being more flexible while also reflecting the latest market developments.

In particular, the ICC Advertising and Marketing Communications Code (2018) adopted by the International Chamber of Commerce (ICC) contains rules which are particularly well adapted to digital advertising such as rules on the identification, transparency and identity of the marketer, as well as a prohibition on harassment, and the need to respect the consumer's choice not to receive direct marketing communication, including giving the consumer a right of withdrawal<sup>203</sup>. All parties involved should also be bound by the principle of responsibility (not only the marketer, but also in particular tech companies, platforms, market influencers or the persons preparing the algorithms used in the marketing campaigns)<sup>204</sup>. **The ICC Code also contains principles applicable to so-called Interest-Based Advertising (IBA), or online behavioural advertising. According to these principles, data collection and use should be transparent (with clear and visible notice), and users should be able to exercise their choice in this respect (user control). Companies should also refrain from creating IBA based on sensitive data except with prior consent and in accordance with the applicable legal framework.**

### 3.1.3. Complexity of the legal framework

The legal framework applicable to advertising in general, and to digital targeted advertising in particular, is very complex. Depending on the parties involved (consumers, traders, minors, etc.), the content of the advertising or the means used to display the message, some legislative measures will be applicable, while other measures will not.

The legal framework is also fragmented within the 27 Member States, since the older directives – eCommerce Directive, for instance – are minimal harmonisation instruments (which means that some Member States have introduced more far-reaching rules, thereby threatening the achievement of the Digital Single Market).

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<sup>202</sup> The violation, by a trader, of the commitments set forth by a Code of conduct could however be considered as a misleading commercial practice, under Article 6(2)(b) of the UCPD (subject to the requirements prescribed by this provision).

<sup>203</sup> This Code is available online at: ICC, 2018, ICC Advertising and Marketing Communications Code.

<sup>204</sup> Article C21 of the ICC Code.

Table 3 below highlights for each of the legal instruments their nature and (personal and material) scope of application.

Table 3: Nature and scope of the legal measures

		Nature	Personal Scope	Material Scope
<b>Specific</b>	<b>eCommerce DIR</b>	Directive (min harmonisation)	B2B and B2C (Information society service provided to the recipient of a service)	Commercial communications which are part of, or constitute, an information society service
	<b>P2B Regulation</b>	Regulation	Platform to Business (only when business users target consumers)	Practices such as ranking, differentiated treatment and access to data
	<b>DSA Proposal</b>	Regulation	Technical intermediaries (ISPs) Hosting service providers Online platforms Very large online platforms (information to be made publicly available) (in their relationship with users)	Information duties
	<b>DMA Proposal</b>	Regulation	Gatekeepers	8 types of digital services, including online advertising when provided in combination with intermediation services, search engines, social networks, video-sharing, communication services, cloud computing or operating systems
	<b>AVMS DIR</b>	Directive (min harmonisation)	Video sharing platforms – end users	Advertising (content rules) Information duties Processing of personal data of minors
<b>General</b>	<b>UCPD</b>	Directive (full harmonisation)	B2C	Commercial practices (incl. marketing and advertising) - broad
	<b>Misleading and Comparative Advertising DIR</b>	Directive	B2C and B2B (depending on provisions)	Misleading and Comparative Advertising
	<b>CRD</b>	Directive (full harmonisation)	B2C	Conclusion of B2C contracts (incl. obligations of information before conclusion of B2C contracts) - broad
	<b>GDPR</b>	Regulation	Relationships between data controllers/processor and data subjects	Processing of personal data (both broad concepts)

Source: Authors' own elaboration.

## 3.2. How far do existing substantial rules address the problems and what are the gaps?

### 3.2.1. Processing of personal data and privacy

Targeted advertising is only possible when the online activities of users<sup>205</sup> can be traced and when their personal data can be processed, for instance to build profiles relating to the targeted audience<sup>206</sup>. The ePrivacy Directive and the GDPR are the two main instruments that frame how this can take place.

The **ePrivacy Directive** mainly applies to the processing of personal data in the electronic communication sector but the directive also contains rules on “cookies” which have a broader scope since they protect the terminal equipment of end users. Accordingly, storing information and gaining access to information already stored in terminal equipment of a subscriber/user (e.g. a phone, computer, connected vehicle or smart speaker) requires the **prior informed consent** of subscribers irrespective of any qualification of personal data of these information<sup>207</sup>. Prior consent of the subscriber/user is not required when gaining access is necessary (i) for the purpose of carrying transmission of a communication or (ii) to provide an information society service requested by the user/subscriber. With regard to this second exception, the EDPB has recently stated that profiling for the purpose of advertising will not be considered as a service expressly requested by the user/subscriber<sup>208</sup>. Hence, **this provision creates *de facto* an opt-in mechanism for the use of tracking cookies<sup>209</sup> or tracking pixels<sup>210</sup> for the purpose of targeted advertising.**

A new ePrivacy Regulation<sup>211</sup> is currently being negotiated between the European Parliament and the Council. The Commission adopted its proposal in 2017, the European Parliament adopted the report of the Committee on Civil Liberties, Justice and Home Affairs in October 2017 and the EU Council adopted its general approach on 10 February 2021. In these three versions of the text, **prior consent** of the user is required to (i) collect of information on the terminal equipment and (ii) use processing and storage capabilities of terminal equipment<sup>212</sup>. This wording has the effect of ensuring that all tracking mechanisms (such as device fingerprinting) requires the users’ prior consent<sup>213</sup>. Contrary to the Commission’s proposal and the European Parliament’s position of 2017, the Council’s general approach allows further processing for compatible purposes, provided that, *inter alia* **the information is not used to determine user characteristics or to build profiles**<sup>214</sup>.

<sup>205</sup> Clifford, D., 2014, ‘EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour’, *JIPITEC*, pp. 194 – 195.

<sup>206</sup> Article 29 Data Protection Working Party, 2010, Opinion 2/2010 on online behavioural advertising, 22 June 2010, WP171, p. 4; Wachter, S., 2020, ‘Affinity Profiling and Discrimination by Association in Online Behavioural Advertising’, *Berkeley Technology Law Journal*, Vol. 35, No. 2, 2020.

<sup>207</sup> CJEU, judgement *Planet49 GmbH*, 1st October 2019, C-673/17, EU:C:2019:801, points 70 and 71.

<sup>208</sup> European Data Protection Board, 2021, Guidelines 02/2021 on Virtual Voices Assistants, 9 March 2021, p. 23.

<sup>209</sup> Article 29 Data Protection Working Party, 2010, Opinion 2/2010 on online behavioural advertising, 22 June 2010, WP171, p. 25.

<sup>210</sup> European Data Protection Board, 2020, Guidelines 8/2020 on the targeting of social media users, 2 September 2020, pp. 19-21.

<sup>211</sup> European Commission, 2017, 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, COM/2017/010 final - 2017/0003 (COD).

<sup>212</sup> Commission ePrivacy Regulation proposal, Article 8(1)(b); General approach of the Council, Article 8(1)(b); European Parliament report of the Committee on Civil Liberties, Justice and Home Affairs, Article 8(1)(b).

<sup>213</sup> See BEUC, 2017, Proposal for a regulation on Privacy and electronic communication (ePrivacy) – BEUC position paper, BEUC-X-2017-059, 09/06/2017, p. 9; Commission ePrivacy Regulation proposals, Recital 20.

<sup>214</sup> General approach of the Council, Article 8(1)(h)(iii).

The proposed ePrivacy Regulation also creates the possibility for users to exert their opt-in through software technical settings<sup>215</sup>.

In addition to the ePrivacy Directive, which relates to placing and accessing to cookies on terminal equipment, the subsequent processing operation on personal data will trigger application of the **GDPR rules**.

The GDPR requires that data processing operations rely on one of the limitative legal grounds provided in Article 6. **With regard to targeted advertising, interpretative guidelines adopted at the EU level tend to emphasise the need to obtain the consent of the data subject.**

The Article 29 Working Party<sup>216</sup> had already stated that the legitimate interest is not a suitable legal ground for advertising purposes involving tracking data subjects across websites/devices/services, involving data brokers and implying intrusive profiling<sup>217</sup>. The European Data Protection Board (EDPB) has also excluded performance of a contract as a legal ground for behavioural advertising<sup>218</sup>. In its recent guidelines on targeting of social media users, the EDPB tends to consider legitimate interest as a valid legal ground only in relation to targeting on the basis of data directly provided by the data subjects. For targeting based on inferred and observed data, consent is generally considered to be more suitable.

Finally, when part of the processing requires consent under the ePrivacy Directive (e.g. accessing cookies stored in the end users' terminal equipment), the EDPB considers that consent under the GDPR is an adequate legal ground for the subsequent processing operations. This aims to avoid use of the legitimate interest ground as a way to lower the level of protection granted by the consent requirement under the ePrivacy Directive<sup>219</sup>.

#### a. Opt-in or opt-out?

When data processing is based on consent, which is typically the case for targeted advertising as seen above, this in practice means that consumers need to opt-in<sup>220</sup> to targeted advertising (i.e. as consent implies a real choice from the data subject)<sup>221</sup>. In addition, as part of a valid consent, the data subject must be able to withdraw consent and in which case, the data controller must stop the processing<sup>222</sup>. This creates the possibility to opt-out for the data subject to processing operations linked to targeted advertising.

<sup>215</sup> Commission ePrivacy Regulation proposal, Article 9 and Article 10(2); European Parliament report of the Committee on Civil Liberties, Justice and Home Affairs, Article 9 and Article 10; General approach of the Council, Article 4a(2).

<sup>216</sup> The Article 29 Working Party was established under Article 29 of the Data Protection Directive (95/46/EC) as an independent EU advisory body on data protection. The GDPR replaced the Working Party by the European Data Protection Board (EDPB).

<sup>217</sup> Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01, p. 15.

<sup>218</sup> European Data Protection Board, 2019, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, 8 October 2019, p. 14.

<sup>219</sup> See European Data protection Board, 2019, Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities, 12 March 2019, p. 14, and especially footnote 29; European Data Protection Board, 2020, Guidelines 8/2020 on the targeting of social media users, 2 September 2020, p. 22; European Data Protection Board, 2021, Guidelines 02/2021 on Virtual Voices Assistants, 9 March 2021, p. 11; European Data protection Board, 2021, Guidelines 01/2020 on processing personal data in the context of connected vehicles and mobility related applications, adopted on 9 March 2021, pp. 7-8.

<sup>220</sup> GDPR, Article 4(11).

<sup>221</sup> European Data Protection Board, 2020, Guidelines 05/2020 on consent under Regulation 2016/679, 4 May 2020, p. 7.

<sup>222</sup> European Data Protection Board, 2020, Guidelines 05/2020 on consent under Regulation 2016/679, 4 May 2020, p. 24.

Even where processing is based on the “legitimate interests of the controller”, the data subject always enjoys a right to object to processing of its personal data for direct marketing purposes (including any related profiling). The right to object may therefore also be used as an opt-out mechanism by data subjects facing targeted advertising.

In any event, when a data subject (i) withdraws consent for data processing and no other legal ground can be invoked by the data controller or (ii) objects to the processing for direct marketing purposes, this person can also request erasure of personal data<sup>223</sup>. In such cases, the data controller must, in principle, communicate to each recipient of the personal data the erasure request of the data subject<sup>224</sup>.

Lastly, under the GDPR, data processing for the purpose of displaying targeted advertising will **always** necessitate prior opt-in in three specific cases:

- First, when an information society service is offered directly to **children between the age of 13 and 16** (depending on what age the Member States decide children can validly give their consent), consent of the holder of the parental responsibility is required in order to process their data<sup>225</sup>. Recital 38 highlights the need for specific protection when children data are used for marketing purposes.
- Second, because data subjects have the right not to be subject to a decision based solely on automated processing, including profiling, which may significantly affect them, **prior explicit consent of the data subject may also be required under Article 22 GDPR**<sup>226</sup>. In that case targeted advertising would be subject to an opt-in of the targeted person.
- Third, the same requirement applies to processing of **special categories of data such as health related data**, which require prior explicit consent of the data subject unless the data have been manifestly made public by the data subject<sup>227</sup>.

#### b. Access to data under the P2B Regulation

As recognised by the **P2B Regulation**, the data (whether personal or not) provided or generated through “online intermediation services” can be of crucial importance. For instance, the data concerned could be ratings or reviews accumulated by business users on the intermediation services<sup>228</sup>. The ability to access these data or to use them can lead to important value creation, not only from a wider economic perspective, but also for the intermediation services and their business users<sup>229</sup>. Such data might be used, directly or indirectly, for targeted advertising purposes in particular to provide data on the effect of the digital advertising campaign. The P2B Regulation does not constrain the use of the personal data or other data that can be gathered through the online intermediation services (there is no specific prohibition for instance). However, it requires the online intermediation service provider to be **transparent towards its business users** regarding the use of personal data or other data by the intermediation service. The terms and conditions of the provider must contain a description of technical and contractual access, **if any**, to personal data and/or other

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<sup>223</sup> GDPR, Article 17(1)(b) and (c). Also see Politou, E., Alepis, E., & Patsakis, C., 2018, Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions, *Journal of cybersecurity*, vol.4, p. 12.

<sup>224</sup> GDPR, Article 19. This requirement suffers exception if it proves to be impossible or involves disproportionate efforts.

<sup>225</sup> GDPR, Article 8.

<sup>226</sup> GDPR, Article 22(2).

<sup>227</sup> GDPR, Articles 9(2)(a) and 9(2)(e).

<sup>228</sup> P2B Regulation, Recital 33.

<sup>229</sup> P2B Regulation, Recital 33.

data provided by users when using the service or generated through the use of the services<sup>230</sup>. That description shall adequately inform the business user on the following:

- (i) whether the provider has access to the data provided by the business user or the consumers through their use of the intermediation service or generated through the provision of the intermediation service; regarding such data, the provider must also indicate whether they are provided to third parties, and if such a provision is not necessary for the functioning of the intermediation service, the purpose of such data sharing and the possibility for the business user to opt-out from such a data sharing;
- (ii) whether the business user has access to those data; and
- (iii) whether the business user has access to data, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers.

The terms and conditions must indicate, when applicable, the categories of the data concerned by such accesses and the conditions under which such accesses are proposed.

Box 11: Main issues and gaps: Processing of personal data and privacy

- Although placing tracking devices on terminal equipment and accessing the information contained on it requires consent under ePrivacy Directive, data controllers remain free to choose the legal ground under Article 6 GDPR for further processing operations.
- Some tracking mechanisms such as device fingerprinting which may not require storing or accessing information in the end user equipment are not clearly covered by the rules of user consent under the ePrivacy Directive. This gap may be closed by the adoption of the new ePrivacy Regulation.
- Depending on the legal basis used by the data controller, data subjects will usually enjoy an opt-in-based consent or (less frequently) as a minimum, an opt-out-based right to object when facing targeted advertising. However, this opt-out right to object is not defined in the legislation and this right may be difficult to exercise in practice, especially for targeted advertising.
- The GDPR recognises children as vulnerable data subjects and contains rules on child consent with regard to information society services offered directly towards them<sup>231</sup>. Conversely, neither the ePrivacy Directive nor the proposed ePrivacy Regulation contain specific rules on the tracking children's devices<sup>232</sup>. However, the revised AVMS Directive does protect children from having their data collected and processed for targeted advertising purposes (see below).
- The P2B Regulation enshrines transparency requirements in the terms and conditions of the online intermediation services on the sharing of personal and non-personal data to business users but this requirement does not extend to end users.

Source: Authors' own elaboration.

<sup>230</sup> P2B Regulation, Article 9.

<sup>231</sup> GDPR, Article 8.

<sup>232</sup> Verdoodt, V. & Feci, N., 2017, Children and targeted advertising in the proposed ePrivacy (Regulation) colouring book: Time to use the whole box of crayons'. BEUC, 2017, Proposal for a regulation on Privacy and electronic communication (ePrivacy) – BEUC position paper, BEUC-X-2017-059, 09/06/2017, p. 15.

### 3.2.2. Transparency obligations

#### c. Specific transparency obligations on ranking

Information duties related to the ranking of products are now contained in the **UCPD**, the **CRD** (through amendments introduced by the Directive on Better enforcement and modernisation of Union consumer protection rules) and in the **P2B Regulation**. These rules are relevant since targeted advertising can in certain settings be seen as a form of ranking.

Ranking is defined in the UCPD as “the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication”<sup>233</sup>. Through ranking parameters, some elements (for instance personal data, purchasing history, web surfing patterns, etc.) could be used to propose a personalised ranking.

Under new Article 7(4a) of the **UCPD**, the main parameters used for ranking a product and their importance (compared to other parameters) are considered as material information if the consumers have the possibility to search products offered by different traders or consumers on the basis of a query (with a keyword or a phrase for instance). It means that, subject to other requirements of Article 7 of the UCPD, the violation of this information duty may be regarded as a misleading omission (and an unfair, and prohibited, commercial practice) under the Directive.

Furthermore, the new Article 6a(1)(a) of the **CRD** states that online marketplaces are obliged to provide consumers with additional information, such as the main parameters determining ranking of offers presented to the consumer as a result of search queries. Where (part of) the offers presented to consumers after search queries are based on targeted advertising, consumers must be given information on the criteria used for ranking, and hence on the criteria for targeting the advertisements themselves.

These online marketplaces are not expected to disclose the *detailed* functioning of the ranking mechanism but they should provide a *general* description of the *main* parameters they use<sup>234</sup>. Information needs to be *made available in a specific section of the online interface that is directly and easily accessible from the page where the query results or the offers are presented*.

The **P2B Regulation** also lays down some requirements of transparency regarding the presentation and ranking of the goods and services offered on a platform or by the search results appearing on a search engine. Article 2(8) of the P2B Regulation defines ‘ranking’ as the “relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication”. Pursuant to that definition, ranking “can essentially be thought of as a form of data-driven, algorithmic decision-making”<sup>235</sup> and, as result, could lead to targeted advertising.

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<sup>233</sup> UCPD, Article 2(m) (as introduced by Directive on Better enforcement and modernisation of Union consumer protection rules).

<sup>234</sup> Directive on Better enforcement and modernisation of Union consumer protection rules, Recital 23.

<sup>235</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 11.



With regard to ranking mechanisms, the P2B Regulation requires providers of online intermediation services and providers of online search engines to be transparent regarding the ranking of the goods or services offered on the intermediation platform, or the relevance given to search results on search engines.

Providers of intermediation services must present, in their terms and conditions, the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters<sup>236</sup>.

Through a publicly available description, search engine providers, must indicate the main parameters, which individually or collectively, are the most significant in determining ranking and the relative importance of those main parameters<sup>237</sup>. These descriptions must enable professional users of the intermediation services or of the search engines to adequately understand whether the characteristics of the goods and services offered through those services or search engines, and their relevance for the consumers, are taken into account in the ranking mechanism, how and to what extent.

If the provider includes, in its ranking parameters, possibilities to influence ranking against any direct or indirect remuneration paid by the professional users, the description mentioned above must integrate those possibilities and the effects of such remuneration on ranking<sup>238</sup>.

Whilst the P2B Regulation does not require the disclosure of the detailed functioning of ranking mechanisms, including algorithms<sup>239</sup>, it states that “providers should give meaningful explanations of their ranking mechanisms and, in particular, the main parameters used”<sup>240</sup>. However, providers must not provide excess information (or lengthy or complicated descriptions) that would render the given explanation not meaningful in the end<sup>241</sup>. In addition, according to the European Commission, “not providing excessive details should also help avoid the risk of enabling the deception of consumers or consumer harm”<sup>242</sup>. As a way to provide such explanations to the professional users of their platforms, providers should identify the main parameters determining ranking proposed on their platforms. To that end, providers should accomplish first an assessment of all relevant features of ranking taken into account for their specific service<sup>243</sup>. Such an assessment must be specific to the service concerned and the ranking presented on it; for instance, some platforms may use a large number of ranking parameters and others very few<sup>244</sup>.

The European Commission has listed examples of types of ranking parameters the providers may use<sup>245</sup>, including the personalisation of the ranking, the consumer search behaviour and intent and the default settings, sorting and filtering mechanisms chosen by the consumer. The European Commission considers that the requirement to describe the main parameters used in personalised ranking “could

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<sup>236</sup> P2B Regulation, Article 5, paragraph 3.

<sup>237</sup> P2B Regulation, Article 5, paragraph 2.

<sup>238</sup> P2B Regulation, Article 5, paragraph 3.

<sup>239</sup> P2B Regulation, Article 5, paragraph 6.

<sup>240</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 17.

<sup>241</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 25.

<sup>242</sup> Ibid.

<sup>243</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 38.

<sup>244</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 38 to 40.

<sup>245</sup> See European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, Annex A.

require that providers analyse the potentially very long list of factors that are used for this personalisation, such as consumers' personal profiles, interests, search behaviour, their actual geographic location, the time of day the search takes place, their use of cookie blockers or other technical tools and more generally, the wealth of data held on the specific consumer as well as their use of default settings"<sup>246</sup>. Consumer search behaviour can also affect the ranking<sup>247</sup>. Finally, the Commission adds that personalised ranking can also be impacted by "default settings which can be rearranged, undone, or 'overridden' by consumers using sorting or filtering tools"<sup>248</sup>.

**The P2B Regulation requires that the provider describes the main parameters that determine ranking on its platform to the direct benefit of the professional users. However, it does not require the provider (or the professional user) to also provide such information directly to the consumer.** Therefore, it is not clear how, to what extent and by which player, the consumer should be informed of such ranking parameters (except for search engines that are required to give a public access to the ranking information).

Nevertheless, the P2B Regulation must be read together with the new Articles 7(4a) of the UCPD and 6a(1)(a), of the CRD. Those directives render compulsory the provision of the information regarding ranking parameters directly to the consumer by the online marketplaces. Such an obligation applies also to online intermediation services referred to in the P2B Regulation, since such services include the notion of online marketplaces referred to in UCPD and CRD<sup>249</sup>.

With regard to **personalised pricing** (that may be incorporated in targeted advertising), reference must be made to the new Article 6(1)(ea) of the **CRD**. This provision states that, where applicable, traders must provide consumers with information on the fact that prices are personalised based on automated decision-making, before consumers are bound by distance contracts. Where targeted advertising includes price personalisation (e.g. an advertising offering a discount to a consumer, based on his previous buying history), this article provides consumers with transparency on (part of) the content of the advertising.

#### d. General rules

Article 6 of the **eCommerce Directive** creates various identification and transparency requirements for commercial communications which are part of, or constitute, an information society service. The commercial communication must be clearly identifiable as such<sup>250</sup>. The person on whose behalf the commercial communication is made must be clearly identifiable<sup>251</sup>. Furthermore, the eCommerce Directive requires promotional offers, such as rebates, and promotional competitions or games, to be clearly identifiable and the associated conditions easily accessible and presented clearly and

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<sup>246</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 51.

<sup>247</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 54.

<sup>248</sup> European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020, paragraph 56.

<sup>249</sup> European Parliament and the Council of the European Union, 2019, Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328 of 18.12.2019, Recital 21.

<sup>250</sup> eCommerce Directive, Article 6(a).

<sup>251</sup> eCommerce Directive, Article 6(b).

unambiguously<sup>252 253</sup>. **This Article 6 therefore also applies to targeted advertising but does not explicitly oblige the platform to inform users that they are receiving targeted advertising.**

Several provisions of the **CRD** can also be relied on to increase consumers' awareness of (targeted) advertising. For instance, Article 6 requires traders to provide consumers, before they are bound by any distance contract, with information on the identity of the traders, the main characteristics of the goods or services, their total prices, etc. **Where these obligations apply, this provision indirectly provides consumers with transparency on (part of) the content of the advertising.**

Furthermore, under the **UCPD**, any lack of transparency with regard to targeted advertising may also be seen as a misleading action or omission under the semi-general rules of Articles 6 and 7 or under the general rule of Article 5(2). These provisions are open norms and the claimant needs to demonstrate that the requirements are fulfilled in the particular case at hand (which could be difficult, especially with regard to the relationship between the information and the transactional decision – potentially – taken by the average consumer). Some differences could also be observed in the case law of the Member States.

In addition to the general transparency requirement (see above), the **GDPR** is interpreted as containing more specific information requirements. First, when the data controller uses profiling techniques, the Article 29 Working Party considers that the data subject must be informed about this profiling. When the data subject exercises the right of access, the data subject must be able to obtain details concerning segments the data subject has been placed into<sup>254</sup>. This transparency requirement may help data subjects to understand why they are the recipient of some advertising. Second, Article 22 of the GDPR relates to decision making processes based solely on automated processing. Under GDPR, the sole decision to display a targeted advertising based on profiling is not, in principle, considered as a fully automated decision with far reaching effect unless it takes advantage of data subject vulnerabilities for instance<sup>255</sup>. In such cases, the data controller must provide meaningful information about the logic involved by the processing<sup>256</sup>. According to the Article 29 Working Party this requirement means, among others, providing information on criteria used during the decision process and the rationale behind the processing<sup>257</sup>. In addition, the right of access<sup>258</sup> of the data subject enable him to obtain information on the parameters used and on their weight *on an aggregate level*<sup>259</sup>. Hence, when the decision to display advertising falls under the scope of Article 22, the data subject may obtain information on parameters used to determine the content of an advertising.

<sup>252</sup> eCommerce Directive, Article 6(c) and (d).

<sup>253</sup> Article 7 contains additional requirements regarding unsolicited commercial communications sent by electronic mails. The commercial communication shall be clearly and unambiguously identifiable as such as soon as it is received by the recipient. Nevertheless, the requirements stated in Article 7 of eCommerce Directive are no longer relevant in most cases since ePrivacy Directive now lays down stricter requirements as regards unsolicited commercial communications (the only hypothesis where Article 7 would still be relevant is "the (limited) cases where natural persons would not be protected by Directive 2002/58/EC (e.g. natural persons who are not subscribers)"; see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on unsolicited commercial communications or 'spam', COM/2004/0028 final, paragraph 22.

<sup>254</sup> Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01, pp. 16-17.

<sup>255</sup> Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01, p. 22.

<sup>256</sup> GDPR, Article 13 (2)(f) and Article 14(2)(g).

<sup>257</sup> Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01, p. 25.

<sup>258</sup> GDPR, Article 15.

<sup>259</sup> Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01, p. 27.

## Box 12: Main issues and gaps: Transparency obligations

- Under consumer protection rules, there is no specific obligation to inform consumers in a clear and comprehensible manner that they are facing targeted advertising, or regarding the parameters used to determine the recipient or the content of the advertising (rules are currently limited to ranking and personalised pricing).
- Under consumer protection rules, regarding the information on ranking, discussions may be expected with regard to the interpretation of “main parameters”. The Guidelines issued by the European Commission on ranking transparency pursuant the P2B Regulation<sup>260</sup> can serve as a source of interpretation. However, the use of these guidelines for interpreting the consumer rules are limited since (i) in terms of scope, the guidelines expressly concern the P2B Regulation and do not cover the consumer rules; (ii) some differences of interpretation are possible since the recipients of the information regarding ranking parameters are not the same in the P2B regulation and in the consumer protection rules (the professional user for the first and the consumer for the second) and they do not have the same levels of knowledge, which may result in different levels of information to be provided.
- Under the GDPR, there is no obligation to provide information on the parameters used to display advertising unless Article 22 applies. Consequently, this is likely to apply exceptionally. Additionally, this requirement is not mentioned in the GDPR but rather in Article 29 Working Party guidelines.
- Under the GDPR, obtaining information on the main criteria used for displaying advertising and/or on details of which segment the data subject is placed when using profiling requires a specific action of the data subject (i.e. exercising its right of access).

Source: Authors' own elaboration.

### 3.2.3. Internal market

To ensure free movement of services and to avoid barriers to trade, the European legislator enacted several legal instruments where, in line with consistent case-law, restrictions to advertising could be acceptable only if they are necessary and proportionate.

In the **eCommerce Directive**, there is a very specific mechanism called the internal market clause (Article 3). With that clause, instead of trying to harmonise all the areas concerned linked to online activities<sup>261</sup>, the European legislator opted for a mechanism based on the principles of the country of origin and mutual trust between Member States.

Pursuant to the clause, information society service providers are subject to the law of the Member State in which they are established and they are supervised by the competent authority of that Member State<sup>262</sup>.

<sup>260</sup> See European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020.

<sup>261</sup> It must be noted also that the Directive (EU) 2015/1535 (European Parliament and the Council of the European Union, 2015, Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015), p. 1–1 sets up a procedure whereby Member States must notify to the European Commission all draft technical regulations on products and information society services before they are adopted in national law. Since these measures can lead to trade barriers, Member States must ensure that they act in a transparent manner, by giving the Commission and the other Member States the possibility to examine the drafts and to comment on these drafts or to issue detailed opinions. The notification triggers a three month standstill period to allow the Member States and/or the Commission to react

<sup>262</sup> eCommerce Directive, Article 3, paragraph 1.

On the other hand, the other Member States cannot take measures to prevent such service providers from offering their services on their territory<sup>263</sup>. The clause only applies to the national requirements that are in the “coordinated field”. The “coordinated field” covers requirements with which the service provider must comply in respect of “the pursuit of the activity of an information society service, such as requirements [...] regarding the quality or content of the service **including those applicable to advertising** [...]”<sup>264</sup>.

Consequently, the national requirements regulating advertising are covered by the coordinated field and are within the scope of the internal market clause.

The CJEU confirmed this analysis in a recent decision of 1<sup>st</sup> October 2020 (C-649/18) regarding national rules restricting the possibility for online pharmacists to conduct advertising including online advertising<sup>265</sup>.

By way of derogation, however, Member States may impose national measures on providers offering services in their jurisdiction provided those measures are: (i) necessary to the protection of public interest objectives (such as the protection of public order or public health), (ii) taken against an information society service, which prejudices such objectives or presents a serious and grave risk of prejudice to those objectives and (iii) proportionate to that objective<sup>266</sup>. In addition, before being authorised to impose such measures on the service provider, the Member State must ask the Member State of establishment to comply with its national measures and must notify the European Commission of its intention to enforce the so-called measure<sup>267</sup>.

If that second condition is not fulfilled (i.e. the measure restricting the freedom to provide an information society service has not been notified to the Member State of establishment and to the European Commission), the measure is considered unenforceable against the provider<sup>268</sup>. To analyse if the first condition of Article 3, paragraph 4(a) is fulfilled as regards necessity and proportionality, the Member State must take into account “the case-law relating to Articles 49 and 56 TFEU [...], in so far as those conditions largely overlap with the requirements that must be fulfilled by any obstacle to the fundamental freedoms guaranteed in those articles of the TFEU”<sup>269</sup>. Although the internal market clause is a powerful mechanism to ensure the free circulation of information society services within the European Union, the possibility given to Member States to derogate still allows for barriers, under the condition that they are justified, non-discriminatory and proportionate. It also creates legal uncertainty for the service providers (and even more for SMEs) since it is complicated for providers which are active in several national markets, to be able to anticipate if they will be subject to the national measures in each Member States where they provide their service, or not.

The C-649/18 case provides an interesting illustration of the risk that the derogation mechanism entails. In that case, four French measures were cited, before the French Courts, to restrict an online pharmacy established in the Netherlands from targeting among others French consumers and patients<sup>270</sup>.

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<sup>263</sup> eCommerce Directive, Article 3, paragraph 2.

<sup>264</sup> eCommerce Directive, Article 2(h).

<sup>265</sup> CJEU, case *A contre Daniel B e.a.*, 1 October 2020, C-649/18, EU:C:2020:764.

<sup>266</sup> eCommerce Directive, Article 3, paragraph 4(a).

<sup>267</sup> eCommerce Directive, Article 3, paragraph 4(b).

<sup>268</sup> CJEU (GC), case *Airbnb*, 19 December 2019, C-390/18, EU:C:2019:1112, point 96; Ledger, M. 2020, CJEU ruling on legal qualification of Airbnb services, *R.D.T.I.*, 2020/3, p. 123, paragraph 15.

<sup>269</sup> CJEU, case *A contre Daniel B e.a.*, 1 October 2020, C-649/18, point 64.

<sup>270</sup> CJEU case *A contre Daniel B e.a.*, 1 October 2020, C-649/18.

Among those measures, three aimed to restrict the possibility for pharmacists to promote their online services<sup>271</sup>. The CJEU had to analyse, for each measure, whether it could fulfil the condition laid down in Article 3, paragraph 4a, or not. For each measure, the CJEU carried out a case-by-case analysis.

This clearly deprives market players of legal certainty<sup>272</sup>. The **eCommerce Directive** also aims “to remove the barriers to the development of cross-border services [...] which members of the regulated professions might offer on the Internet”<sup>273</sup>. In order to reach that objective, Article 8 creates a positive obligation for the Member States to authorise regulated professions to use commercial communications which are part of, or constitute, an information society service. However, commercial communications need to comply with the professional rules regarding, in particular the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession<sup>274</sup>. On its decision *Vanderborght*<sup>275</sup>, the CJEU stated that a prohibition of advertising for a certain activity is liable to restrict the possibility, for the persons carrying on an activity, of making themselves known to their potential clientele and of promoting the services which they propose to offer to that clientele. Such a prohibition therefore constitutes a restriction on the freedom to provide services. The CJEU concluded that the professional rules can never result in a total prohibition of the use of online advertising by the member of a regulated profession. Therefore, the Member States must ensure that no total prohibition of the use of online advertising by the member of a regulated profession remains or is adopted.

Under Article 24, paragraph 1, of the **Services Directive**, the same principle applies regardless of whether the commercial communication is made online or not. It provides that Member States must remove total prohibitions on commercial communications by the regulated professions. However, the second paragraph of Article 24 goes on to recall that such commercial communications must nevertheless comply with the professional rules that apply to each regulated profession which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy. Article 24, paragraph 2 explains how to achieve the balance between the right to make commercial communications and the need to comply with these professional rules. It specifies that professional rules that would restrict the use of commercial communications by the regulated professions, are admitted provided that they are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

In addition, the **Proportionality Test Directive** was adopted not to remove the existing restrictive professional rules, but to prevent new ones from being adopted<sup>276</sup>.

<sup>271</sup> The first forbade the use of paid referencing services, the other restricted the possibility of proposing price reductions and the last prohibited the pharmacist from sending advertising through paper flyers.

<sup>272</sup> On that point, in the field of the online sale of medicinal products, see Bourguignon, C., 2020, *La vente en ligne transfrontalière de médicaments au sein de l’Union européenne*, *D.C.C.R.*, 2020/2, n° 127, p. 127.

<sup>273</sup> eCommerce Directive, Recital 32.

<sup>274</sup> eCommerce Directive, Article 8(1).

<sup>275</sup> CJEU, case *Procédure pénale contre Luc Vanderborght*, 4 May 2017, C-339/15, EU:C:2017:335, point 44; Regarding that decision: Ghislain, S., 2018, ‘Publicité et professions libérales : questions actuelles au regard de l’arrêt Vanderborght du 4 mai 2017 de la Cour de Justice’, *D.C.C.R.*, 2018/3-4, nos 120-121, p. 19-43; Bourguignon, C., 2019, ‘Les réglementations des professionnels de la santé revues à l’aune des libertés de circulation économiques : l’exemple de la publicité à l’ère du numérique’, *R.D.T.I.*, 2019/1, n° 74, p. 25-54.

<sup>276</sup> It completes the requirement imposed on Member States in Article 59, paragraph 3, of the Directive 2005/36/CE (European Parliament and the Council of the European Union, 2005, Directive 2005/36/CE of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *OJ L 255 of 30.9.2005*). Under that Article, the Member States shall examine “whether requirements under their legal system restricting the access to a profession or its pursuit to the holders of a specific professional qualification, including the use of professional titles and the professional activities allowed under such title, referred to in this Article as ‘requirements’ are compatible with the following principles: (a) requirements must be neither directly nor indirectly discriminatory on the basis of nationality or residence; (b) requirements must be justified by overriding reasons of general interest; (c) requirements must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective”. The Member States had to communicate to the European Commission the results of such an examination by 18 January 2016.

Pursuant to that Directive, before introducing new (or amending existing) legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions, the Member States are required to undertake an assessment of proportionality in accordance with the rules laid down in the Directive. Those rules are the following: the new provision must be neither directly nor indirectly discriminatory on the basis of nationality or residence<sup>277</sup>; it must be justified on grounds of public interest objectives<sup>278</sup>; it must be proportionate, i.e. “suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain that objective”<sup>279</sup>. These assessments must be notified by the Member State to the European Commission which makes it publicly available<sup>280</sup>. Under Article 7 of that Directive, the compliance of national restrictions to advertising with the principle of proportionality should be examined by the Member State before being adopted and such an assessment shall be notified to the European Commission<sup>281</sup>. The Directive had to be transposed into national law by 30 July 2020.

Box 13: Main issues and gaps: Internal market principles

- The internal market clause of the eCommerce Directive clearly applies to online advertising. The host Member State could apply its national restrictions only if they are non-discriminatory, justified and proportionate. This may lead to legal uncertainty for market players especially for SMEs.

Source: Authors' own elaboration.

### 3.2.4. Prohibition of certain practices

The applicable legal framework may prohibit some practices currently carried out in the context of targeted advertising. Such prohibitions must therefore be taken into account while assessing the compliance of any advertising with the legal framework.

The revised **AVMS Directive** introduces qualitative rules for advertising that need to be complied with by video sharing platforms for the commercial communications that are marketed, sold or arranged by them. These rules<sup>282</sup> mirror exactly those that need to be complied with by audiovisual media service providers (linear and non-linear) and will have an impact on users in particular because platforms will need to make sure that their advertising is recognisable as such and does not discriminate on the basis of sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. Also, their advertising cannot cause any detriment to minors. Targeted advertising campaigns will therefore need to take these factors into consideration and users will benefit from these protections. The video sharing platforms in scope will need to take “appropriate measures” to make sure that advertising not arranged by them also complies with these rules.

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Such requirements were inserted in 2013 with the Directive 2013/55/EU (European Parliament and the Council of the European Union, 2013, Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 354 of 28.12.2013).

<sup>277</sup> Proportionality Test Directive, Article 5.

<sup>278</sup> Proportionality Test Directive, Article 6.

<sup>279</sup> Proportionality Test Directive, Article 7.

<sup>280</sup> Proportionality Test Directive, Article 11.

<sup>281</sup> On that point: Bourguignon, C., *op. cit.*, p. 50, paragraph 37.

<sup>282</sup> Article 9(1) of AVMS Directive.

Also of interest, the revised AVMS Directive specifies that that data collected by video sharing platforms to protect children may not be processed for commercial purposes, such as for **direct marketing, profiling and behaviourally targeted advertising**<sup>283</sup>. This rule mirrors the one which is already in place for (linear and non-linear) audiovisual media service providers and which provides that they cannot process the personal data of minors they collect (or otherwise process) for commercial purposes, **such as direct marketing, profiling and behaviourally targeted advertising**<sup>284</sup>.

The non-discrimination principle is also enshrined in different EU legislative instruments. These instruments are the "Race Directive"<sup>285</sup>, the "Employment discrimination Directive"<sup>286</sup>, the "Gender equality Directive"<sup>287</sup>, the "Gender Directive"<sup>288</sup> and the "Geo-blocking Regulation"<sup>289</sup>.

These instruments prohibit direct discrimination (i.e. situations where a person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of a protected ground) and indirect discriminations, unless objectively justified (i.e. situations where an apparently neutral provision, criterion or practice would put persons characterised by a protected ground at a particular disadvantage), on the basis of different protected grounds. These instruments also have different scopes of application. On the basis of these instruments targeted advertising may be prohibited if the targeting is directly based on areas under protection or if it is based on neutral criteria which nonetheless have discriminatory effects on a group of people subject to protections.

The **Race Directive** applies, among others, within the field of employment, social security, education and access to goods and services (including housing) and prohibits direct and indirect discrimination based on racial or ethnic origin. The **Employment discrimination Directive** applies only within the context of employment and prohibits direct and indirect discrimination based on the grounds of religion or belief, disability, age and sexual orientation. The **Gender equality Directive** applies in the context of social security and employment and prohibits direct and indirect discrimination based on sex. Within the field of access to and supply of goods and services, advertising and media content is explicitly excluded from the scope of the **Gender Directive**.

Finally, the **Geo-blocking Regulation** prohibits direct and indirect discrimination based on nationality and place of residence in the internal market. In particular, traders cannot apply different general conditions of access to their goods and services on the basis of these criteria. This Regulation does however allow traders to apply different general conditions of access between Member States or specific customers groups on a non-discriminatory basis<sup>290</sup>.

<sup>283</sup> Article 28b (3) of AVMS Directive.

<sup>284</sup> Article 6a of AVMS Directive.

<sup>285</sup> Council of the European Union, 2000, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000.

<sup>286</sup> Council of the European Union, 2000, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02.12.2000.

<sup>287</sup> European Parliament and the Council of the European Union, 2006, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26.7.2006.

<sup>288</sup> Council of the European Union, 2004, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004.

<sup>289</sup> European Parliament and the Council of the European Union, 2018, Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I of 02.03.2018.

<sup>290</sup> Geo-Blocking Regulation, Article 4 (2).



The **UCPD** may also be relevant on a stand-alone basis or in combination with one of the legal instruments mentioned above. Indeed, three kinds of commercial practices are considered to be unfair under the UCPD and, therefore, prohibited<sup>291</sup>: (i) misleading or aggressive practices listed in Annex I that must *in all circumstances be regarded as unfair*; (ii) misleading or aggressive practices prohibited under *semi-general clauses* of Articles 6 to 9; and (iii) practices prohibited under the *general clause* of Article 5(2). Various practices related to advertising and, in particular, targeted advertising may therefore fall under the scope of the UCPD and should be assessed under this three step test. Once again, it must be stressed that the practice of targeted advertising is not prohibited as such. A new practice prohibited in all circumstances, relevant for advertising (and, targeted advertising), is however added by the Directive on Better enforcement and modernisation of Union consumer protection rules (cf. new point 11a of the Annex): consumers should be informed of “any paid advertisement or payment specifically for achieving higher ranking of products within the search results”.

Furthermore, with regard to minors or children, there is no general prohibition of advertising (nor targeted advertising). One exception to this is that there is a specific aggressive practice which is prohibited in all circumstances and listed in Annex I: “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products *for them*”. It is however very specific and, as a result, not very useful with regard to current market practices. Reference must also be made to the average consumer test, applicable to commercial practices aimed at specific groups of vulnerable consumers (such as children). In accordance with Article 5(3) of the UCPD, the assessment must be carried out by the competent authorities from the perspective of the average member of that group. The lack of specific rules protecting minors or children under the UCPD may also be an issue within the Member States: since the UCPD is a full harmonisation directive, Member States are not allowed to prohibit commercial practices addressed to minors or children (as otherwise, they would not be compliant with the directive).

The European Commission also presented on 21 April 2021 its proposal to regulate the use of **artificial intelligence** (AI) in Europe<sup>292</sup>. Once adopted, this new Regulation could also contain rules which will affect online advertising to the extent that advertising is based on AI in scope. In particular, Article 5 of the proposal foresees that the following practices should be prohibited:

- the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person’s consciousness in order to materially distort a person’s behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm;
- the placing on the market, putting into service or use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm.

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<sup>291</sup> UCPD, Article 5.

<sup>292</sup> European Commission, 2021, Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain Union legislative acts, 21.4.2021 COM(2021) 206 final 2021/0106 (COD).

## Box 14: Main issues and gaps: Prohibition of some practices

- Under the UCPD, there are no general rules prohibiting some marketing or advertising practices targeting or directed to minors (or children).
- Under the AVMS, the new rules only apply to video sharing platforms in scope and therefore platforms that do not have as their principle or essential functionality the provision of programmes, user-generated video or both to inform, entertain or educate the general public will not be covered. The video sharing platforms in scope are prevented from using data collected to protect children from processing it for commercial purposes, such as for direct marketing, profiling and behaviourally targeted advertising.
- The scopes of non-discrimination Directives are different and advertisements with direct or indirect discriminatory effects may be prohibited depending on the area. If applicable, the AVMS Directive however requires that audiovisual commercial communications offered directly by video sharing platforms shall not include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation<sup>293</sup>.

Source: Authors' own elaboration.

### 3.2.5. Many players involved and key role played by the platforms

Since the modification of the **CRD in 2019 by the Better Enforcement Directive**, some platforms (i.e. online marketplaces) are also subject to information obligations under consumer protection law. Under this body of law, the obligations of platforms remain limited, as they mainly need to provide information on the main parameters used for ranking of offers presented to consumers after a search query (new Article 6a(1)(a) of the CRD).

As highlighted in the EDBP guidelines, targeting Internet users in general may involve many actors such as targeters<sup>294</sup>, social media platforms, data brokers, data management providers, data analytics companies...<sup>295</sup>. The main actors under **GDPR** are data controllers (i.e. entities defining alone or jointly with other the purpose and the means of the processing) and the data processor (i.e. entities processing data on behalf of a controller)<sup>296</sup>. Furthermore, data processing involves "joint controllers" which requires a case by case analysis of the processing and the roles of the involved entities<sup>297</sup>.

Qualification of (joint) controller/processor is important to determine the stakeholder's duties under the GDPR. The data controller bears the majority of the obligations enshrined in the GDPR. The data controller is for instance in charge of ensuring transparency requirements and must enable the data subjects to exercise their rights. When processing is partly/wholly subject to joint control, Article 26 GDPR requires that the joint controllers determine their respective responsibilities for compliance with the obligations under the GDPR (including transparency requirement and exercise of the data subject rights) by means of an arrangement.

<sup>293</sup> Revised AVMS Directive, Article 9(1)(c)(ii).

<sup>294</sup> The EDPB uses the term targeter to designate natural or legal persons that use social media services in order to direct specific messages at a set of social media users on the basis of specific parameters or criteria. See following footnote.

<sup>295</sup> European Data Protection Board, 2020, Guidelines 8/2020 on the targeting of social media users, 2 September 2020, p. 9.

<sup>296</sup> GDPR, Article 4(7) and Article (8).

<sup>297</sup> European Data protection board, 2020, Guidelines 07/2020 on the concepts of controller and processor in the GDPR, 02 September 2020. p. 22.

Finally, when a data controller/processor relationship exists, it must be governed by a contract<sup>298</sup>. This requirement ensures, among others, respect of data security requirements and control of the data controller when sub-processors are involved.

When many actors intervene at different stages of the processing, joint control may exist only with regard to part of the processing operations necessary during the process of displaying targeted content. The CJEU has, for instance considered that joint control exists between a website operator and a social network for the personal data collection and transmission through use of a social media plugin for advertising purpose<sup>299</sup>. A joint controller relationship exists however only for processing for which both entities effectively determine the purposes and the means<sup>300</sup>. In its guidelines on targeting on social media, the EDPB has stated that a joint control exists between the targeter and social media platforms for some processing operations related to targeting of social media users, among others on the basis of (i) data provided by the data subject to social media by means of criteria selected by the targeter, (ii) observed personal data by means of tracking pixels or GPS location, (iii) inferred personal data by means of interests on social media<sup>301</sup>. Additionally, when targeting is done through displaying advertising on websites, the Article 29 Working Party has stated that joint control may exist between the publisher and the ad network provider<sup>302</sup>.

Box 15: Main issues and gaps: Many players involved and key role played by the platforms

- The qualification of data (joint) controllers/data processor can be complex in an ecosystem where many actors may intervene at different stages of the processing.
- Targeters, publishers and ad network providers may not necessarily be aware of their joint controller status under the GDPR when using web services in order to promote their goods and services by means of targeted advertising. They may however be liable for any damage resulting from an infringement to the Regulation<sup>303</sup>.
- In the absence of adequate qualification, joint controllers may not conclude arrangements framing their respective responsibilities. Consequently, the essence of this arrangement cannot be made public<sup>304</sup> which can impair the ability of the data subject to be informed and exercise their rights.

Source: Authors' own elaboration.

<sup>298</sup> GDPR, Article 28.

<sup>299</sup> CJEU, judgement *Fashion ID*, 29 July 2019, C-40/17, EU:C:2019:629, point 78 and 80.

<sup>300</sup> CJEU, judgement *Fashion ID*, 29 July 2019, C-40/17, EU:C:2019:629, point 85.

<sup>301</sup> European Data Protection Board, 2020, Guidelines 8/2020 on the targeting of social media users, 2 September 2020, pp. 13-14, 17-18 and 20.

<sup>302</sup> Article 29 Data Protection Working Party, 2010, Opinion 2/2010 on online behavioural advertising, 22 June 2010, WP171, p. 11.

<sup>303</sup> GDPR, Article 82.

<sup>304</sup> See, for this requirement, GDPR, Article 26(2).

## 3.2.6. Summary

Table 4: Summary table on gaps

		Processing of personal data	Transparency specific rules	Transparency general rules	Opt-in/opt-out	Prohibition of practices
Specific	P2B Regulation	v	v			
	ePrivacy (incl. Proposal)	v		v	v (for tracking devices and direct marketing communication)	
	AVMS			v		v
General	UCPD		v	v		v
	Misleading and Comparative Advertising DIR			v		
	CRD		v	v		
	GDPR	v	v	v	v (depending on the legal ground of the processing)	

Source: Authors' own elaboration.

### 3.3. How far do existing enforcement measures address the problems and what are the gaps?

#### 3.3.1. Overview of the main enforcement measures

Existing legislation applicable to targeted advertising mostly relies on Member States to ensure the enforcement of substantial provisions. This is the case in particular for the eCommerce Directive, the P2B Regulation, the ePrivacy Directive, the UCPD, the CRD, the GDPR, and the AVMS Directive.

The eCommerce Directive<sup>305</sup>, the P2B Regulation<sup>306</sup>, the UCPD<sup>307</sup>, the Directive on misleading and comparative advertising<sup>308</sup>, and the CRD<sup>309</sup> merely provide that Member States shall ensure the enforcement of substantial provisions by using effective, proportionate and dissuasive measures and/or sanctions. Depending on the Member State, there may be criminal, civil and/or administrative sanctions. Since the penalties are not usually harmonised at the EU level, there may be differences between the Member States. It must however be stressed that, following the Better enforcement Directive companies that breach UCPD and the CRD in three or more EU countries will face maximum fines of at least 4% of their annual turnover in the concerned countries or at least EUR 2m, when information about the trader's annual turnover is unavailable.

<sup>305</sup> See notably Article 20, eCommerce Directive.

<sup>306</sup> See notably Article 15(1) and (2), P2B Regulation.

<sup>307</sup> See notably Article 13, UCPD. In the Better Enforcement Directive, some further guidance on enforcement was provided (e.g. on criteria to impose penalties).

<sup>308</sup> See notably Article 5, Directive on misleading and comparative advertising.

<sup>309</sup> See notably Article 24, CRD. In the Better Enforcement Directive, some further guidance on enforcement was provided (e.g. on criteria to impose penalties).

The DSA proposal<sup>310</sup>, the ePrivacy Directive (and proposed Regulation)<sup>311</sup>, the GDPR<sup>312</sup>, and the AVMS Directive<sup>313</sup> contain more detailed rules on enforcement measures, as they require Member States to grant national competent authorities with powers to investigate, and enforce the substantive rules provided for in the texts (notably through fines and other sanctions).

In relation to the DMA proposal, enforcement would however be ensured by the Commission, which would be granted the powers to adopt implementing acts, investigate cases, impose interim measures and fines, etc.<sup>314</sup>.

Some additional enforcement mechanisms are in place at EU level. The Directive on representative actions for the protection of the collective interests of consumers was adopted on 25 November 2020 and needs to be implemented by 25 June 2023<sup>315</sup>. It puts in place a procedural mechanism to allow so-called qualified entities to bring representative actions before national courts or administrative authorities on behalf of consumers where the infringer harms the collective interest of consumers. The collective interest of a consumer refers to the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers.

Out of court dispute settlement is also very much encouraged and the Directive on Consumer ADR<sup>316</sup> and a Regulation on consumer ODR<sup>317</sup> aim to ensure that disputes between consumers and traders can be submitted to entities offering impartial, transparent, effective and fair alternative dispute resolution procedures. The consumer protection cooperation regulation<sup>318</sup> which applies when traders and consumers are not established in the same country, may also be relevant, as it involves the establishment of a cooperation network which may be useful in addressing cross-border infringements.

### 3.3.2. Main issues and gaps

A key issue is that most consumers will not seek redress before competent courts when targeted advertising infringes their rights as consumers, citizens or data subjects. Among the reasons for not seeking judicial redress, are the complexity of the legal framework, the lack of knowledge about their rights or the identity of the person responsible for the advertising, the low value of the case, the length and the cost of the procedure, the symbolic outcome that may be expected (injunction deciding the stopping of an advertising campaign, already finished many months before the judgement...), the lack of evidence, etc.

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<sup>310</sup> See notably Articles 38 and 41, proposed DSA.

<sup>311</sup> See notably Article 15, ePrivacy Directive.

<sup>312</sup> See notably Article 58, GDPR.

<sup>313</sup> See notably Article 28b, AVMS Directive.

<sup>314</sup> See notably Articles 18, 26 and 37 of the proposed DMA.

<sup>315</sup> European Parliament and the Council of the European Union, 2020, Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409 of 4.12.2020.

<sup>316</sup> European Parliament and the Council of the European Union, 2013, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165 of 18.6.2013.

<sup>317</sup> European Parliament and the Council of the European Union, 2013, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165 of 18.6.2013.

<sup>318</sup> European Parliament and the Council of the European Union, 2017, Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345 of 27.12.2017.

In most cases, when court decisions are handed down in the context of advertising, the claim is not introduced by a consumer but by another trader, because of unfair market practices (and relying on the violation of consumer protection rights).

Some of these gaps are already taken into account – partially at least – by the current legal framework, with the Injunction Directive, the new Representative Action Directive or the Directive on Consumer ADR. This is however not specific to targeted advertising and a continuous assessment needs to be made to ensure that access to justice is improved. The existence of specific enforcement bodies (such as those under the GDPR, ePrivacy Directive or AVMS) could also help fill some gaps, provided they have sufficient funding and investigation and enforcement powers. A particular challenge will certainly be the coordination between these authorities when cases fall under the scope of several legal texts (and, therefore, several enforcement bodies).

### 3.3.3. Summary on enforcement

Table 5: Summary table on enforcement

		Specific Enforcement Body (in addition to traditional courts)	MS shall take enforcement means	Criteria for penalties	Possible fines calculated on turnover	Burden of proof (and risks) on the provider	Civil sanctions	Self-regulatory bodies
Specific	eCommerce DIR		v	v				
	P2B Regulation		v	v				
	ePrivacy (incl. Proposal)	v	v	v	v (proposal)			
General	UCPD		v	v	v	v		
	Misleading and Comparative Advertising DIR		v			v		v
	CRD		v	v	v	v		
	GDPR	v	v	v	v			
	AVMS DIR	v	v	v				

Source: Authors' own elaboration.

## 3.4. What are the new measures proposed by the Commission in DSA and DMA proposals?

### 3.4.1. DSA Proposal

The rules on advertising contained in the proposed DSA are aimed at providing more transparency surrounding advertising which in turn may help **users** to oppose targeted advertising by refusing to be profiled on data protection grounds. This transparency also aims to enable scrutiny **by authorities and vetted researchers** as to how advertisements are displayed and how they are targeted.

All online platforms (i.e. hosting service providers that communicate content to the public) would be required<sup>319</sup> to ensure that the recipients of the service receive individualised information to enable them to identify, for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time that the information displayed is an advertisement; the (natural or legal) person on whose behalf the advertisement is displayed; and meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed (for targeted advertising).

Although these transparency obligations are already present in EU legislation, the current rules are spread across different legal instruments and do not apply to all platforms. This is therefore a welcome new element. However it may be useful to clarify the links between the DSA and the GDPR and the ePrivacy Directive (and future Regulation), in particular whether and how data subjects need to provide consent before being exposed to behavioural advertising. At the very least also, since data subjects are always allowed to withdraw their consent, the DSA could also specify that the information should also include information on how users can object to the further processing of their data for advertising purposes. There are also no rules in the DSA on the collection and use of children's personal data for behavioural/targeted advertising purposes whereas a prohibition is included for video sharing platforms in the recently revised AVMS Directive. For sake of coherence, this rule should also be included in the future DSA. Also in terms of shortcomings, the DSA does not contain any rule on non-discrimination whereas such rules are contained in various EU legal instruments, creating a patchwork of rules, applying to different situations.

The very large online platforms (VLOPs) would also need to compile and make publicly available through application programming interfaces (APIs) a repository containing certain information, while also making sure that the repository does not contain any personal data. In particular, the repository would have to specify whether the advertisement was intended to be displayed specifically to one or more particular groups of recipients of the service and if so, the main parameters used; the total number of recipients reached and, where applicable, aggregate numbers for the group or groups of recipients to whom the advertisement was targeted specifically<sup>320</sup>. The Commission would have to support and promote the development of voluntary industry standards to ensure the interoperability of these repositories<sup>321</sup>.

This also addresses some of the concerns highlighted above and is particularly interesting because this data will need to be made publicly available, meaning that end-users and business users (on top of researchers and enforcers) will have access to this data. It must however be noted that only the very large online platforms will be subject to these requirements. Of course, the 'readability' of the data may not be obvious to the layman, but the future European Board for Digital Services could play a role in making this information more accessible to users.

The Commission would have to encourage and facilitate the development of codes of conduct at EU level to support and complement the transparency obligations relating to advertisements with transparency obligations that would go beyond the imposed rules<sup>322</sup>.

Although not specific to advertising, it is also interesting to recall that the rules on the liability of hosting service providers would remain broadly the same as under the eCommerce Directive. For the purpose of this study, we note the new addition to the rules on the liability of hosting service providers.

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<sup>319</sup> Article 24 of the proposed DSA.

<sup>320</sup> Article 30 of the proposed DSA.

<sup>321</sup> Article 34 of the proposed DSA.

<sup>322</sup> Article 36 of the proposed DSA.

Article 5.3 of the proposed DSA states that the exemption of Article 5.1 would not apply “with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control”. Although this paragraph does not directly mention advertising, it would not be unreasonable to consider to what extent it may be used in cases where the platform leads the consumer to believe that the advertisement is arranged by the platform directly and not by a third party intermediary.

The proposal also introduces mechanisms for users to flag illegal content in Article 14, rules on internal complaints handling in Article 17 and rules on out-of-court dispute settlement in Article 18. However, it is not clear how these rules will apply in case of advertising that is in breach of EU or national legislation.

### 3.4.2. DMA Proposal

The DMA proposal applies to the gatekeeper of advertising services which also provides one of the following digital services, the so-called Core Platforms Services: B2C intermediation services (including marketplaces and app stores), search engines, social networks, video-sharing platforms, number-independent interpersonal communication services, cloud computing or operating systems<sup>323</sup>.

A gatekeeper is defined on the basis of a cumulative three criteria test, namely: (i) significant impact on the EU internal market; (ii) control of an important gateway for business users to reach end-users; and (iii) entrenched and durable position<sup>324</sup>. The DMA proposal introduces a rebuttable presumption, for each of the three criteria, in the form of a threshold. The first criterion (significant impact) will be deemed fulfilled if the Core Platforms Services provider achieved an annual EEA turnover equal to or above 6.5 billion EUR or a market capitalisation of at least 65 billion EUR and that Core Platforms Services provider is currently active in at least three Member States. The second criterion (important gateway) will be deemed met if the Core Platforms Services provider reached more than 45 million monthly active end-users in the EU (around 10% of the EU population) as well as more than 10,000 active business users on an annualised basis. As for the third criterion (entrenched and durable position), it will be fulfilled if the turnover and user thresholds set above are met for the last 3 financial years<sup>325</sup>.

A digital platform which has been designated as gatekeeper for one or several Core Platforms Services is subject to several obligations and prohibitions amongst which some are related to online advertising.

Two obligations aim to complement competition law and to improve the functioning of the Adtech value chain:

- Provide advertisers and publishers with information concerning the price paid by the advertiser and publisher and remuneration paid to the publisher<sup>326</sup>; and

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<sup>323</sup> DMA proposal, Article 2(2h).

<sup>324</sup> DMA proposal, Article 3(1).

<sup>325</sup> DMA proposal, Article 3(2).

<sup>326</sup> DMA proposal, Article 5 (Article 5.g). Such lack of transparency is currently investigated in the Google AdTech case, Cases AT. 40 660 and 40 670.



- Provide advertisers and publishers, free of charge, access to the performance measuring tools of the gatekeeper and the information necessary to carry out their own independent verification of the ad inventory<sup>327</sup>.

One obligation aims to allow more privacy competition between substitute digital services and, in turn, to prevent deep consumer profiling from becoming the industry standard:

- Submit to the Commission an independently audited description of consumer profiling techniques used<sup>328</sup>.

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<sup>327</sup> DMA proposal, Article 6(1)(g).

<sup>328</sup> DMA proposal, Article 13 and recital 61.

## 4. WHAT SOLUTIONS HAVE BEEN APPLIED?

### 4.1. Comparison of national context

The main issues emerging in each country case study are quite homogenous. All country systems generally tackle trademarks and copyright protection, market manipulation, unfair competition, youth protection, consumer protection, data protection and protection of personal rights. These can therefore be seen as global challenges that are the result of misleading and/or aggressive practices. In all case studies, consumer protection laws apply equally to online advertising and are therefore the main elements of consumer protection legislation, complemented in all cases by specific laws relating to the online space, data, markets or vulnerable consumer groups. This is evidence that, first and foremost, **all countries see consumer protection as the key issue when it comes to regulating online advertising**. The major differences are in how each country tries to address these challenges, with a similar set-up across the EU (and former EU) countries and some highly relevant practices in the non-EU case studies.

As a consequence of the focus on consumer protection, the key legislation, outlined in Table 6, aims to prohibit advertising that unduly constrains consumers' freedom of choice. In addition to the legislation in this table, the GDPR is the regulatory response to data protection concerns in the EU case studies and the United Kingdom, where EU legislation still applies following the UK's departure from the EU. Unlike the EU, the US does not have a separate data protection authority or a single comprehensive privacy law at the federal level, like the GDPR. However, the Federal Trade Commission (FTC), which implements the relevant United States (US) legislation, has Section 5 which deals with unfair or deceptive acts or practices in or affecting commerce, including data protection. Section 5 also is complemented by privacy-related statutes to protect consumer privacy, including for example the Children's Online Privacy Protection statute. This approach makes up a mosaic of regulation that mirrors many issues addressed by the GDPR<sup>329</sup>.

Table 6: Main piece of legislation in case study countries

Country	Key legislation	Year	Revisions
Australia	Competition and Consumer Act	2010	N/A
France	Consumer Code and law on trust in digital economy	1993 and 2004	2017
Germany	Law against unfair competition	2004	2008, 2015
Ireland	Consumer Protection Act (CPA) and the Electronic Communications Networks and Services, Privacy and Electronic Communications Regulations	2007 and 2011 respectively	N/A
United Kingdom	Unfair Trading Regulations	2008	2014, 2015
United States	The Federal Trade Commission Act	1914	Numerous (latest 2018)

Source: Authors' own elaboration.

<sup>329</sup> Federal Trade Commission, *Children's Online Privacy Protection Rule ("COPPA")*, Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501–6505.

The review of the legal framework of the case study countries shows that the issues faced are similar. Perhaps the only exception is in Ireland, which has a far higher volume of claims passing to the Competition and Consumer Protection Commission (CCPC), Ireland’s statutory body implementing the main legislation applying to consumer protection. This has to do with the fact that a large number of online platforms are based in Ireland. The Irish law under which most claims have been made is the 2011 Electronic Communications Networks and Services, Privacy and Electronic Communications Regulations, outlined in the above table and expanded on in the annex case study<sup>330</sup>.

What can be seen when looking at the overall value of online advertising spending in the case study countries is that the United States accounts for more than all the other case study countries combined, and indeed is the largest market globally for online advertising spending. The EU country with the largest spending in terms of total value is Germany. The picture when broken down per capita is more nuanced. The United States is still the largest spender. However, Australia, despite spending 93% less overall than the United States, appears second, with USD 396<sup>331</sup> per capita in 2020. In the EU, Ireland is the highest by far in terms of per capita spending, partly reflecting the fact that this is where the platforms are based. In terms of the breakdown by activity, Ireland shows the largest percentage of total spending on social media spend in the EU, Germany in display advertising and France in search spending. However, all case studies show quite similar percentages in this respect, roughly half of the spend going on search, then 20-30% going on display and social media, respectively.

Table 7: Breakdown of online advertising spending in 2020 (USD)

Country	Search value	Display value	Social media advertising value	Total value	Per capita spending
Australia	4.5 bn (44%)	3.7 bn (36%)	2.1 bn (20%)	10.3 bn	396
France	3.1 bn (54%)	1.1 bn (20%)	1.5 bn (26%)	5.7 bn	85
Germany	4.7 bn (52%)	2.6 bn (29%)	1.7 bn (19%)	9 bn	107
Ireland	427 mn (51%)	183 mn (22%)	229 mn (27%)	839 mn	168
United Kingdom	10.8 bn (53%)	3.7 bn (18%)	5.8 bn (29%)	20.3 bn	299
United States	60.9 bn (44%)	38 bn (27%)	39.7 bn (29%)	138.6 bn	419

Source: Table compiled by authors with data from Statista, available at: [www.statista.com](http://www.statista.com).

In terms of growth, all countries have seen significant increases in the costs of digital advertising, with COVID-19 representing a small deviation in the general trend (see Table 7 for more details). For example, Ireland saw the digital advertising spend in the Irish market for 2019 rise by 17% to reach EUR 673 million<sup>332</sup>. In France, 2018 saw digital becoming the leading medium for advertising sales (40%), compared with 27% for television<sup>333</sup>.

<sup>330</sup> Irish Statute Books, 2011, *European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations*.

<sup>331</sup> This corresponds roughly EUR 323 per capita [exchange rate 31.12.2020].

<sup>332</sup> RTE, 2020, *Irish digital advertising spend grew by 17% last year*.

<sup>333</sup> Report commissioned by the French Minister of Culture and the Secretary of State in charge of digital, 2020, *Online advertising: A level playing field*.

The Syndicat des Régies Internet (SRI) provided an estimate of the growth of the digital advertising market in France at +7% for the whole of 2021<sup>334</sup>. The advertising market share of online advertising in Germany has increased from 12% in 2019 to 40% in 2020<sup>335</sup>. From a consumer perspective, this growth is reflected in the prices of goods and services, particularly those which make heavy use of digital advertising (for example consumer electronics, hotels, and flights). As elsewhere, market manipulation and the costs of misleading actions and aggressive commercial practices are a concern in the UK. In 2009, Consumer Focus estimated that misleading and aggressive practices cost EUR 3.8 billion (GBP 3.3 billion)<sup>336</sup>.

#### Box 16: Effect of COVID-19 on online advertising in France and Australia

The COVID-19 pandemic is having a large impact on various industries, and digital advertising is no exception. Businesses have been assessing their marketing efforts, which includes online advertising. According to a recent report by the Interactive Advertising Bureau, almost 24% of media buyers, planners, and brands paused ad spending until Q2 2020<sup>337</sup>. In France, Digital advertising revenues were down by 8% in the first half of 2020<sup>338</sup>. Display, banners, video, special operations and audio all experienced a 17% decline in revenue and search was down by 9%, however retail search digital advertising has continued to grow at a rapid pace, especially due to the success of eCommerce during the lockdown. The Australian Digital Advertising market experienced double-digit decline in Q2 2020 due to the Impact of COVID-19. All online advertising categories showed declines compared to quarter ending June 2019 with Search down 9% and Display 11%. Video has outperformed the overall general display market, with no change in expenditure year on year, increasing its share of the general display market by to 53%<sup>339</sup>. However, recent research from the Consumer Policy Research Centre (CPRC) has also found that, after the adjustment in 2020, the COVID-19 pandemic has resulted in consumers relying on digital markets at much higher levels<sup>340</sup>. The market is therefore expected to recover fully in the long-term and continue growing exponentially.

Source: Authors' own elaboration.

## 4.2. Design and implementation of responses

**All case study countries except Australia have chosen to implement self-regulatory principles, to support consumer protection legislation, when it comes to online advertising.** As can be seen in Table 8 below, whether a system is self-regulatory or implements mandatory regulation affects the actors in the system. Most EU Members States, and many non-European Union countries, have a self-regulatory organisation that is a member of the European Advertising Standards Alliance (EASA). EASA co-ordinates the cross-border complaints system for its members (which include the Advertising Standards Agency (UK))<sup>341</sup>.

<sup>334</sup> Oliver Wyman, 2020 Report, *Syndicat des Régies Internet (SRI)*.

<sup>335</sup> Giersberg, F., 2020, *Advertising market 2020 with clear corona effect*.

<sup>336</sup> Department for Business, Energy & Industrial Strategy, 2018, *Misleading and aggressive commercial practices: new private rights for consumers*.

<sup>337</sup> Mordor Intelligence, 2021, *Online advertising market – growth, trends, covid-19 impact and forecasts (2021 - 2026)*

<sup>338</sup> Amiot, E., 2020, *Digital Advertising in France Weakened by the Pandemic, Syndicat des Régies Internet (SRI)*.

<sup>339</sup> Le Roy, G., 2020, *Australian Digital Advertising Market Experiences Double Digit Decline In Q2 2020 Due To Impact Of COVID-19*.

<sup>340</sup> Consumer Policy Research Centre, 2020, *Unfair trading practices in digital markets – evidence and regulatory gaps*, Research and policy briefing.

<sup>341</sup> Advertising Standards Agency, 2014, *Scope of the Code: CAP Code*.

There are two other notable points from Table 8 below. The first is that **Germany has no dedicated national authority. This is because the main legislation is enforced by the market participants in the district court** (Landgericht) via injunctions which can prohibit online advertising activities. This a specific legal instrument in German civil law, which has legal effects for both process participants and third parties. For example, through this instrument a ‘blacklist’ of unfair business actions, which impact entrepreneurs and include both misleading and aggressive commercial practices, has been created<sup>342</sup>. The rationale of this ‘blacklist’ is to protect consumers’ freedom of choice and consumers’ right to make informed decisions.

The other notable example is the UK system which involves the Committee of Advertising Practice (CAP), rather than one single industry body. This Committee develops and implements the UK Code of Non-Broadcast Advertising and Direct Promotional Marketing (CAP Code) and is mainly supported by the Advertising Standards Agency. However, it also includes member organisations who, through contractual agreements with media publishers and carriers, agree to comply with the Code on behalf of other businesses who may not be a member of the Advertising Standards Agency. In that sense, the CAP is not just one ‘catch all’ industry body, but a mixture.

Table 8: Effect of COVID-19 on online advertising in France and Australia

Country	Self-regulation	Designated industry body(-ies)	National authority(-ies)
Australia	N	None	Australian Competition and Consumer Commission (ACCC) and the Australian Communications and Media Authority (ACMA)
France	Y	Regulatory authority for advertising (ARPP)	The National Competition Authority (NCA), National Commission for Informatics and Freedoms (NCIF), and the Audiovisual Council (AC)
Germany	Y	German Advertising Association (GAA)	None
Ireland	Y	Advertising Standards Agency (ASAI)	Competition and Consumer Protection Commission (CCPC)
United Kingdom	Y	Committee of Advertising Practice (CAP)	National Trading Standards (NTS)
United States	Y	BBB National Programs (BBBNP)	Federal Trade Commission (FTC)

Source: Authors’ own elaboration.

In contrast to the other case studies, in Australia there is no single designated industry body mirroring the national authorities mandated to regulate online advertising in the country. This is because many of the mandatory regulations, such as the ‘News Media Bargaining Code’, overseen by the ACCC and the Australian Communications and Media Authority (ACMA), were only introduced in early 2021. Furthermore, the lack of a self-regulatory system negates the demand for a designated industry interlocutor for the national authorities. It is important to note that, in terms of impact, despite the ‘News Media Bargaining Code’ being less than one year old, it has already led to both Google and Facebook negotiating voluntary commercial agreements with a number of large and small Australian

<sup>342</sup> German Law, 2004, *Act against Unfair Competition (UWG), Annex (to Section 3 Paragraph 3)*.

news businesses. A short description of the general context of mandatory regulation in Australia, including from the origins of the code, is outlined in the box below.

Box 17: The path of online advertising regulation in Australia

To tackle the issues arising from online advertising in both business-to-business (B2B) and business-to-consumer (B2C) relations, the ACCC made a number of recommendations to the Australian Government as part of the **Final Report of the Digital Platforms Inquiry**<sup>343</sup>. A number of these recommendations have already been implemented by the Australian Government.

The **Digital Platforms Inquiry** which ran between December 2017 and July 2019 looked at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets<sup>344</sup>. The final report published in 2019 contains recommendations reflecting the issues arising from the growth of digital platforms<sup>345</sup>. The recommendation to address the imbalance in the bargaining relationship between these platforms and news media businesses was a key driver behind the adoption of the News Media Bargaining Code.

Another noteworthy inquiry is the **inquiry into markets for the supply of digital platform services**, which commenced in February 2020 and will continue until March 2025. The first report of this inquiry was released in September 2020 and provides an in-depth focus on online private messaging services in Australia. The second report, which considers mobile app marketplaces, is to be publicly released by the end of April 2021<sup>346</sup>. A separate ACCC **inquiry into markets for the supply digital advertising technology services and digital advertising agency services** released an interim report earlier this year, with a final report due to be publicly released in September<sup>347</sup>.

Overall, many different regulatory measures have been adopted in Australia, some of which have not become law yet, as there is typically a significant consultation period, and the results of inquiries are carefully considered and often reflected in legislative proposals.

Source: Authors' own elaboration.

In terms of self-regulation, all the case study countries using a system of self-regulation have some form of code or guidelines for online advertising. In France for example, the French self-regulatory authority's (ARPP) code of conduct on online advertising is the main set of principles and includes recommendations applicable to some digital format/techniques, such as social media. In the UK, the 12<sup>th</sup> edition of the CAP Code came into force in September 2010 and was released because the digital remit of the Advertising Standards Agency (ASAI) was extended to cover online marketing communications. In Ireland, the Advertising Standards Authority is the independent self-regulatory body set up and financed by the advertising industry, and it publishes a Code of Standards<sup>348</sup>, which includes rules on online behavioural advertising, which are binding for its members. More information can be found in Box 18 below. In Germany, the Advertising Standards Council has a set of operating principles, last updated in 2009<sup>349</sup>.

<sup>343</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> ACCC, 2021, *Digital platform services inquiry 2020-2025*.

<sup>347</sup> ACCC, 2021, *Digital advertising services inquiry*.

<sup>348</sup> Advertising Standards Authority for Ireland, 2016, *Code, 7th edition*.

<sup>349</sup> German Advertising Standards Council, 2009, *Working Principles*.

## Box 18: Ireland, an example of mixed regulatory systems

In Ireland, similar to France, Germany the United Kingdom and to some extent, the United States, a designated industry body (the ASAI) and a national authority (CCPC) both enforce regulations on online advertising. Both authorities use codified principles to seek action against traders and advertisers. The ASAI Code more specifically targets marketing and also includes distinct rules for online behavioural advertising. While consumers who have experienced damages can choose to follow either the CCPC or the ASAI procedures, **the self-regulatory procedure under the ASAI Code** provides quicker relief than the procedure under the Consumer Protection Act (CPA), with the CCPC. Indeed, while a certain level of severity has to be reached for the CCPC to seek action against a trader, the ASAI takes action as soon as an advertiser has breached their code. This implies any consumer can start a procedure with the ASAI. The decisions by the ASAI are also made public, which may cause negative publicity to advertisers and thus, create a dissuasive effect<sup>350</sup>.

The CCPC is a member of the **EU Consumer Protection Cooperation (CPC) Network**, which is responsible for enforcing EU consumer protection laws in EU and EEA countries. Under the CPC framework, any authority in a country where consumer protection law may have been breached can ask its counterpart, in the country where the trader is based, to take action to stop this breach of law. Authorities can also alert each other to possible breaches that could spread to other countries and, with the European Commission's support, authorities can also coordinate their approaches to applying consumer protection law to tackle widespread infringements<sup>351</sup>.

Source: Authors' own elaboration.

In the United States, the system can be seen as self-regulatory but underpinned by a strong regulator with the ability to make case law (its role outlined in the box below). In this case, the FTC itself, in consultation with industry, provides advice to online companies and commercial websites. In February 2009, the FTC released a revised set of principles for the self-regulation of online behavioural advertising<sup>352</sup>. These guidelines are also currently under review and the role of the FTC more generally is interesting from a best practice point of view.

<sup>350</sup> Advertising Standards Agency for Ireland, 2020, *Complaints Bulletins*.

<sup>351</sup> Competition and Consumer Protection Commission, 2019, *Annual Report 2019*.

<sup>352</sup> Federal Trade Commission, 2009, *Self-Regulation Principles for Online Behavioral Advertising*.

## Box 19: The regulatory practice on online advertising in the United States

In the United States, the FTC's role conducting investigations and contributions to case law differs from the other national authorities' roles and allows the FTC to react quickly to emerging market practices. The American system differs from the other systems examined as the role of case law is more prominent in upholding the consumer protection and privacy principles set in Section 5 of the FTC Act. For example, the FTC was recently able to propose an order<sup>353</sup> on the use of online facial recognition by companies which includes a new algorithmic remedy. To complement its investigation activities, the FTC actively liaises with stakeholders, through guidelines and workshops. The FTC is currently organising a workshop on dark commercial patterns, for which stakeholders can share their comments ahead of time and which will result in the publication of a report. In elaborating their guidelines, the FTC also adopts a collaborative approach with stakeholders. The **Endorsements and Testimonials in Advertising** (known as the Endorsement Guides) were last updated in 2009 and are currently under review<sup>354</sup>. As a part of the review, the FTC initiated a notice and a consultation period during which stakeholders can address their comments to the FTC, all of which are available online, on the 'regulations.gov' website. The procedure typically takes a few years. The Commission will vote on whether to adopt the recommended changes.

The FTC has created the **Consumer Sentinel Network**, which provides a knowledge sharing platform for its members on issues that relate to consumer protection through reports<sup>355</sup>. Internationally, the FTC consults regularly with DG JUST about developments in consumer law and enforcement cooperation. Although the US laws and legal system differs significantly from the EU, the FTC and the EU share many of the same high-level goals in the area of consumer protection including in relation to digital advertising. To that end, the FTC is very active in international engagement in the OECD, the International Consumer Protection Enforcement Network (ICPEN), and other international organisations, and engages at EU level or bilaterally with Member States<sup>356</sup>.

Source: Authors' own elaboration.

### 4.3. Evaluation of EU Member State and third country experiences

Overall, there are several lessons concerning the institutional framework and enforcement that can be learned at the EU-level from experiences at national level within and outside Europe.

The FTC as an authority shows many positive attributes. Although the research the FTC leads (including, for example, the creation of the Consumer Sentinel Network), as well as the cases it deals with, are specific to the US, its statutes can be much broader and higher level than EU laws. The FTC's activity on specific cases allows quick responses to a rapidly growing industry in which new issues arise quickly, and its review process for guidelines is directed yet participatory, as evidenced by the review of the Endorsement Guides.

In Ireland, the activity led by the industry body, the ASAI, does appear to complement the national authority, CCPC, which deals predominantly with more severe breaches which have already caused harm to consumers. The self-regulatory procedure under the ASAI Code provides quicker relief than the procedure under the CPA, with the CCPC, and this dual system could be considered a best practice. The UK industry body, the ASA, is also quite advanced with regards to self-regulation and dealing with

<sup>353</sup> Federal Trade Commission, 2021, *California Company Settles FTC Allegations It Deceived Consumers about use of Facial Recognition in Photo Storage App*, Press Release.

<sup>354</sup> United States Federal Trade Commission, 2020, *FTC Seeks Public Comment on its Endorsement Guides*, Press Release.

<sup>355</sup> United States Federal Trade Commission, *Enforcement page: Consumer Sentinel Network*.

<sup>356</sup> United States Federal Trade Commission, *About the FTC: Office of International Affairs*.



specific cases. In 2019, the ASA issued 62 sanctions leading to compliance, and only 9 advertisers needed to be referred to Trading Standards for further action to be taken<sup>357</sup>. In France, there is a self-regulatory system with strong engagement from national authorities. Moreover, the competition authority publishes opinions on online advertising, such as the one of 6 March 2018 on data exploitation in the online advertising sector<sup>358</sup>. This quasi-regulatory activity by the French national authorities could be seen as a form of 'pro-active self-regulation', which may be considered an EU best practice most similar to the US model. In Germany, consumers have a positive view of the development of the main legislation. This is perhaps due to a greater awareness of the debate around data and privacy than in other countries. Consumers still perceive the current regulatory framework as a mixture of paradoxical advantages, disadvantages and neutral or ambivalent elements<sup>359</sup>. This perception taps into general consumer feelings in all the case study countries regarding what is known as the 'personalisation-privacy' paradox. However, it appears German consumers are perhaps more aware of what this involves in terms of online advertising and 'free' online services.

In Australia, the adoption of a framework to curtail the market power of digital platform giants, such as Google and Facebook, has attracted a strong interest from other policy makers and competition regulators, including the UK's Competition and Markets Authority (CMA)<sup>360</sup>. According to a recent statement by the UK government, the UK's Digital Secretary asked the new Digital Markets Unit to 'look specifically at how a [mandatory] code would govern the relationships between platforms and content providers such as news publishers, including to ensure they are as fair and reasonable as possible<sup>361</sup>. It is worth noting that this regulatory measure is comparable to Article 15 of the EU Copyright Directive, which also aims to require payments from digital platforms to publishers<sup>362</sup>.

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<sup>357</sup> UK Advertising Standards Agency, 2019, *Using technology for good – Annual Report 2019*.

<sup>358</sup> Autorité de la concurrence, 2018, *Opinion n° 18-A-03 of 6 March 2018 on the use of data in the internet advertising sector advertising sector*. 2018.

<sup>359</sup> Dehling, T., Zhang, Y. & Sunyaev, A., 2019, 'Consumer Perceptions of Online Behavioral Advertising', *Proceedings of the 21st IEEE Conference on Business Informatics*.

<sup>360</sup> Lomas, N., 2021, *After Facebook's news flex, Australia passes bargaining code for platforms and publishers*, Tech Crunch.

<sup>361</sup> *Ibid.*

<sup>362</sup> European Parliament and European Council, 2019, *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance)*.

## 5. CONCLUSIONS AND RECOMMENDATIONS

In this section, we synthesise the insights from the previous sections to provide recommendations that may address the gaps identified. We distinguish between recommendations to address challenges for consumers and recommendations to address challenges for SMEs as publishers and advertisers, and to support the development of a single market in online advertising.

### 5.1. Recommendations to better protect consumers

#### 5.1.1. Ensuring that data use and sharing in digital advertising conforms with privacy rules

The delivery of behavioural advertising typically involves the extensive use of consumer data that may be collected without consumers' knowledge. Consumers have little understanding of who is collecting data and how or what data is being collected and processed. The use of dark patterns to leverage consent for data collection and processing can further exacerbate this issue (see below). In addition, advertising auctions are often based on the transfer of large amounts of personal data between a variety of different actors. Usually there is little awareness and control of who the data is shared with or whether it is used in contexts other than advertising. Both practices run counter to the rights recognised in the GDPR and highlight the need for an improvement in the rules and enforcement.

The findings of this study and the interviews conducted suggest that while the GDPR has provided the legal framework to address these issues, the fundamental problem with the GDPR is that the measures are often only selectively enforced by National Data Protection Authorities. There is a need for more consistent and adequate enforcement of the legal framework, to achieve the underlying objectives of the regulation. However, National Data Protection Authorities are not always well equipped to effectively and efficiently enforce the GDPR due to a lack of necessary resources. The European Parliament Resolution on GDPR implementation<sup>363</sup> points to the lack and uneven enforcement of the GDPR by National Data Protection Authorities across the EU which is due, in part, to lack of human, technical and financial resources. According to the Resolution, weak enforcement is particularly evident in cross-border complaints and the European Parliament has expressed concerns over the functioning of the one-stop-shop mechanism regarding the role of the Irish and Luxembourg DPAs which are responsible for dealing with issues relating to the largest tech companies which tend to be registered in those two Member States.

A short term solution would be to improve the working of the coordination mechanism foreseen by the GDPR. A more robust, but longer term, solution may be:

- To insert provisions in the GDPR that allow for the intervention of the European Commission as a complement to the intervention of the authority of the country where the platform is established when it comes to large digital companies operating across multiple countries, similar to what is provided for in the current DSA proposal<sup>364</sup>.

<sup>363</sup> European Parliament resolution of 25 March 2021 on the Commission evaluation report on the implementation of the General Data Protection Regulation two years after its application, paras. 12-22. See also Brave (2020): Europe's governments are failing the GDPR – Brave's 2020 report on the enforcement capacity of data protection authorities, which shows that as the number of complaints increases, it becomes more difficult for the authority to act quickly and efficiently to address them. In addition, Brave shows that alongside a low headcount, budget increases are also decelerating, which is equally problematic when acting against such financially strong companies

<sup>364</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 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, COM(2020) 825 final, 2020/0361 (COD), arts. 50-66.

### 5.1.2. Informing consumers about the fact that they are being targeted and improved consent mechanisms

Consumers are often not aware that they are being targeted and thus influenced by online advertising. In addition to affecting purchasing decisions, the ability to target messages to specific consumer groups provides the potential for the manipulation of public opinion by certain players<sup>365</sup>. Therefore, additional information requirements should be imposed on online platforms (and websites in general) that display advertising, enabling the recipient to recognise advertising, to verify the sender of the advertising and the parameters used to determine the recipient. Various existing legal instruments cover aspects of these problems including the eCommerce and AVMS Directives, the amended CDS and UCPD, and the GDPR. However, the rules are complex and may be subject to inconsistent application and enforcement.

The current DSA proposal is a step in the right direction since it will strengthen the level of awareness of consumers about online advertising. The proposed DSA could be further strengthened by ensuring that the requirements apply to all intermediary services in scope (including search engines). It must be noted however that the proposed DSA does not apply to all 'information society services' covered by the eCommerce Directive, which means that many online websites/publishers will not be covered (see Dealing with multiple actors below). In terms of the information to be conveyed to consumers it seems debatable whether they should be informed about the value of their provided data in monetary terms. Any individual consumer would most likely evaluate monetary amounts towards their own disposable income or their wealth in general. Hence, consumers' impression of the "monetary" value of their data would be mainly driven by their own financial status and not by their privacy preferences. The latter, however, should be the crucial factor in the consent decision.

More promising could be to provide information on what data is specifically used in which targeting method. In this way, consumers would be able to know how for instance their address, age, sex, influences the displayed advertisements. Based on this information, consumers will be able to perform a self-assessment of their individual privacy risk rather than relying on a pre-calculated monetary value. How (format and location) to display mandatory information requirements could be specified in codes of conduct.

Article 24 of the DSA proposal aims to address to some extent the need for clarity around the parameters used for targeting, but further steps could be taken to ensure that all the challenges listed are addressed. Specifically, the DSA could contain:

- A requirement to ensure that there is transparency concerning the fact that the consumer is exposed to targeted advertising and on the main parameters used therefore (but not how they are specifically processed in the targeting algorithm);
- A requirement that information about targeted advertising should be conveyed in a manner that takes into account consumer biases and limitations in dealing with information overload. To apply this principle in practice, different options could be tested by the platforms (A/B testing) and those which are the most effective could be included in the codes of conduct foreseen by Article 36 of the DSA proposal;
- A requirement to provide at least one option which is not based on targeting (similar to what Article 29 of the proposed DSA foresees for the recommender systems used by the very large online platforms); and

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<sup>365</sup> A concern expressed during an interview.

- Moreover, the DSA should encourage opt-in setting to targeted advertising via the tools available to support self- and co-regulation such as codes of conduct (Article 36 of the DSA proposal).

### 5.1.3. Addressing “dark patterns” through GDPR guidelines

Dark patterns refer to designs and wording (e.g. in the context of consent forms) which aim to lead consumers to take decisions which may not be in their best interests.

Some EU authorities have used the GDPR to sanction the use of dark patterns. For example, the French Data Protection Authority fined Google for a “lack of transparency, inadequate information and lack of valid consent in its ads personalisation tool<sup>366</sup>”. Some EDPB Guidelines also cover this issue to some extent.

Further action may be appropriate to ensure the issue is addressed Europe wide. Potential solutions could include:

- Defining design guidelines, among others, for cookie banners and consent forms; and potentially as a longer-term solution (noting that EDPB guidelines are not binding);
- Establishing a higher legal standing for the EDPB guidelines in future revision of the GPPR, for instance by explicitly providing that the DPA and national court should take the guidelines into utmost account; and
- Providing a user-friendly tool to report websites that may not comply with the proposed design guidelines<sup>367</sup>.

### 5.1.4. Clarifying that digital targeted advertising must not breach rules on discrimination and improving algorithmic transparency

The availability of data is useful in displaying relevant ads. However, it can also enable advertisers to intentionally engage in discrimination against certain customer groups e.g. based on age, race, gender or disability. In addition, wherever a lot of data is evaluated by algorithms, unintentional discrimination can occur in ad delivery if the training datasets for the ad algorithms are systematically biased with respect to specific subgroups of the population.

Algorithmic systems are the cornerstone of platforms' content moderation, data analysis and recommender as well as ranking systems. Incorporating an access obligation that refers to not only the working algorithm but also grants access to data which was used to build and test the algorithm (so called “training data”) is crucial for evaluating the compliance of these systems. Without the associated training data, it is difficult to backward-engineer the construction of the algorithm and assess its potential for, e.g., biases in content moderation or potential for data-based discrimination within recommender systems.

These problems may largely be addressed by existing and planned legislation. The proposed AI Act will be a horizontal legislation applicable to all the actors involved in online advertising. The AI Act may tackle discrimination, as the current proposal suggests addressing algorithmic bias and requiring more transparency, better documentation and traceability for (high-risk) AI systems<sup>368</sup>.

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<sup>366</sup> Global Data Hub, 2020, *Beware 'dark patterns' – data protection regulators are watching*.

<sup>367</sup> In the US, users can report websites to their respective Attorney General if they feel they are subjected to a dark pattern. Available at: <https://darkpatternstipline.org/report/>.

<sup>368</sup> European Commission, 2021, Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain Union legislative acts, 21.4.2021 COM(2021) 206 final 2021/0106 (COD), arts 7-19.

Moreover, the non-discrimination principle is enshrined in different EU legislative instruments like the “Race Directive”<sup>369</sup>, the “Employment discrimination Directive”<sup>370</sup>, the “Gender equality Directive”<sup>371</sup>, and the “Gender Directive”<sup>372</sup>, some of which may be applicable to digital advertising. In addition, the GDPR includes an “explainability” rule regarding algorithms<sup>373</sup> and the AVMS Directive explicitly requires non-discrimination in relation to video sharing platforms<sup>374</sup>. Meanwhile the DSA proposal addresses illegal content (which should encompass content which breaches EU and national legislation forbidding discrimination)<sup>375</sup>. However, the DSA could nonetheless further contribute to ensuring that rules regarding discrimination are adhered to in the context of digital advertising through:

- Greater transparency concerning targeting itself and the main parameters thereof as well as giving the possibility to change those parameters (see suggestions above); and
- Regular vetting of systems and training data by accredited researchers will offer new insights on how to mitigate systemic risks and lead to lessened information asymmetries.

#### 5.1.5. Ensure that minors are not subject to harmful targeted advertising which exploits their vulnerabilities

User profiling can enable certain vulnerable consumer groups including minors to be identified and shielded from inappropriate advertising. However, the same profiling techniques could also be used to exploit such users’ vulnerabilities and display inappropriate advertisements.

The FTC in the US uses Section 5 complemented by privacy-related statutes to protect consumer privacy, including the Children’s Online Privacy Protection statute. In December 2020, the FTC issued orders to 9 social media and video streaming companies under Section 6B of FTC act that allows them to collect information from companies. The orders require the companies to provide data on how they collect, use, and present personal information, their advertising and user engagement practices, and how their practices affect children and teens.

In the EU, the AVMS Directive already includes obligations to protect minors from harmful content in advertising, causing physical, mental or moral detriment. However, the provisions apply only to video sharing platforms<sup>376</sup>. More generally, targeting advertising towards children is addressed indirectly by the provisions of the GDPR that make clear that children cannot give consent<sup>377</sup>.

However, to clarify that minors (and potentially other vulnerable customer groups) should be protected from targeted advertising:

<sup>369</sup> Council of the European Union, 2000, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000.

<sup>370</sup> Council of the European Union, 2000, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02.12.2000.

<sup>371</sup> European Parliament and the Council of the European Union, 2006, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26.7.2006.

<sup>372</sup> Council of the European Union, 2004, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004.

<sup>373</sup> GDPR, Article 22.

<sup>374</sup> AVMSD, Article 28b(2) which refers to Article 9(1).

<sup>375</sup> DSA proposal, Article 2(g) defines illegal content as “any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law”.

<sup>376</sup> AVMSD, Article 28b(2) which refers to Article 9(1).

<sup>377</sup> GDPR, Article 8.

- The DSA could include a similar provision to that related to commercial communication of the AVMSD which is applicable to video sharing platforms, thereby extending the rules on the protection of minors to all hosting platforms.

#### 5.1.6. Dealing with multiple actors

Many actors are involved in targeted advertising: publishers, ad intermediaries, and advertisers. In many cases, targeted advertising is pushed to the publisher's website and to the end user without the intervention of the publisher. The scope of the proposed DSA is limited to intermediation services- and the rules on advertising are themselves limited to online platforms and VLOPS, which means that many websites will not be covered, whereas the issues raised in this report go beyond these actors.

Furthermore, any legislative solution which is limited to certain platforms, needs to be mirrored up the value chain since the ad intermediaries are often the engines of targeted advertising solutions. Similarly, the notion of joint controller under the GDPR is not always crystal clear and not necessarily apparent to the end-user. Possible solutions may be:

- To clarify that Article 5.3 of the DSA proposal could also apply to platforms which lead an average and reasonably well-informed consumer to believe that advertising is provided by the online platform itself or by a recipient of the service who is acting under its authority or control. This would ensure that the platform has an incentive to comply with all the transparency rules since otherwise they would be deprived of the liability exemption of Article 5.1; and
- To potentially consider new legislation at EU level which ensures that any ex-ante legislation protecting consumers is also applicable to ad intermediaries.

#### 5.1.7. Clarifying the redress mechanisms

Online advertising needs to comply with many EU and national rules. To date, the enforcement mechanisms are different depending on the specific area that is breached. The proposed DSA also sets out a generic mechanism for users to flag illegal content and to seek redress. This may further complicate matters for consumers. Potential solutions could be to:

- Address in more detail how sector specific rules will interact with the DSA, especially on enforcement;
- Include among the list of tasks for the Digital Service Coordinators the need to provide information to consumers on how to seek redress in relation to online advertising (among other areas); and
- Envisage the adoption of a sector specific directive to address all the consumer protection issues linked to online advertising, thereby ending a piecemeal approach which is not necessarily conducive to consumer trust.

#### 5.1.8. Facilitating the functioning of the internal market

The risk of legal uncertainty deriving from the potential application of national rules to advertising services could be mitigated by enforcing the cooperation mechanisms between Member States so that derogations remain the exception rather than the rule. Specifically, the condition of prior notification of the measure laid down in Article 3(4b) of the eCommerce Directive, could be better harmonised and clarified. This could be done for instance by:

- Amending the eCommerce Directive (possibly through the DSA) by introducing precise deadlines and procedural conditions for the implementation of derogations by Member States

(e.g.: the Member State where the service is provided could not take any measure before the expiration of a three-month deadline)<sup>378</sup>; and

- EU-wide codes of conduct which could be ‘vetted’ by the European Commission to define which types of national restrictions would be compatible with the internal market clause.

## 5.2. Recommendations to better protect SMEs as publishers and advertisers

### 5.2.1. Addressing exploitation by platforms which hold a dominant position in digital advertising

Large platforms providing ad-tech services such as Google and Facebook allow access to a very high proportion of EU Internet users. As such, smaller firms in particular may be reliant on these channels to reach consumers, potentially allowing exploitation in the form of higher charges or other restrictions in the advertising market.

The proposed DMA includes provisions which aim to shine a light on potential exploitation by requiring digital gatekeepers to provide information on prices and performance regarding digital advertising to advertisers<sup>379</sup>. Alongside approving the DMA provisions, potential exploitation of gatekeeper platforms in digital advertising could be addressed by:

- Taking advantage of the additional information to pursue case by case enforcement under competition law at the EU and national level.

### 5.2.2. Increase transparency concerning advertising auctions and the performance of advertising

The distribution of ads via ad-auctions or RTB is marked by a lack of transparency towards both advertisers and publishers. According to interviews, this can create a situation where advertisers cannot understand why they win or lose auctions for specific keywords and how the final price for the impression or conversion is determined. Likewise, publishers face similar uncertainty since they observe only their personal ad revenue, but how much is pocketed by the intermediary remains unknown. The same applies to performance data of the advertisement or the ad-inventory.

Advertisers largely depend on data that is supplied by the ad intermediaries and which has already been edited or aggregated in some form. Access to raw data on ad performance is lacking. This creates a situation in which it is difficult for advertisers to calculate their own unbiased returns on their advertising expenses (Ad-ROI).

The insights of this study and the interviews conducted for this study suggest that the introduction of obligations for B2B side performance data provision would be a promising step. Ideally, this data should be unedited and in an agreed upon standardised format to maximise usability. The benefits of this approach are two-fold. Firstly, access to raw data allows for a quality comparison of different intermediary services based on actual success and conversion rates. This gives both advertisers and publishers the possibility to make informed decisions with respect to their ad spending and ad revenues.

<sup>378</sup> Such recommendations are inspired by the mechanisms laid down in Article 3 of the AVMS Directive (as amended as amended by European Parliament and the Council of the European Union, 2018, Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 in view of changing market realities, OJ L 303/69 of 28.11.2018).

<sup>379</sup> DMA proposal, Article 5(g) and Article 6(1)(g).

Furthermore, this would most likely increase the competitive pressure on large intermediaries of Facebook and Google, which is currently rather low, and would promote innovation in the long run. Secondly, increased transparency with respect to calculable click-through and conversion rates would strongly benefit the potential to detect ad-fraud. Currently, it is difficult for an advertiser to detect whether they are targeted by fraudulent behaviour or for a publisher whether fraud takes place on their websites. If access to raw data is granted, this change as ad-fraud would most likely lead to a significant increase in click-through-rates (increasing an advertiser's costs) while conversion-rates would drop (absolute conversions remain constant). Hence, an unusually large discrepancy between click-through and conversion rates could be a first indicator for present fraud.

The DMA proposal covers some of the following issues, at least to some degree. For example, gatekeepers are required by Article 6(1)(g) of the DMA proposal to provide advertisers and publishers with access to the performance measurement tools and information they need to independently validate advertising inventory. In addition, gatekeepers are obligated by Article 5(g) of the DMA proposal to "provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper"<sup>380</sup>. However, the opacity of the ad auction system is not entirely addressed by the latter provision. It remains unclear how the resulting prices are calculated, which other factors are considered in the auction process and how they are weighted when determining the auction winner. A potential solution could be:

- To add to the proposed transparency obligations in the DMA obligations regarding transparency of the auction criteria used by the gatekeeper of the ad-tech core platform service that include details of the price components (CPC, CPI, CPM) as well as other factors which are taken into account in the auction process and their weighting.

### 5.2.3. Tackling bundling and tying by gatekeeper intermediaries of premium advertising space

Ad-inventory of vertically integrated large intermediaries (e.g. Facebook, YouTube (Google)) is considered very valuable from an advertiser's perspective but is often exclusively marketed via their own Ad-Network or Ad-Exchange. This applies for example to ad inventory on Facebook or on YouTube which are only accessible via their respective networks. However, the non-availability of such premium publishers' inventories to smaller competing ad intermediation networks may act as an entry barrier and limit their ability to compete. This concern has been also expressed in an interview conducted with a European ad-network. This issue has been recently addressed by the current DMA proposal of the European Commission<sup>381</sup>. According to Article 5(f) of the DMA proposal a gatekeeper shall "refrain from requiring business users or end users to subscribe to or register with any other core platform services"<sup>382</sup>. Essentially, a gatekeeper is prohibited from jointly marketing/selling multiple core services for which it has been designated as enjoying a gatekeeper position.

<sup>380</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374 (COD).

<sup>381</sup> Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. and Van Alstyne, M., The EU Digital Markets Act, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-29788-8 (online), doi:10.2760/139337 (online), JRC122910.

<sup>382</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374 (COD).



Separating the intermediary services from these vertically integrated players and the ad-inventory of their publisher's sites could be beneficial in reducing entry barriers and could promote competition on the intermediary level in the online advertising value chain. Furthermore, it could work against the strong concentration tendencies observed in this market and lessen concerns over market power and negative effects on advertising prices and consumer choice.

#### 5.2.4. Addressing asymmetric access to consumer data

Due to their user-facing services, large providers of ad-tech services like Google and Facebook can access extensive amounts of data while other companies lack such access. This leaves challenges to large providers in a weaker competitive position. Concerns have been raised that these large providers not only bundle access to the data with the purchase of advertising solutions and services, but may also directly prohibit or introduce considerable obstacles to the use of the data via a competitors' advertising services<sup>383</sup>. Although the prohibition on bundling and self-preferencing in the DMA proposal provides some assistance in this regard<sup>384</sup>, further obligations could be established to address this issue more vigorously. Other regulations, such as the Data Governance Act, do not yet seem to fully address the data sharing issue. However, the forthcoming Data Act may include some data sharing provisions. The P2B Regulation addresses the need to be transparent in terms and conditions on data sharing. A recommendation could be:

- Further research on this issue may be helpful with a focus on the obstacles to the use of data by third parties and which measures could be introduced to tackle barriers and foster innovation.

#### 5.2.5. Counteracting the monopolisation of the browser market

Google's Privacy Sandbox as well as Apple's ad tracking restriction efforts have been introduced with reference to their ability to increase user privacy. While Google's measure aims to make third-party cookies obsolete for behavioural advertising in the future, Apple's empowers consumers with more control over their data. At first glance, these efforts appear to be a positive development, indicating that the market is addressing consumers' needs for privacy and developing mechanisms to protect them.

However, both companies operate platforms that are used by a large number of consumers. As a result, other companies in the advertising chain are dependent on them. The restrictions will hinder these players in carrying out their business, at least in the short term.

Google's approach is viewed particularly critically. Google itself recently acknowledged that the current implementation of their Privacy Sandbox technology FLoC (Federated Learning of Cohorts) which is designed to deliver behavioural targeting without third-party cookies "might not be compatible with European privacy law"<sup>385</sup>. In addition, some stakeholders and experts believe that Google's approach is likely to harm other players along the advertising value chain and will help to cement its current market position, leading to lower levels of competition and creating greater dependencies. Although blocking of third-party cookies is not a new approach, as Mozilla's Firefox and Apple's Safari browsers already

<sup>383</sup> Autorité de la concurrence, 2018, Sector-specific investigation into online advertising; Srinivasan, D. (2020): Why Google Dominates Advertising Markets – Competition Policy Should Lean on the Principles of Financial Market Regulation. *Stanford Technology Law Review* 24 (1): 55-175.

<sup>384</sup> In particular, DMA proposal, Article5(e) and 5(f) as well as Article6(1)(d).

<sup>385</sup> Schiff, A., 2021, *Google Will Not Run FLoC Origin Tests In Europe Due To GDPR Concerns (At Least For Now)*, Adexchanger.

block third-party cookies by default<sup>386</sup>, blocking them on Google Chrome may lead to distortions in the market, as Google Chrome currently holds about 65% of the browser market<sup>387</sup>. In this context, regulatory action may need to be considered.

### 5.3. Summary of conclusions

The following table summarises the problems discussed in this chapter and links the problems to associated causes, as well as identifying potential solutions, in light of our analysis of the gaps remaining after taking into account existing legislation, and proposals for the DSA and DMA.

In addition to the propositions linked to specific problems, it should be noted that there may also be lessons to be learned from an institutional perspective from the experience of enforcing existing rules, as shown in the case studies. Ireland, for example, demonstrates that the activities of the national authority can be successfully complemented by self-regulatory procedures established by the industry that helps to enable better and faster remedies. The establishment of a dual system could also be a promising approach across Europe.

More generally, a greater level of harmonisation is needed at the EU level, especially with regard to the enforcement of existing legal frameworks. In addition, national authorities should use similar concepts and definitions for “advertising” and “commercial communication” and also “targeted advertising” in order to maintain consistency.

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<sup>386</sup> Onlinemarketing.de, 2020, Welche Auswirkungen hat die Abschaffung von Third Party Cookies auf die Werbebranche?

<sup>387</sup> Statcounter.com, 2021, *Browser Market Share Worldwide – Statistic*.

Table 9: Summary of conclusions

Problem	Causes	Objectives	Existing legal instruments	Proposed solutions (DMA/DSA)	Proposed further solutions
Consumers do not know that their data is being used to target advertising.	Lack of transparency on (1) ad targeting (and person on whose behalf the advertisement is displayed) (2) main parameters used for targeting, (3) consent given to use personal data for ad targeting	More transparency and clearer consent mechanisms	(1) eCommerce and AVMS Directives (2) CRD amended and UCPD amended (3) GDPR and e-privacy : prior consent and info	For (2) DSA Article 24; but need to have clear understanding on which are the main parameters	<ul style="list-style-type: none"> <li>• Requirement to ensure transparency concerning the existence of targeted advertising (similar to ranking);</li> <li>• How (format and location) to display mandatory information requirements could be specified in codes of conduct</li> <li>• Complementing Article 24 DSA with what is foreseen in Article 29 on recommenders systems for VLOPs, i.e. to give an option to change the parameters used;</li> <li>• Possibly, to encourage opt-in for targeted advertising through self- or co-regulation (provided in Article 36 DSA)</li> </ul>
Algorithmic discrimination (e.g. based on gender, disability)	Ability to intentionally exploit personal data and unintentional algorithmic bias due to biased training data	Limit intentional and unintentional discrimination.	Artificial Intelligence Act (AIA) proposes to address algorithmic bias and to provide transparency on how the algorithm has been trained for high risks application; GDPR: Explainability rule; AVMS: non-discrimination on VSP	Not directly covered in proposals DSA covers all illegal content (hence also violations of EU and national discrimination rules) and has provision regarding transparency of profiling (Article 24)	Introduce further rules on the DSA by: <ul style="list-style-type: none"> <li>• Improving transparency (see above)</li> <li>• Specifying in Recitals of DSA that all EU instruments that prohibit certain forms of advertising are in any event still applicable as these are sector specific rules</li> <li>• Also the obligations imposed in proposed AIA should contribute to close the gap.</li> <li>• Regular vetting of systems and training data by accredited researchers will offer new insights on how to mitigate systemic risks and lead to lessened information asymmetries.</li> </ul>

Problem	Causes	Objectives	Existing legal instruments	Proposed solutions (DMA/DSA)	Proposed further solutions
Privacy violations	Complex legal framework; Problem of enforcement	Clarity needed on legal framework and better enforcement	Provisions exist (GDPR and e-privacy), but country of origin principle/co-ordination challenging. Enforcement does not always work	Not addressed in proposals	<ul style="list-style-type: none"> <li>Introduce in the GDPR the same asymmetric enforcement mechanism as foreseen in proposed DSA: Commission may be in charge, next to the authority of the country of establishment, for VLOPS.</li> </ul>
Challenges for consumers to seek redress in case of illegal advertising	Advertising can be illegal because it is in breach of different types of rules (consumer protection, privacy etc.)	Provide clarity for consumers on where to seek redress	GDPR, national rules, procedures in case of cross-border disputes, ADR	Not addressed except for in proposed DSA rules on flagging, internal complaints handling, and out of court dispute resolution but application is not clear in case of illegal advertising	<ul style="list-style-type: none"> <li>Address in more detail how sector specific rules will interact with the DSA, especially on enforcement</li> <li>Include among the list of tasks for the Digital Service Coordinators the need to provide information to consumers on how to seek redress in relation to online advertising (among other areas)</li> <li>Envisage the adoption of a sector specific directive to address all the consumer protection issues linked to online advertising, thereby ending a piecemeal approach which is not necessarily conducive to consumer trust</li> </ul>
Dark patterns	(1) Lack of guidelines (2) Country of origin principle impedes enforcement (3) Insufficient incentive for local authority to intervene	Freely given consent needed to process data	Guidelines from EDPB, but only soft law	Not addressed in proposals	<p>Amend the DSA:</p> <ul style="list-style-type: none"> <li>Develop design guidelines on consent forms, improve enforcement (European authority),</li> <li>Legal status of Guidelines - to improve consideration by judge/national authority</li> <li>Interface with opt-out; provide tool to enable consumers to report websites infringing guidelines</li> </ul>

Problem	Causes	Objectives	Existing legal instruments	Proposed solutions (DMA/DSA)	Proposed further solutions
Inappropriate targeting of minors	Insufficient legal framework	Protect minors	GDPR: children cannot give consent - AVMSD for VSPs: specific protection for minors	Not addressed in proposals	<ul style="list-style-type: none"> <li>• Include in DSA similar provisions as in Article 28(b)(2) AVMS for VSP: prohibition to target ads to minors</li> </ul>
Multiple actors involved (publishers, intermediaries, advertisers), creates a possible dilution of responsibility	Linked to nature of the market	Make sure that the rights of consumers and legal requirements are respected and endorsed by all actors in the value chain Place more responsibility on platforms	GDPR (notion of joint controller) AVMS, DSA, CDR, UCPD	Any legal obligation contained in the DSA should be extended to other websites/publishers (not in scope of DSA) and to ad intermediaries	<ul style="list-style-type: none"> <li>• Make sure that the personal scope of application of the rules fits by possibly proposing legislation to mirror obligations of the DSA for websites/publishers and ad sector</li> <li>• Clarify that Article 5.3 of the DSA should also apply when consumers are led to believe that the platform is organising the advertising itself. This will provide an incentive for platforms to conform with the rules</li> </ul>
Potential for gatekeepers to exploit market power and to raise prices and limit choice	Concentration of intermediaries - dependence by SMEs on largest distributors	Potential to intervene to address exploitative conduct	Not addressed	Transparency on price (Article 5g) and performance in DMA for gatekeeper platforms - to be given to advertiser	<ul style="list-style-type: none"> <li>• Adequately addressed in DMA</li> <li>• Case by case intervention under competition law, where needed</li> </ul>
Ad fraud	Lack of information about source of clicks/revenues	Transparency about source of clicks/revenues	Not addressed	Access to performance measuring tool in DMA (Article 6.1g)	<ul style="list-style-type: none"> <li>• Adequately addressed in DMA</li> </ul>

Problem	Causes	Objectives	Existing legal instruments	Proposed solutions (DMA/DSA)	Proposed further solutions
Ad auction algorithms could disadvantage smaller players / make it more expensive to launch new services	Lack of transparency in ad auctions / profit maximisation focus	Transparency in the auction system / potential to intervene if it has the effect of excluding SMEs	Not addressed	Not entirely covered by the DMA Price determination process (including role of quality) for auctions not covered	Add to the proposed transparency obligations in the DMA: <ul style="list-style-type: none"> <li>• Auction criteria used by the ad-tech platform service that include details of the price components (CPC, CPI, CPM) as well as other factors which are taken into account in the auction process and their weighting.</li> <li>• Obligations to provide B2B side performance data</li> </ul>
Asymmetric access to data favours large intermediaries over competing ad networks and publishers	Large customer base and data sets controlled by gatekeeper platforms / network effects	Level playing field for opportunities in advertising	Not addressed	Data Governance Act will not address data sharing. DMA has some data provisions for gatekeepers (for search). Forthcoming Data Act may include some data sharing provisions. DMA self-preferencing prohibition (Article 6,1d) may help in some cases. P2B Regulation addresses need to be transparent in T&C on data sharing situation	<ul style="list-style-type: none"> <li>• To be further analysed</li> <li>• DMA may help advertising linked to search, but problem not wholly solved. May be partly addressed if targeted advertising declines in importance.</li> </ul>

Problem	Causes	Objectives	Existing legal instruments	Proposed solutions (DMA/DSA)	Proposed further solutions
Lack of clarity on functioning of internal market clause in relation to advertising	Conditions for derogations are wide and subject to case by case scrutiny	Create more legal certainty	eCommerce Directive	Not addressed in proposals	<ul style="list-style-type: none"> <li>Amend eCommerce Directive (possibly through DSA) by introducing more effective procedural rules to derogation procedure of Article 3</li> <li>Through EU-wide codes of conduct list types of national derogations that could be applied to cross-border advertising. These codes could be 'vetted' by the European Commission</li> </ul>

Source: Authors' own elaboration.

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## ANNEX 1: LEGISLATIVE MEASURES AND PROPOSALS

### Specific measures applicable to advertising in the digital environment

#### a) eCommerce Directive

##### 1. Nature and scope

The eCommerce Directive<sup>388</sup> aims at harmonising certain legal aspects of information society services i.e. those that are necessary to establish an adequate level of confidence for users to make use of online services and to ensure the proper functioning of the internal market<sup>389</sup> (minimum harmonisation). Commercial communications, including unsolicited commercial communications by electronic mail are among these harmonised areas<sup>390</sup>.

The eCommerce Directive applies to “information society services”. This refers to “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”<sup>391</sup>, regardless of whether the recipient is a consumer or a trader. The eCommerce applies both to B2B (professional to professional) and B2C (professional to consumer) relationships. The concept of “commercial communications” is defined broadly as “any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession”<sup>392</sup>.

##### 2. Substantial measures (relevant for targeted advertising)

Article 6 of the eCommerce Directive creates various identification and transparency requirements for commercial communications which are part of, or constitute, an information society service. The commercial communication must be clearly identifiable as such<sup>393</sup>. The person on whose behalf the commercial communication is made must be clearly identifiable<sup>394</sup>. Furthermore, the eCommerce Directive requires promotional offers, such as rebates, and promotional competitions or games, to be clearly identifiable and the associated conditions easily accessible and presented clearly and unambiguously<sup>395</sup>.

Article 7 contains additional requirements regarding unsolicited commercial communications sent by electronic mails. The commercial communication shall be clearly and unambiguously identifiable as such as soon as it is received by the recipient<sup>396</sup>. Moreover, the service provider using such way to

<sup>388</sup> European Parliament and the Council of the European Union, 2000, 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, OJ L 178 of 17.07.2000 (hereafter the “eCommerce Directive”).

<sup>389</sup> eCommerce Directive, Recital 10.

<sup>390</sup> eCommerce Directive, Recitals 29 to 31.

<sup>391</sup> eCommerce Directive, Article 2(a) referring to the definition of “information society services” laid down in Article 1(2) of Directive 98/34/EC (European Parliament and the Council of the European Union, 1998, Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204 of 21.07.1998), as amended by Directive 98/48/EC (European Parliament and the Council of the European Union, 1998, Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217 of 5.08.1998). The Directive 98/34/EC is no longer in force and has been replaced by Directive (EU) 2015/1535 (European Parliament and the Council of the European Union, 2015, Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241 of 17.09.2015). The definition of the concept of “information society services” is now provided in Article 1(b) of the new Directive, but remains identical.

<sup>392</sup> eCommerce Directive, Article 2(f).

<sup>393</sup> eCommerce Directive, Article 6(a).

<sup>394</sup> eCommerce Directive, Article 6(b).

<sup>395</sup> eCommerce Directive, Article 6(c) and (d).

<sup>396</sup> eCommerce Directive, Article 7(a).

communicate shall consult regularly the opt-out registers, in which the recipients (natural persons) who do not wish to receive such communications can register, and respect such a choice<sup>397</sup>. The ePrivacy Directive (see below) has however consecrated an opt-in principle.

Article 8 of the eCommerce Directive is on the use of commercial communications by regulated professions (such as dentists, pharmacists, lawyers, etc.)<sup>398</sup>. It creates a positive obligation for the Member States. They have to authorise the regulated professions to use the commercial communications which are part of, or constitute, an information society service. Such use shall nevertheless comply with the professional rules regarding, in particular, the independence, dignity and honor of the profession, professional secrecy and fairness towards clients and other members of the profession<sup>399</sup>. The establishment of codes of conduct at a European level is also promoted<sup>400</sup>.

In addition, the internal market clause of Article 3 of the eCommerce Directive provides that information society service providers are subject to the law of the Member State in which it is established<sup>401</sup>, for the areas that are in the “coordinated field”. This “coordinated field” covers requirements with which the service provider has to comply in respect of “the pursuit of the activity of an information society service, such as requirements [...] regarding the quality or content of the service including those applicable to advertising [...]”<sup>402</sup>. As a consequence, therefore the service provider needs to comply with the law applicable to advertising according to legislation of the Member State where the service provider is established, and not with law of the Member State where the service is proposed (country of destination).

### 3. Enforcement and penalties

According to the directive, infringements to the principles laid down in the Directive must be sanctioned according to rules in the Member States. Sanctions must however be effective, proportionate and dissuasive<sup>403</sup>.

## b) P2B Regulation

### 1. Nature and scope

The Regulation on platform to business relations (hereafter the “P2B Regulation”)<sup>404</sup> deals with the relationships between online intermediation services or online search engines and professional users of those online services. The P2B Regulation aims at addressing “potential frictions” that can exist in

<sup>397</sup> eCommerce Directive, Article 7(b).

<sup>398</sup> Article 2(g) of the eCommerce Directive refers to the definition provided several directives that have been replaced by Directive 2005/36/EC (European Parliament and the Council of the European Union, 2005, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255 of 30.09.2005); Article 3, paragraph 1(a) of this new directive defines the “regulated profession” as follows : “a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession”.

<sup>399</sup> eCommerce Directive, Article 8(1).

<sup>400</sup> eCommerce Directive, Article 8(2).

<sup>401</sup> eCommerce Directive, Article 3(1).

<sup>402</sup> eCommerce Directive, Article 2(h).

<sup>403</sup> eCommerce Directive, Article 20.

<sup>404</sup> European Parliament and the Council of the European Union, 2019, 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, OJ L 186 of 11.7.2019.

those relationships<sup>405</sup>. It establishes, at a European level, a set of mandatory rules aiming “to ensure a fair, predictable, sustainable and trusted online business environment within the internal market”, so that professional users of the online intermediation services are granted “appropriate transparency, as well as effective redress possibilities<sup>406</sup>.”

The P2B Regulation applies to online intermediation services and online search engines provided to business users and corporate website users<sup>407</sup>.

“Online intermediation services” are defined as follows: (1) they are information society services<sup>408</sup>; (2) those services “allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded” and (3) “they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers<sup>409</sup>.” The “business user”, under the P2B Regulation, is “any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession<sup>410</sup>.”

The “online search engine” is the “digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found<sup>411</sup>.” The websites concerned are particularly those of corporate website users. A “corporate website user” is defined as “any natural or legal person which uses an online interface, meaning any software, including a website or a part thereof and applications, including mobile applications, to offer goods or services to consumers for purposes relating to its trade, business, craft or profession<sup>412</sup>.”

The relationships considered are business (platform) to business (professional users) relationships as long as the business users concerned target consumers through their use of the online platform services.

## 2. Substantial measures (relevant for targeted advertising)

Both online intermediation services and online search engine must inform their professional users of the main parameters determining ranking<sup>413</sup> and the importance of those main parameters (including on the possibility to influence ranking against remuneration)<sup>414 415</sup>.

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<sup>405</sup> P2B Regulation, Recital 2.

<sup>406</sup> P2B Regulation, Recital 7.

<sup>407</sup> P2B Regulation, Article 1, paragraph 2.

<sup>408</sup> As defined in point (b) of Article 1(1) of Directive (EU) 2015/1535.

<sup>409</sup> P2B Regulation, Article 2(2).

<sup>410</sup> P2B Regulation, Article 2(1).

<sup>411</sup> P2B Regulation, Article 2(5).

<sup>412</sup> P2B Regulation, Article 2(7).

<sup>413</sup> The concept of “ranking” refers to “the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication” (P2B Regulation, Article 2(8)).

<sup>414</sup> As explained in European Commission, 2020, Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424/1 of 8.12.2020

<sup>415</sup> P2B Regulation, Article 5.

Under the P2B Regulation, they must also inform their professional users about any differentiated treatment which they may give, in relation to goods or services offered to consumers, through their services<sup>416</sup>.

Finally, terms and conditions of online intermediation services must contain a description of technical and contractual access, if any, to personal data and/or other data provided by users when using the service or generated through the use of the services<sup>417</sup>.

The drawing up of codes of conduct by providers of online intermediation services together with business users and by online search engines shall be encouraged in order to ensure the proper application of the P2B Regulation<sup>418</sup>.

### 3. Enforcement and penalties

The Member States must ensure accurate and effective enforcement of the P2B Regulation<sup>419</sup>. They are not obliged neither to create new enforcement bodies (they can entrust existing authorities for ensuring such an implementation) nor to provide for ex officio enforcement or to impose fines<sup>420</sup>. Each Member State determines which measures shall apply to infringements to the P2B Regulation. Those measures must be effective, proportionate and dissuasive<sup>421</sup>.

## c) DSA Proposal

### 1. Nature and scope

The Commission's proposed Digital Services Act<sup>422</sup> (DSA) takes the form of a Regulation, which means that it will be directly applicable in the Member States' legal order. The DSA covers technical intermediaries (such as internet access providers), hosting service providers (which include advertising servers), online platforms (that disseminate content to the public) as well as very large online platforms (VLOP) that have more than 45 million monthly active users in the EU<sup>423</sup>.

### 2. Substantial measures (relevant for targeted advertising)

The proposed DSA contains rules which differ according to the size of the online platform.

The rules are aimed to make sure that users receive more information to help them make use of their rights as data subjects. This added transparency is also intended to enable the scrutiny by authorities and vetted researchers on how advertisements are displayed and how they are targeted.

In addition to the requirements resulting from Article 6 of the eCommerce Directive, all online platforms would be required<sup>424</sup> to ensure that the recipients of the service receive individualised information so that they can identify, for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time:

- that the information displayed is an advertisement;

<sup>416</sup> P2B Regulation, Article 7.

<sup>417</sup> P2B Regulation, Article 9.

<sup>418</sup> P2B Regulation, Article 17.

<sup>419</sup> P2B Regulation, Article 15(1).

<sup>420</sup> P2B Regulation, Recital 46.

<sup>421</sup> P2B Regulation, Article 15(2).

<sup>422</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 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, COM(2020) 825 final, 2020/0361 (COD)..

<sup>423</sup> Article 1 of the proposed DSA.

<sup>424</sup> Article 24 of the proposed DSA.

- the (natural or legal) person on whose behalf the advertisement is displayed; and
- meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed (for targeted advertising).

VLOPs would have to comply with additional rules and in particular would have to compile and make publicly available through application programming interfaces (APIs) a repository containing certain information, while also making sure that the repository does not contain any personal data. The repository would have to contain at least the content of the advertisement; the person on whose behalf the advertisement is displayed; the period during which the advertisement was displayed; whether the advertisement was intended to be displayed specifically to one or more particular groups of recipients of the service and if so, the main parameters used; the total number of recipients reached and, where applicable, aggregate numbers for the group or groups of recipients to whom the advertisement was targeted specifically<sup>425</sup>. The Commission would have to support and promote the development of voluntary industry standards to ensure the interoperability of these repositories<sup>426</sup>.

The Commission would have to encourage and facilitate the development of codes of conduct at EU level to support and complement the transparency obligations relating to advertisements with transparency obligations that would go beyond the imposed rules<sup>427</sup>.

### 3. Enforcement and penalties

The Member States where the provider is mainly established would be in charge of enforcement.<sup>428</sup> Member States would have to designate one or more competent authorities who would be responsible for the application and enforcement of the rules. One of these competent authorities would have to be designated as the Digital Service Coordinator (DSC) at the national level. DSCs would be given a set of far-reaching investigation and enforcement powers (including power to request information, on-site inspections, power to accept commitments from providers and to make them binding, to order the cessation of infringements and to impose fines)<sup>429</sup>.

For VLOPs, the proposal sets-out an enhanced supervision system, whereby the DSC of the country of establishment could be asked either by the Commission or by a newly created European Board for Digital Services to investigate a suspected infringement. Where infringements persist, the Commission could itself intervene and the DSC would be removed from the case. In case of non-compliance with the regulation, interim measures or binding commitments, the Commission can adopt a non-compliance decision ordering the VLOPs to comply and may fine or impose periodic payments.

The level of fine is different according to whether VLOPs are involved or not.

- For VLOPs, the Commission would be able to impose fines up to 6% of the company total turnover in the preceding financial year. Periodic penalty payments up to 5% of the company average daily turnover in the preceding financial year per day may also be imposed under conditions.
- For other providers, Member States would have to determine the rules and levels of fines but the proposals sets that fines imposed by Member States could not exceed those specified for VLOPs<sup>430</sup>.

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<sup>425</sup> Article 30 of the proposed DSA.

<sup>426</sup> Article 34 of the proposed DSA.

<sup>427</sup> Article 36 of the proposed DSA.

<sup>428</sup> Article 38.1 of the proposed DSA.

<sup>429</sup> Article 38 and 41 of the proposed DSA.

<sup>430</sup> Article 42 of the proposed DSA.

## d) DMA Proposal

### 1. Nature and scope

The Commission's proposed Digital Markets Act (DMA) would also take the form of a Regulation<sup>431</sup>. It would apply to Core Platform Services (CPS) designated by the Commission as gatekeepers, which are offered to business user or end-users that are located in the EU, irrespective of the place of residence/establishment of the gatekeeper<sup>432</sup>. These CPS would be listed in an exhaustive manner in the proposed DMA and include for instance:

- online intermediation services, as defined in the Platform to Business Regulation (see above);
- online search engines, also defined in the Platform to Business Regulation;
- online social networking services;
- video-sharing platform services (as defined in the Audiovisual Media Services Directive (see below));
- number-independent interpersonal communication services, as defined in the European Electronic Communications Code; and
- advertising services, including advertising intermediation services, as long as they are offered by providers of the above services.

### 2. Substantial measures (relevant for targeted advertising)

Under the proposed DMA, gatekeeper platforms would have to submit to the Commission an independently audited description of any consumer profiling techniques they use<sup>433</sup>. Also, they would not be allowed to combine personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, unless the end user has been presented with the specific choice<sup>434</sup>. This could limit the ability of gatekeeper platforms to engage in targeted and personalised advertising which draw on data from multiple sources.

The other rules are mainly aimed at providing more transparency in the relationship between business users i.e. between the gatekeepers and the advertisers and publishers:

- Gatekeepers would also have to provide information to advertisers and publishers (if they ask for it) on the price paid by each of them, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper<sup>435</sup>;
- Subject to regulatory dialogue, gatekeepers could also be asked to provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory<sup>436</sup>; and

<sup>431</sup> European Commission, 2020, Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374 (COD).

<sup>432</sup> Articles 1 and 2 of the proposed DMA.

<sup>433</sup> Article 13 of the proposed DMA.

<sup>434</sup> Article 5(a) of the proposed DMA.

<sup>435</sup> Article 5(g) of the proposed DMA.

<sup>436</sup> Article 6(g) of the proposed DMA.

- Subject to regulatory dialogue, gatekeepers should also refrain from the ability to engage in self-preferencing in relation for instance to the ranking of their products and services compared to products and services of third parties<sup>437</sup>.

### 3. Enforcement and penalties

The European Commission would be the competent regulatory body to enforce the DMA<sup>438</sup>. The Commission would have the power to develop, through delegated and implementing acts, further aspects of the DMA, such as the list of gatekeepers' obligations<sup>439</sup>. It would have the power to request information from all undertakings, conduct on-site inspections and order interim measures. The Commission could also make binding commitments proposed by gatekeepers. In case of non-compliance, the Commission could order the gatekeeper to comply with its obligations and impose fines of up to 10% of the gatekeeper's total annual (global) turnover<sup>440</sup>. Other infringements (e.g. failure to provide access to databases or algorithms, failure to notify that the provider meets the thresholds to be presumed as gatekeeper) could lead to a fine of up to 1% of the gatekeeper's total annual turnover<sup>441</sup>. Further, the Commission could impose periodic penalty payments of up to 5% of the average daily turnover<sup>442</sup>.

## e) ePrivacy (and Proposal)

### 1. Nature and scope

The ePrivacy Directive<sup>443</sup> applies to the processing of personal data in the electronic communication sector but it also contains rules on use of cookies, which might be necessary for personalised and targeted advertising. These rules on cookies protect the terminal equipment of end users. A new e-privacy Regulation<sup>444</sup> is currently being negotiated between the European Parliament and the Council. The Council reached a general agreement on the text on 10 February 2021, which means that negotiations between the European Parliament and the Council can now start.

### 2. Substantial measures (relevant for targeted advertising)

The main provision of interest is the one which provides that the storing of information, or the gaining of access to information already stored on a device (e.g. third party cookies, accessing pictures on a mobile phone) unless the user has given his consent; or when this storage is necessary for the transmission of a communication, or to provide an information society service requested by the user<sup>445</sup>.

With regard to unsolicited communications (by email, for instance), ePrivacy Directive sets forth the opt-in principle (prior consent of the users), with some exceptions<sup>446</sup>.

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<sup>437</sup> Article 6(d) of the proposed DMA.

<sup>438</sup> Article 18 of the proposed DMA.

<sup>439</sup> Article 37 of the proposed DMA.

<sup>440</sup> Article 26 of the proposed DMA.

<sup>441</sup> Article 26 of the proposed DMA.

<sup>442</sup> Article 27 of the proposed DMA.

<sup>443</sup> European Parliament and the Council of the European Union, 2002, 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), OJ L 201 of 31.7.2002.

<sup>444</sup> European Commission, 2017, 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, COM(2017) 10 final - 2017/0003 (COD).

<sup>445</sup> Article 15.3 of the ePrivacy Directive.

<sup>446</sup> Article 13 of the ePrivacy Directive.



The regulation proposed by the European Commission foresees that the use of the processing and storage capabilities of a device and the collection of information from that device (i.e. device fingerprinting) is also prohibited (with the same exceptions except that first party web-audience measuring would be allowed). Under the proposed regulation, software permitting electronic communications (e.g. operating systems, browsers and other applications) would have to require users, upon installation, to choose whether they want to prevent third parties from storing information on their device (e.g. third party cookies); or processing information stored on their device<sup>447</sup>.

### 3. Enforcement and penalties

Enforcement is left to the Member States which need to specify the rules on penalties, including criminal sanctions where appropriate. They must also ensure, without prejudice to any judicial remedy which might be available, that the competent national authority and, where relevant, other national bodies have the power to order the cessation of the infringements. Member States must ensure that the competent national authority and, where relevant, other national bodies have the necessary investigative powers and resources, including the power to obtain any relevant information they might need to monitor and enforce national provisions adopted pursuant to this Directive<sup>448</sup>.

Under the proposed regulation, the authorities in charge would be the same as under the GDPR<sup>449</sup>. Fines would also be set which may do up to 4% of the total world annual turnover of the company<sup>450</sup>.

## General measures applicable to advertising

### a) Unfair Commercial Practices Directive

#### 1. Nature and scope

The Unfair Commercial Practice Directive<sup>451</sup> (UCPD) is a full/maximal harmonisation directive<sup>452</sup>; therefore, the Member States cannot adopt national rules having a higher or lower consumer protection level. The directive was recently amended by the Better Enforcement Directive<sup>453</sup>.

The UCPD applies to unfair business-to-consumer commercial practices. The concept of “commercial practices” is defined broadly: advertising and marketing related to products are expressly included, regardless of whether these activities are carried out online or offline<sup>454</sup>. Personal scope is limited to B2C relationships (from a trader to a consumer)<sup>455</sup>.

<sup>447</sup> Article 8 of the proposed ePrivacy Regulation.

<sup>448</sup> Article 15a of ePrivacy Directive.

<sup>449</sup> Article 18 of the proposed ePrivacy Regulation.

<sup>450</sup> Article 23 of the proposed ePrivacy Regulation.

<sup>451</sup> European Parliament and the Council of the European Union, 2005, Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149 of 11.06.2005.. On this Directive, please refer to European Commission, 2016, Commission Staff Working Document, *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, SWD(2016) 163 final; J. Stuyck, J., and Straetmans, G., 2016, (ed.), *Commercial practices*, Gent, Larcier.

<sup>452</sup> UCPD, Article 4.

<sup>453</sup> European Parliament and the Council of the European Union, 2019, Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328 of 18.12.2019.

<sup>454</sup> UCPD, Article 3 and Article 2(d) (definition of the “commercial practice”).

<sup>455</sup> UCPD, Article 2(a) and (b).

## 2. Substantial measures

Three kinds of commercial practices are considered as unfair under UCPD and, therefore, prohibited<sup>456</sup>: (i) misleading or aggressive practices listed in Annex I that must *in all circumstances be regarded as unfair*; (ii) misleading or aggressive practices prohibited under *semi-general clauses* of Articles 6 to 9; and (iii) practices prohibited under the *general clause* of Article 5(2). Various practices related to advertising and, in particular, targeted advertising, may fall under the scope of the UCPD and should therefore be assessed under this three step test. Among others, direct exhortation to children, included in an advertisement, to buy a product, or persistent and unwanted solicitations by email must be considered as unfair commercial practices under *all circumstances*<sup>457</sup>. Misleading omissions may also be qualified as unfair practices (under the *semi-general clause*), especially when information requirements prescribed by Union Law in the field of advertising or advertising are violated<sup>458</sup>. Following the modifications introduced by the Better Enforcement Directive, the main parameters used for ranking of product and their importance are considered as material information under UCPD if the consumers have the possibility to search products on the basis of a query<sup>459</sup>.

Self-regulation and codes of conducts (especially relevant in the context of advertising)<sup>460</sup> are also promoted.

## 3. Sanctions and enforcement

Adequate and effective means should be implemented by the Member States to ensure that the practices carried out on the market comply with the rules of the UCPD. Special attention is paid to the burden of proof of factual claims: the trader may be requested to provide the evidence and, in case he fails to, the claim should be considered as inaccurate<sup>461</sup>. Effective, proportionate and dissuasive penalties should also be laid down<sup>462</sup>. Following the Better Enforcement Directive, criteria to be taken into account for the imposition of penalties are listed, and the possibility to impose fines calculated on trader's annual turnover is expressly mentioned.

### b) Directive on misleading and comparative advertising

#### 1. Nature and scope

Under the Directive on misleading and comparative advertising<sup>463</sup>, traders are protected against misleading advertising<sup>464</sup> (from other traders), while the practice of comparative advertising<sup>465</sup> (in B2B or B2C relationships) is permitted, under specific requirements.

<sup>456</sup> UCPD, Article 5.

<sup>457</sup> UCPD, Annex I.

<sup>458</sup> UCPD, Article 7(5) and Annex II (where a non-exhaustive list of the Union Law instruments in relation to commercial communication is provided).

<sup>459</sup> UCPD, new Article 7(4a). This paragraph does not apply to providers of online search engines, as defined in Article 2 (6) of the P2B Regulation. Cf. also new point 11a of the Annex, related to paid advertisement or payment specifically for achieving higher ranking of products within the search results.

<sup>460</sup> See for instance the ICC Code (2018).

<sup>461</sup> UCPD, Article 12.

<sup>462</sup> UCPD, Article 13.

<sup>463</sup> European Parliament and the Council of the European Union, 2006, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376 of 27.12.2006.

<sup>464</sup> Directive on misleading and comparative advertising, Article 2(b).

<sup>465</sup> Directive on misleading and comparative advertising, Article 2(c).

## 2. Substantial measures

In order to determine whether advertising is misleading, three main criteria, related to the characteristics of goods and services, the price and the advertiser, are laid down in Article 3.

Comparative advertising is authorised, provided three conditions (e.g. it compares goods or services meeting the same needs), and five prohibitions (e.g. it is not misleading or it does not create confusion among traders), are respected<sup>466</sup>.

## 3. Enforcement and penalties

Some key principles, also laid down in the UCPD, can be found in the Directive on misleading and comparative advertising: adequate and effective means to be taken by the Member States<sup>467</sup>, evidence to be provided by the advertiser<sup>468</sup>. Voluntary controls, by self-regulatory bodies, are also encouraged.

### c) Consumer Rights Directive

#### 1. Nature and scope

As for the UCPD, the Consumer Rights Directive (CRD)<sup>469</sup> is a Directive of maximal harmonisation<sup>470</sup>. Hence, Member States are not allowed to adopt national rules that have a higher or lower level of consumer protection. The CRD was also amended in 2019, by the Better Enforcement Directive<sup>471</sup>.

The CRD applies to the conclusion of sales and services contracts, between consumers and professional traders<sup>472</sup>. Advertising and marketing materials may be included in its scope, when they lead to the conclusion of contracts between consumers and traders.

#### 2. Substantial measures

The CRD ensures that consumers are provided with a minimum set of information before being bound by a contract with a professional trader. Among other things, the trader must provide consumers with information about the main characteristics of the goods or services, the identity of the trader, the total price of the goods or services, etc.<sup>473</sup>. There are further transparency requirements in the context of off-premises and distance contracts, including contracts concluded online<sup>474</sup>. Since some information requirements must be fulfilled before the conclusion of the agreement, they could be relevant for advertising materials, when such materials lead to the conclusion of contracts between consumers and professional traders.

Following the modifications introduced by the Better Enforcement Directive, the CRD makes it mandatory to inform consumers when prices were personalised by means of automated decision

<sup>466</sup> Directive on misleading and comparative advertising, Article 4.

<sup>467</sup> Article 5 of the Directive.

<sup>468</sup> Article 7 of the Directive.

<sup>469</sup> European Parliament and the Council of the European Union, 2011, Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304 of 22.11.2011.. On this Directive, please refer to European Commission, 2014, "DG Justice Guidance Document concerning 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", June 2014.

<sup>470</sup> CRD, Article 4.

<sup>471</sup> European Parliament and the Council of the European Union, 2019, Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328 of 18.12.2019.

<sup>472</sup> CRD, Article 3.

<sup>473</sup> CRD, Article 5.

<sup>474</sup> CRD, Article 6.

making, before the conclusion of a distance contract<sup>475</sup>. Since prices may be automatically personalised in advertising materials displayed to consumers, this modification of the CRD may be of relevance. In addition, if the contract is concluded on online market places, the provider must inform consumers about the main parameters used for the ranking of offers and their relative importance<sup>476</sup>. Where the ranking of offers is notably based on advertising, this provision of the CRD may prove relevant as well.

### 3. Enforcement and penalties

As for the UPCD, adequate and effective means should be implemented by the Member States to ensure the compliance with the Directive<sup>477</sup>. The burden of proof is upon the traders, regarding their information obligations<sup>478</sup>. In addition, the Directive states that effective, proportionate and dissuasive penalties should be laid down in national laws<sup>479</sup>. Following the modifications brought by the Better Enforcement Directive, criteria to take into account for the imposition of penalties are now listed in the CRD, and the possibility to impose fines calculated on trader's annual turnover is detailed<sup>480</sup>.

## d) GDPR

### 1. Nature and scope

The General Data Protection Regulation<sup>481</sup> (GDPR) applies to the (wholly or partly automated processing of personal data<sup>482</sup>. Both processing and personal data are broadly defined concepts that encompass a large scope of operations, including profiling<sup>483</sup>, which imply use of information relating to identified or identifiable natural person<sup>484</sup>. Personal scope of the Regulation is not limited to B2C relationships. The Regulation applies to relationship between data controllers (i.e. any entities determining purposes and means data processing operations), processors and data subjects<sup>485</sup>. Hence this Regulation applies to advertising practices as long as they imply use of personal data.

### 2. Substantial measures

Any data processing operation must comply with a set of principles enshrined in Article 5 of the Regulation which include transparency fairness and purpose limitation. Controllers must be able to demonstrate compliance with these principles<sup>486</sup> and ensure that processing operation are by design compliant with these principles<sup>487</sup>. Data processing must also rely on a lawful ground enshrined in the GDPR. In this context, and depending on intrusiveness of the processing, legitimate interest of the controllers or consent of the data subject seems to be the only available grounds for processing related

<sup>475</sup> CRD, new Article 6, paragraph 1, (ea).

<sup>476</sup> CRD, new Article 6a, paragraph 1, (a).

<sup>477</sup> CRD, Article 23.

<sup>478</sup> CRD, Article 6.

<sup>479</sup> CRD, Article 24.

<sup>480</sup> CRD, new Article 24.

<sup>481</sup> European Parliament and the Council of the European Union, 2016, Regulation 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, OJ L 119 of 04.05.2016.

<sup>482</sup> GDPR, Article 2 (1).

<sup>483</sup> GDPR, Article 4(4) (definition of "profiling").

<sup>484</sup> GDPR, Article 4(1) (definition of "personal data") and Article 4(2) (definition of "processing"). Also see GDPR, Recital 26 on the broad definition of "personal data".

<sup>485</sup> GDPR, Article 4(7) (definition of "controller") and Article 4, 8) (definition of "controller"). The GDPR also applies to joint controllers scenarios (i.e. when two or more entities jointly determine the purposes and means of processing operations). See GDPR, Article 26.

<sup>486</sup> GDPR, Article 5(2).

<sup>487</sup> GDPR, Article 25.

to targeted advertising<sup>488</sup>. Use of sensitive data, even inferred<sup>489</sup>, such as health data, or political opinion related data also requires explicit consent. Requirements for valid consent are however demanding<sup>490</sup>. In addition to information right<sup>491</sup>, and depending on the lawful ground for processing, controllers must grant data subjects rights which empower users facing online advertising. These rights include the right to withdraw consent, the right to erasure and the right to object to processing for marketing purposes<sup>492</sup>. Among their various obligations, controllers must assess the risks to the rights and freedoms carried by their processing activities and may be required to conduct a data protection impact assessment (DPIA)<sup>493</sup>. DPIA may be necessary, for instance when advertising practices target vulnerable data subjects such as children<sup>494</sup> and imply profiling and combination of datasets from different sources<sup>495</sup>. Finally, the GDPR entails data subjects with the right not to be subject to fully automated decision to present advertising with far reaching effects if it, for instance take profit of the data subject's vulnerabilities<sup>496</sup>.

### 3. Enforcement and penalties

Member States are required to establish at least one independent supervisory authority to monitor the application of the GDPR<sup>497</sup>. National supervisory authorities have the power to adopt corrective measures including ban on processing activities and imposing effective proportionate and dissuasive administrative fines<sup>498</sup>. Administrative fines may be calculated on the basis of the annual turnover of data controllers/processors<sup>499</sup>. Criteria to be taken into account for the imposition of penalties are also listed<sup>500</sup>. Additionally, the Regulation ensures that data subjects can obtain compensation for any damage caused by an infringement to the GDPR requirements<sup>501</sup>. Member States shall lay down effective, proportionate and dissuasive penalties for additional infringement such as those which may not be subject to administrative fines<sup>502</sup>.

## e) AVMS

### 1. Nature and scope

The Audiovisual Media Services Directive as amended in 2018<sup>503</sup> is a minimum harmonisation directive, meaning that the Member States are allowed to introduce more detailed or stricter provisions than the minimum set of rules it contains.

<sup>488</sup> See European Data Protection Board, 2020, Guidelines 8/2020 on the targeting of social media users, 2 September 2020; European Data Protection Board, 2019, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, 8 October 2019.

<sup>489</sup> S. Wachter, S., 2020, 'Affinity Profiling and Discrimination by Association in Online Behavioural Advertising', pp. 17-22.

<sup>490</sup> GDPR, Article 4.11) (definition of "consent").

<sup>491</sup> GDPR, Article 13 and Article 14.

<sup>492</sup> GDPR, Article 7(3), Article 17 and Article 21(1).

<sup>493</sup> GDPR, Article 35.

<sup>494</sup> GDPR, Recitals 38 and 75.

<sup>495</sup> See Article 29 Data Protection Working Party, 2017, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, 4 October 2017, WP 248rev.01.

<sup>496</sup> GDPR, Article 22; Article 29 Data Protection Working Party, 2018, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, 3 October 2018, WP251rev.01.

<sup>497</sup> GDPR, Article 51(1).

<sup>498</sup> GDPR, Article 58(2).

<sup>499</sup> GDPR, Article 83(4), Article 83(5) and Article 83(6).

<sup>500</sup> GDPR, Article 83(2) and Article 83(3).

<sup>501</sup> GDPR, Article 82.

<sup>502</sup> GDPR, Article 84.

<sup>503</sup> European Parliament and the Council of the European Union, 2010, 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), OJ L 095 of 15.4.2010.

It was amended in 2018 and now includes rules that need to be complied with by video-sharing platforms (VSPs). VSPs are defined as providers of a service (provided for remuneration) or a dissociable section of a service; whose principal purpose “or an essential functionality” is to provide programmes, user-generated videos or both to inform, entertain or educate the public; where no editorial responsibility is exercised by the provider who however determines its organisation, including by automatic means or algorithms (in particular by displaying, tagging and sequencing); by an electronic communication network.

## 2. Substantial measures

On advertising, there are two sets of rules<sup>504</sup>.

First, for commercial communications that marketed, sold or arranged by the platforms themselves, they need to respect the basic qualitative standards that apply to linear and linear broadcasters<sup>505</sup> i.e. they cannot:

- use surreptitious, use subliminal techniques (or must be readily recognisable as such);
- prejudice respect for human dignity, discriminate (or promote discrimination) on the basis of sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, or encourage behaviours prejudicial to health or safety or to the protection of the environment;
- promote under prescription medicines or medical treatments, cigarettes (electronic cigarettes and refill containers) and other tobacco products, or promote alcohol by targeting specifically minors or by encouraging immoderate consumption; and
- harm minors physically, morally or mentally, show them in dangerous situations, directly exhort them to buy or hire a product/service by exploiting their inexperience or credulity, or directly encourage them to persuade their parents or others to buy the product/service, or exploit the trust they have in parents, teachers, etc.

Second, for other commercial communications (uploaded by users), VSPs need to take appropriate measures to make sure that users comply with the standards listed above. These measures can be for instance to include these standards in the service terms and conditions, having a functionality for uploaders to declare whether videos contain commercial communications (as far as they know or can be reasonably expected to know) and clearly informing viewers where content includes commercial communications, provided the unloader has declared it or there is knowledge. The measures must be proportionate and practicable taking into account the size of the VSP and the nature of the service.

## 3. Enforcement and penalties

According to the AVMS Directive, the assessment of whether the measures are appropriate needs to be carried out by the national regulatory authority of the Member State where the VSP is established<sup>506</sup>. Availability of out of court redress needs to be ensured. For the rest (penalties and other sanctions), Member States should decide.

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<sup>504</sup> Article 28b of AVMS Directive.

<sup>505</sup> Article 9(1) of AVMS Directive.

<sup>506</sup> Article 28b of AVMS Directive.

**Tables**

1. Nature and scope

		<b>Nature</b>	<b>Personal scope</b>	<b>Material Scope</b>
<b>Specific</b>	eCommerce DIR	Directive (min harmonisation)	B2B and B2C (Society information service provider to the recipient of an information society service)	Commercial communications which are part of, or constitute, an information society service
	P2B Regulation	Regulation	Platform to Business (only when business users target consumers)	Practices such as ranking, differentiated treatment and access to data
	DSA Proposal	Regulation	Technical intermediaries (ISPs) Hosting service providers Online platforms Very large online platforms	Intermediary services, information society services
	DMA Proposal	Regulation	Gatekeepers	Core Platform service, information society service, digital sector, online intermediation services, etc.
	ePrivacy (incl. Proposal)	Directive (min harmonisation) Regulation	Terminal equipment of end-users	Processing of personal data
<b>General</b>	UCPD	Directive (full harmonisation)	B2C	Commercial practices (incl. marketing and advertising) - broad
	Misleading and Comparative Advertising DIR	Directive	B2C and B2B (depending on provisions)	Misleading and Comparative Advertising
	CRD	Directive (full harmonisation)	B2C	Conclusion of B2C contracts (incl. obligations of information before conclusion of B2C contracts) - broad
	GDPR	Regulation	Relationships between data controllers/processor and data subjects	Processing of personal data (both broad concepts)
	AVMS	Directive (min harmonisation)	Video sharing platforms – end users	Advertising (content rules)

Source: Authors' own elaboration.

2. Substantial measures

		Information duties	Prohibition of misleading practices	Prohibition of aggressive practices	Opt-in	Opt-out	Code of conducts (or self/co regulation promoted)	Others
<b>Specific</b>	eCommerce DIR	v				v	v	
	P2B Regulation	v					v	
	DSA Proposal	v					v	
	DMA Proposal	v						
	ePrivacy (incl. Proposal)	v			v			
<b>General</b>	UCPD		v	v			v	
	Misleading and Comparative Advertising DIR		v					
	CRD	v						
	GDPR	v			v (if processing based on consent)	v (opposition right + right to withdraw consent)		Regulatory body at EU level
	AVMS	v					v	

Source: Authors' own elaboration.



### 3. Enforcement and penalties

		Specific Enforcement Body (in addition to traditional courts)	MS shall take enforcement means	Criteria for penalties	Possible fines calculated on turnover	Burden of proof (and risks) on the provider	Civil sanctions	Self-regulatory bodies
Specific	eCommerce DIR		v	v				
	P2B Regulation		v	v				
	DSA Proposal	v	v	v	v			v
	DMA Proposal	v	(Commission to enforce)	v	v			
	ePrivacy (incl. Proposal)	v	v	v	v (proposal)			
General	UCPD		v	v	v	v		
	Misleading and Comparative Advertising DIR		v			v		v
	CRD		v	v	v	v		
	GDPR	v	v	v	v			
	AVMS	v	v	v				

Source: Authors' own elaboration.

## ANNEX 2: CASE STUDIES

### Australia

#### 1. National context

Consumer protection seems to be at the forefront of the need for a regulatory response to online advertising in Australia. Country-specific issues identified in academic literature<sup>507</sup> concern predominantly **industry transparency, disclosure, consent processes and compliance practices**.

The Australian Consumer Law (ACL) is part of the **Competition and Consumer Act 2010**, which aims to protect consumers and ensure fair trading in Australia. It applies in the same way to all sectors and in all Australian jurisdictions, i.e., all consumers in Australia enjoy the same rights and all businesses have the same obligations, irrespective of which state or territory they engaged in transactions. The ACL covers general standards of business conduct, prohibits unfair trading practices, regulates specific types of business-to-consumer transactions, provides basic consumer guarantees for goods and services, and regulates the safety of consumer products and product-related services<sup>508</sup>.

To tackle the issues arising from online advertising in both business-to-business (B2B) and business-to-consumer (B2C) relations, the ACCC made a number of recommendations to the Australian Government as part of the **Final Report of the Digital Platforms Inquiry**<sup>509</sup>. A number of these recommendations have already been implemented by the Australian Government.

Most notably, the **News Media Bargaining Code**<sup>510</sup>, overseen by the ACCC and the Australian Communications and Media Authority (ACMA), is a mandatory legislative code of practice aiming to address the bargaining power imbalance between news media businesses and major digital platforms such as Google and Facebook. It promotes fair and transparent negotiating practices in reaching commercial arrangements with Australian news media businesses. The Code constitutes a significant microeconomic reform highlighting the importance of well-resourced media diversity in Australia<sup>511</sup>. While the Australian Government has not yet 'designated' any digital platforms to participate in the scheme, the passing of legislation in February 2021 has already encouraged both Google and Facebook to successfully negotiate voluntary commercial agreements with a number of large and small Australian news businesses.

Other measures relevant to online advertising include continued inquiries by the ACCC of core competition issues arising from online advertising<sup>512</sup> or information and privacy issues<sup>513</sup> addressed by the Australian Information Commissioner (OAIC).

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<sup>507</sup> Mathews-Hunt, K., 2019, 'CookieConsumer: Tracking online behavioural advertising in Australia', *Computer Law & Security Review* 32, pp 55-90.

<sup>508</sup> The Australian Consumer Law, *Schedule 2 of the Competition and Consumer Act 2010*.

<sup>509</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*.

<sup>510</sup> ACCC, 2021, *News media bargaining code*.

<sup>511</sup> Australian Government, 2018, *Parliament passes News Media and Digital Platforms Mandatory Bargaining Code*, media release.

<sup>512</sup> ACCC, 2021, *Lack of competition in ad tech affecting publishers, advertisers and consumers*.

<sup>513</sup> Office of the Australian Information Commissioner, *Targeted advertising: Your Rights*.

## 2. Design and implementation of response

Several market sector inquiries were launched by the ACCC to better understand the specific issues pertaining to online advertising. The **Digital Platforms Inquiry** between December 2017 and July 2019 looked at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets<sup>514</sup>. The final report published in 2019 contains recommendations reflecting the issues arising from the growth of digital platforms<sup>515</sup>. The recommendation to address the imbalance in the bargaining relationship between these platforms and news media businesses recently materialised in the adoption of the News Media Bargaining Code.

Another noteworthy inquiry is the **inquiry into markets for the supply of digital platform services**, which commenced in February 2020 and will continue until March 2025. The first report of this inquiry was released in September 2020 and provides an in-depth focus on online private messaging services in Australia. The second report, which considers mobile app marketplaces, is to be publicly released by the end of April 2021<sup>516</sup>. A separate ACCC **inquiry into markets for the supply digital advertising technology services and digital advertising agency services** released an interim report earlier this year, with a final report due to be publicly released in September<sup>517</sup>.

Overall, many different regulatory measures have been adopted in Australia, some of which have not become law yet, since industry players are generally hesitant before any significant change. The Australian government was quite positive and accepted vast majority of proposals made by the ACCC's Digital Platforms Inquiry. The cooperation between the key regulators and Australian Government Departments, i.e. the ACCC and the ACMA, the Office of the Australian Information Commissioner, the Treasury and the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) as well as cooperation with overseas regulators went smoothly.

In the case of the Bargaining Code, it was a challenge arriving at regulatory settings that struck an appropriate balance between the interest of different stakeholder groups, including digital platforms, news businesses and consumers – including around complex and contested issues such as commercial negotiations and data sharing of digital platforms. Even though the existing legislation had to be adjusted before adopting the Code, it took less than a year to adopt it in an accelerated procedure, since the Government requested an urgent response to the commercial challenges being faced by Australian news businesses<sup>518</sup>.

While the speed of adopting the Bargaining Code turned out to be a challenging factor due to the need to get all the details right, other measures have taken longer to adopt, often because many stakeholders are usually involved. Bringing the necessary coalition of stakeholders affected by the measures can be time-consuming, but also helpful<sup>519</sup>.

In its work on the Digital Platforms Inquiry and the Bargaining Code, the ACCC held a large number of meetings with the most affected stakeholders such as digital platforms, media outlets, other industry stakeholders and consumer groups to develop an accurate understanding of all relevant policy issues

<sup>514</sup> ACCC, 2019, *Digital Platforms Inquiry: Final Report*.

<sup>515</sup> Ibid.

<sup>516</sup> ACCC, 2021, *Digital platform services inquiry 2020-2025*.

<sup>517</sup> ACCC, 2021, *Digital advertising services inquiry*.

<sup>518</sup> Interview with Andrew Sudol and David Abkiewicz, Directors of the Digital Platforms Branch of the Australian Competition & Consumer Commission (ACCC), 30/03/2021.

<sup>519</sup> Ibid.

and ensure the lowest possible burden when it comes to complying with the recommended regulatory measures<sup>520</sup>.

The aim of many recommendations of the Digital Platforms Inquiry was to address privacy concerns, improve consumer protection, facilitate consumer choices, and boost competition, due to the ACCC's finding that there is significant overlap and interaction between these goals. For example, strengthened privacy and data protection laws can also empower consumers to make more informed choices about how their data is processed. This, in turn, is likely to increase competition between digital platforms regarding the privacy dimension of their services. It may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways<sup>521</sup>.

### 3. Analysis and Evaluation

Before any legislation is passed into law in Australia, a regulatory impact statement must be issued. While measures aimed at promoting competition have a clear objective, it is hard to assess the results of the News Media Bargaining Code measure as it is too early in the process. While none of the other DPI recommendations have been made into law yet, when it comes to digital platforms issues, there is still robust public debate regarding data use and privacy.

The most relevant Australian consumer law court cases related to issues of online advertising concerned alleged misleading conduct of digital platforms. In a case against Google from 2013, the Federal Court decided that search engines are not liable for misleading conduct of advertisers. The decision was subsequently upheld by the High Court<sup>522</sup>. In another case, the ACCC successfully argued against misleading conduct through algorithmic ranking of hotel room rates by Trivago which constituted a breach of the ACL<sup>523</sup>. Two cases concerning alleged misleading conduct relating to user data collection against Facebook<sup>524</sup> and Google<sup>525</sup> respectively are still pending before the Federal Court.

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<sup>520</sup> Ibid.

<sup>521</sup> Ibid.

<sup>522</sup> ACCC, 2013, *Google appeal upheld*, media release.

<sup>523</sup> ACCC, 2020, *Trivago misled consumers about hotel room rates*, media release.

<sup>524</sup> ACCC, 2020, *ACCC alleges Google misled consumers about expanded use of personal data*, media release.

<sup>525</sup> Ibid.

## Germany

### 1. National context

The main issues emerging from online advertising in Germany are **trademarks and copyrights protection, market manipulation, unfair competition, youth protection, consumer protection, data protection and protection of personal rights**<sup>526</sup>. These challenges are the result of misleading and aggressive practices, such as email ads, “key words ads”, pop-up advertisement, exit-intent pop-ups, layer-ads, interstitials, re-marketing and ads on social media<sup>527</sup>. The increasing amount<sup>528</sup> of omnipresent, personalised and misleading advertising, particularly via social media, is seen to bring considerable damages to consumers<sup>529</sup>. The most important legislation on online advertising is the **law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, UWG)**. The UWG prohibits advertising that unduly constrains consumers’ freedom of choice. This is the case if as a result of an aggressive business act by the entrepreneur the consumer is led to undertake a business act, which it would have not undertaken otherwise. In particular, an undue influence is considered the misuse by the entrepreneur of its position of power to exert pressure on the consumer and, as a result, constrain its ability to make an informed and thoughtful decision<sup>530</sup>. The General Data Protection Regulation (GDPR) is the relevant regulatory response as regards aspects related to data protection. To be considered are also youth protection regulations and copyright and trademark laws, the Telemedia Act and the penal law.

### 2. Design and implementation of response

The current version of the UWG, initially **elaborated in 2004**, is the result of **two major reforms in 2008 and 2015**<sup>531</sup>. The initial version integrated, as a result of the active participation of the civil society and academia in the course of the elaboration of the regulation<sup>532</sup>, several national laws into a unified legal framework, codified important case law, considerably increasing consumer protection by introducing a ‘black list’ and led to a high degree of liberalisation of competition law<sup>533</sup>. Significantly, the UWG of 2008 harmonised Germany’s legislation with EU law (most significantly Directive 2005/29/EG) and strengthened the EU single market<sup>534</sup>.

The UWG is not being implemented by authorities *ex officio*. Rather, it is **enforced by the market participants in court via prohibitory injunctions**. The latter is a rather unusual legal instrument in the German civil law in so far as it has legal effects for both process participants and third parties. The exclusively competent court of first instance is the district court (Landgericht). A more cost-effective alternative is the arbitration for dispute settlements at the chambers for industry and commerce. However, only traders who are in direct competition with the defendant and associations promoting commercial and industrial interests are entitled to apply.

<sup>526</sup> Buse, N., 2021, *Onlinewerbung- was ist erlaubt, was ist verboten?*, Buse Herz Grunst Rechtsanwälte.

<sup>527</sup> Ibid.

<sup>528</sup> Weber, M., 2020, *Werbemarkt in Deutschland um 1,9 Prozent gewachsen*, W&V.

<sup>529</sup> Interview, Federal Ministry of Justice and Consumer Protection, 30.03.2021.

<sup>530</sup> Ibid. (Fn. 1).

<sup>531</sup> Teplitzky, O., Peifer, K.-N., & Leistner, M., 2020, *Großkommentar zum Gesetz gegen den unlauteren Wettbewerb mit Nebengesetzen, Kommentar*, Article 575.

<sup>532</sup> Köhler, H., Bornkamm, J., Henning-Bodewig, F., 2002, *Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform* | WRP 2002, 1317-1328.

<sup>533</sup> Wilde Beuger Solmecke Rechtsanwälte, 2021, *Rechtsanwälte, Irreführende Werbung*.

<sup>534</sup> Business-Wissen, 2008, *Einheitliche Werberegeln für die ganze EU*.

Moreover, the German system is characterised by **self-regulation**. Two advertising standards organisations – the German Advertising Standards Council and the Wettbewerbszentrale – deal with issues of social responsibility and unfair commercial practices by applying the UWG<sup>535</sup>.

According to Article 2(1) no. 6, the UWG targets all natural and legal persons that undertake a business act within the framework of their commercial, trading or professional activities and all persons that act in the name of or on behalf of these persons. Consequently, the UWG has a **broad scope of application** and targets advertising networks, advertising firms and agencies, publishers and publishing platforms. The scope of this liability is **not clearly determined** by the UWG and is subject to case law<sup>536</sup>. The overall objective of the UWG is to protect consumers from undue business acts and the public interest in an undistorted competition (Article 1 UWG). The GDPR, which is directly applicable in Germany, focuses on aspects related to data protection and applies to targeted email advertising (Recital 47)<sup>537</sup>. Following its overall objective, the UWG exclusively targets entrepreneurs and provides a ‘black-list’ of undue business actions in the attachment to Article 3(3) UWG, which includes both misleading and aggressive commercial practices<sup>538</sup>. The rationale of this ‘black-list’ is to protect the consumers’ freedom of choice and its right to make an informed and thoughtful decision.

### 3. Analysis and Evaluation

The UWG has mainly implemented Directive 2005/29/EG, which sets EU-wide minimum standards, into national law. Going beyond the scope of application of the directive, Article 3(1) UWG covers C2B (consumer to business) relations, the point of reference being the perceptible impairment of consumer interests. In contrast, Article 5 of Directive 2005/29/EG more generally prohibits undue business practices<sup>539</sup>. Moreover, Article 7(2) no. 3 UWG already sees an unreasonable harassment in cases where businesses send consumers email ads without the latter’s prior explicit consent, whereas the EU requirements do not foresee such an ‘opt-in’ (Annex I, point 26)<sup>540</sup>. In response to misleading or aggressive commercial practices, the UWG foresees remedy claims and prohibitory injunctions (Article 8), claims for damages (Article 9) and claims concerning the profits skimmed as a result of undue business practices. Moreover, as a result of data protection violations, the consumer has non-material damage claims, which result from the general right of privacy.

**Consumers viewed the development of the UWG favourably**<sup>541</sup>. This can be attributed to the high quality of the regulatory response and consumers’ high willingness to pay “free of charge” services with private data<sup>542</sup>. While the regulatory response has had a positive impact on consumer protection and established a level playing field for market competitors<sup>543</sup>, **the regulatory response is generally seen as being insufficient**, in particular, given the surge of online advertising during the COVID-19 pandemic. The advertising market share of online advertising has increased from 12% in 2019<sup>544</sup> to 40% in 2020<sup>545</sup>.

<sup>535</sup> European Advertising Standards Alliance, 2021, *Members: Germany*.

<sup>536</sup> Huber, D., 2021, *Werbung im Internet: Ist das rechtlich zulässig?*, IT-Recht Kanzlei zum Werberecht.

<sup>537</sup> Schürmann, K., 2020, *E-Mail-Marketing ohne Einwilligung – was ist erlaubt?*, Schürmann Rosenthal Dreyer Rechtsanwälte.

<sup>538</sup> Gesetz gegen den unlauteren Wettbewerb (UWG), Annex to Article 3(3).

<sup>539</sup> Wettbewerbszentrale, 2010, *Synopse UWG – Richtlinie unlautere Geschäftspraktiken (UGP-RL)*.

<sup>540</sup> *Ibid*, p. 18.

<sup>541</sup> Interview, Verbraucherzentrale Bundesverband, 06.04.2021.

<sup>542</sup> Interview, Federal Ministry of Justice and Consumer Protection, 30.03.2021.

<sup>543</sup> Interview, Verbraucherzentrale Bundesverband, 06.04.2021.

<sup>544</sup> Statista, 2020, *Marktanteile der einzelnen Werbemedien im deutschen Bruttowerbemarkt im Jahr 2019*.

<sup>545</sup> Giersberg, F., 2020, *ZAW: Werbemarkt 2020 mit deutlichen Corona-Auswirkungen*.

The German Advertising Association demands new solutions to the rising dominance of online advertisement at national and European level<sup>546</sup>. There is **extensive case law on online advertising**. Most recent cases have dealt with ads on the social media platform “Instagram”. In particular, courts have decided that the identification of advertising via the hashtag “#ad” is insufficient if it appears at the end of a long list of hashtags<sup>547</sup>, that for “business-like acts” in the sense of the UWG the objective external effect is decisive<sup>548</sup> and that the identification of advertising is dispensable if the advertising account is public (blue checkmark) and has a high number of followers<sup>549</sup>.

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<sup>546</sup> Ibid.

<sup>547</sup> OLG Celle, 08.06.2017, Az. 13 U 53/17; KG Berlin, 11.10.2017, Az. 5 W 221/17.

<sup>548</sup> LG Itzehoe, 23.11.2018, Az. 3 O 151/18; OLG Braunschweig, 08.01.2019, Az. 2 U 89/19.

<sup>549</sup> LG München I, 29.04.2019, Az. 4 HK O 14312/18.

## France

### 1. National context

In 2018, with 40% of advertising investments, digital is now the leading medium for advertising sales in France, compared to 27% for television<sup>550</sup>. As mentioned by a recent report commissioned by the French Minister of Culture and the Secretary of State in charge of digital, a significant transfer of advertisement's investments from television and traditional media to digital and online platforms occurred in the last years. Oliver Wyman who was commissioned by the Syndicat des Régies Internet (SRI) to provide an estimate of the size of the digital advertising market in France estimates the growth of the digital advertising market in France at +7% for the whole of 2021<sup>551</sup>.

There is **no specific legal framework for online advertising in France**. The law that applies is therefore that of advertising in general. Main rules applicable to online advertising and are also applicable to traditional/offline advertising. It has to be noted however that **self-regulation is prevalent** in the field of online advertising in France as it has proven to adapt quickly to a very fast-changing market. **In terms of regulation**, Decree No. 2017-159 of Feb. 9, 2017<sup>552</sup> extends a law of 1993 "against corruption and in favour of transparency for advertising" (so-called 'Sapin Law') to online advertising (i.e. advertisements conveyed on any devices connected to the internet) to apply transparency obligations that currently apply to traditional advertising. **In terms of self-regulation**, the ARPP code of conduct on online advertising, mentioned above, contains recommendations applicable to some digital format/techniques, such as social media. For example, on social media networks, the ARPP recommends adding an explicit notice, if the commercial nature of the advert is not obvious<sup>553</sup>.

According to the media, the extension of transparency obligation set up in the "Sapin Law" to online advertising (Decree No. 2017-159 of Feb. 9, 2017) has been welcomed by French advertisers<sup>554</sup>. An Article from Les Echos indeed states that by introducing regulation into the free space that is the Internet, "the publication of the decree now injects rigidity into online transactions. But perhaps it will succeed in lightening an increasingly suffocating atmosphere of mistrust [in the online advertising field]"<sup>555</sup>.

### 2. Design and implementation of response

The actors involved in designing and implementing the French response to online advertising are not specifically and solely working on online advertisement. These actors include the French competition authority which **publishes opinions on competition matters linked to online advertisement**. Additionally, the Commission Nationale de l'Informatique et des Libertés (CNIL) and the Conseil Supérieur de l'Audiovisuel (CSA) are important actors as they organise consultation and publish recommendations on the topic. Finally, the professional regulatory authority for advertising (ARPP) may intervene during the elaboration of methodologies linked to online advertisement, such as digital carbon footprint.

<sup>550</sup> Report commissioned by the French Minister of Culture and the Secretary of State in charge of digital, 2020, *Online advertising: A level playing field*.

<sup>551</sup> Amiot, E., 2020, *Digital Advertising in France Weakened by the Pandemic*, Syndicat des Régies Internet (SRI).

<sup>552</sup> French Legal Statute, 2017, *Decree No. 2017-159 of February 9, 2017 on digital advertising services*.

<sup>553</sup> Autorité de régulation professionnelle de la publicité, 2015, *Recommandations on digital commercial communications*.

<sup>554</sup> Les Echos, 2017, *Decree on the transparency of online advertising finally published*, News Article.

<sup>555</sup> Ibid.



All French media are members of the ARPP, which allow all important stakeholders in the field of online advertisement to propose good practices and elaborate recommendations, in a consultative manner.

### 3. Analysis and Evaluation

To regulate online advertising effectively and restore the balance between actors in the sector, the report commissioned by the French Minister of Culture and the Secretary of State in charge of digital highlights that it would be necessary to first “align the constraints between the traditional and digital sectors on the one hand, and between online platforms and publishers on the other”<sup>556</sup>. To ensure a level playing field between these actors, the report proposes to harmonise the legal framework governing advertising on audiovisual media (linear or not) and display advertising on the Internet.

The report also found that traditional competition law is “complex to implement and sometimes too slow in view of the speed with which the digital market is evolving”<sup>557</sup>. To solve this issue at national level, it was suggested that the existing arsenal of competitive regulation be expanded and renewed to deal effectively with the structuring nature of the major platforms, and thus act effectively on their sources of market power and anti-competitive behaviour in the online advertising market<sup>558</sup>.

In France, there are **no court cases** specifically addressing online advertising, but the French competition law authority took several **decisions** on the matter. For example, as concerns **search engine and advertising intermediation markets**, in December 2017, the competition authority rejected the complaint lodged by the company 1PlusV against Google for tying sale and discriminatory treatment practices<sup>559</sup>. The French authority dismissed the complaint as 1PlusV failed to bring evidence that:

- Google was using tying practices;
- there was no commercial partnership between the parties; and
- 1PlusV did not comply with the conditions to access Google’s services.

Another example of decision taken by the French competition authority concerns the **online advertising market, linked to search**. In November 2016, the authority dismissed a complaint lodged by the company IAH against Google’s AdWords referencing service<sup>560</sup>. Finally, the French competition authority also has a consultative role and it published opinions on online advertising, such as the one of 6 March 2018 on data exploitation in the online advertising sector<sup>561</sup>.

<sup>556</sup> Report commissioned by the French Minister of Culture and the Secretary of State in charge of digital, 2020, *Online advertising: A level playing field*.

<sup>557</sup> Ibid.

<sup>558</sup> Ibid.

<sup>559</sup> Autorité de la concurrence, 2017, *Decision 17-D-24 of 18 December 2017 concerning practices implemented in the online search engine and online advertising intermediation sectors*.

<sup>560</sup> Autorité de la concurrence, 2016, *Decision No 16-D-25 of 23 November 2016 on practices implemented in the online advertising sector online advertising*.

<sup>561</sup> Autorité de la concurrence, 2018, *Opinion n° 18-A-03 of 6 March 2018 on the use of data in the internet advertising sector advertising sector*. 2018.

## Ireland

### 1. National context

In Ireland, consumer protection appears to be **one of the most regulated issues** relating to online advertising. Privacy and data protection are also heavily regulated. Other issues which have arisen with Online Behavioural Advertising are privacy, non-discrimination and group level protection<sup>562</sup>. The review of the legal framework on online advertising and the interview show that issues Ireland faces are similar to the issues faced by other Member States, with perhaps the **exception of the volume of claims the CCPC has to deal with**, which has to do with the fact that a large number of online platforms are based in Ireland. The law on online advertising is governed by the 2011 Electronic Communications Networks and Services, Privacy and Electronic Communications Regulations<sup>563</sup>.

The **Consumer Protection Act 2007**<sup>564</sup> (CPA) is the main Irish law that covers advertising. The Consumer Protection Act 2007 integrates the EU Directive on Unfair Commercial Practices<sup>565</sup> in Ireland. The act includes rules on advertising in general, which also apply to online advertising. The main aspects related to online advertising regulated by the act are misleading advertising and false advertising directive. Other EU law applies in Ireland to legal advertising, namely the misleading advertising directive<sup>566</sup> and the General Data Protection Regulation<sup>567</sup>. Finally, some sector specific regulations also apply to online targeted advertising: The Consumer Credit Act 1995<sup>568</sup>; the Copyright and Related Rights Act 2000<sup>569</sup>; the Trademarks Act 1996<sup>570</sup>; and the Patents Act 1992<sup>571</sup>.

In Ireland, **self-regulation is the principal method of regulation of advertising**. The Advertising Standards Authority, an independent self-regulatory body set up and financed by the advertising industry, publishes a Code of Standards<sup>572</sup>, which includes rules on online behavioural advertising, binding for its members.

To tackle misleading advertising (including online advertising), the Competition and Consumer Protection Commission (CCPC) prohibits a set of practices. The CPA established a national enforcement body, the CCPC, which is responsible for dealing with citizens' complaints. Citizens can also complain to the Advertising Standards Authority for Ireland (ASAI), for any practice which breaches the ASAI Code. An innovative area in which the code regulates is online behavioural advertising (OBA)<sup>573</sup>.

<sup>562</sup> Wachter, S., 2019, 'Affinity Profiling and Discrimination by Association in Online Behavioural Advertising', *Berkeley Technology Law Journal*, Vol. 35, No. 2.

<sup>563</sup> Irish Statute Books, 2011, *European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations*.

<sup>564</sup> Irish Statute Book, 2007, *Consumer Protection Act 2007*.

<sup>565</sup> European Parliament and European Council, 2005, *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 ('Unfair Commercial Practices Directive')*, Official Journal of the European Union.

<sup>566</sup> European Parliament and European Council, 2006, *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising*, Official Journal of the European Union.

<sup>567</sup> European Parliament and European Council, 2016, *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 (General Data Protection Regulation)*, Official Journal of the European Union.

<sup>568</sup> Irish Statute Book, 1995, *Consumer Credit Act 1995*.

<sup>569</sup> Irish Statute Book, 2000, *Copyright and Related Rights Act 2000*.

<sup>570</sup> Irish Statute Book, 1996, *Trademarks Act 1996*.

<sup>571</sup> Irish Statute Book, 1992, *Patents Act 1992*.

<sup>572</sup> Advertising Standards Agency for Ireland, *ASAI Code*, 7th edition.

<sup>573</sup> Advertising Standards Authority for Ireland, 2016, *Code*, 7th edition Section 18.1.

The CCPC's activity appears to be uncontroversial in the media and the legislative framework on consumer protection provides a **sufficient framework for the CCPC to take action if necessary**.

## 2. Design and implementation of response

The ASAI Code was drawn up by the Board of ASAI after a consultation with key stakeholders including industry representatives, the public, consumer representatives and the CCPC. Its current version came into effect on the 1<sup>st</sup> of March 2016. The CCPC internally monitors certain areas where they suspect consumer detriment might occur. The CCPC publishes a **strategy paper**<sup>574</sup> **every three years**, in which the objectives from the previous strategy are reviewed, and new ones are determined. The CCPC measures the number of Compliance Notices, Fixed payment Notices to bring about compliance and end damaging practices. The CCPC also leads a number of investigations in the area of consumer protection law<sup>575</sup>. To empower consumers directly, before any grief has been experienced, the CCPC uses its website, as a channel to equip consumers to make informed choices. The number of visits on the website is monitored, as well as the time spent on the website. The ASAI also monitors the respect of the ASAI Code and the effectivity of its activity through complaints bulletins. The bulletins are published periodically on the ASAI website by the Complaints Committee. They provide a summary of the ASAI's work on complaints and how it ensures ads in Ireland are lawful. It is a way for the organisation to monitor its activity, in terms of the range and areas of complaints they deal with.

For complaints to the CCPC, consumers will start a procedure **after they have made a commercial decision**. The CCPC will then enquire in order to decide whether the level of severity is important enough to pursue further action against the advertiser. In case further action is sought, the CCPC can either use fixed payment notices, prohibition notices or take enforcing action against the trader, including compensation. Consumers can also decide to take action with the ASAI. The ASAI procedure does not require a commercial decision to have been made. In that sense, it is sufficient for an ad to breach the ASAI code for consumers to take action. If a breach is identified, the ASAI will contact the advertiser to have them withdraw the ad. The decision is then made public.

Both the CCPC and the ASAI **organise events** where stakeholders including industry representatives interact. For example, the ASAI recently organised the “#InfluencerMarketing in 2021 and beyond”<sup>576</sup> webinar which included industry representatives and the CCPC. The CCPC also communicates with businesses directly and regularly publishes guidance to help them deal comply with the law. For example in 2016, the CCPC published the guide on how to sell online<sup>577</sup> to communicate with consumers through warnings on their website. For example in 2020, they published a warning about a website which engaged online sales. They advised consumers to exercise caution if buying goods from it and set up a consumer helpline to address any issues<sup>578</sup>.

In both the ASAI code and the CPA, the rules on prohibition on unfair commercial practices target traders and advertiser, including online traders and advertisers. Under the Consumer Protection Act traders are defined as “a person who is acting for purposes related to the person's trade, business or profession, or a person acting on behalf of a trader. Those who promote goods or services on behalf of a business may be considered a trader under consumer protection law”.

<sup>574</sup> See Competition and Consumer Protection Commission, 2020, *Strategy Statement 2021-2023*.

<sup>575</sup> Competition and Consumer Protection Commission, 2019, *Annual Report 2019*.

<sup>576</sup> See: Advertising Standards Authority for Ireland, 2021, *#InfluencerMarketing in 2021 and beyond*, Webinar, 23rd February 2021.

<sup>577</sup> See: Competition and Consumer Protection Commission, 2016, *Selling Online: What you need to know*, Business Guide.

<sup>578</sup> See: Competition and Consumer Protection Commission, 2020, *Consumer warning about irelandsstore.com*, News.

The ASAI Code targets advertisers, who are defined as “anyone disseminating marketing communications, including promoters and direct marketers. References to advertisers should be interpreted as including intermediaries and agencies unless the context indicates otherwise”<sup>579</sup>. Regarding the definition of advertisers, the ASAI held a webinar<sup>580</sup>, during which it **updated the definition of advertiser to include influencers**.

### 3. Analysis and Evaluation

The regulatory response seems to have a positive effect on unfair commercial practices, as a significant number on complaints have been dealt with by the ASAI as shown by their complaints bulletins. For example, the latest complaints bulletin contains 8 case reports, all of which were found in breach of the ASAI Code. In that sense, **the activity led by the ASAI seems to complement the CCPC**, which deals predominantly with more severe breaches which have already caused harm to consumers. The ASAI also engages in **preventive measures**.

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<sup>579</sup> See for example, Section 1.1(d) of the ASAI Code.

<sup>580</sup> See: Advertising Standards Authority for Ireland, 2021, *#InfluencerMarketing in 2021 and beyond*, Webinar, 23rd February 2021.

## United Kingdom

### 1. National context

Consumer protection appears to be **the dominant issue** emerging from the debate around online behavioural advertising (OBA) or targeted advertising in the UK. UK consumers are increasingly privacy-conscious, with many consumers seeking to limit personalised targeting by setting privacy settings in their browsers or online services<sup>581</sup>. Another aspect to consider is the costs of digital advertising (amounting to around EUR 16.11 billion – GBP 14 billion – in the UK in 2019)<sup>582</sup> that are **reflected in the prices of goods and services**, particularly those which make use of heavy digital advertising (for example consumer electronics, hotels, and flights). Indicatively, Facebook (which is paid for indirectly through advertising revenues) saw its average revenue per user increase from less than GBP 5<sup>583</sup> in 2011 to over GBP 50<sup>584</sup> in 2019<sup>585</sup>. Market manipulation and the costs of misleading actions and aggressive commercial practices are another concern in the UK. In 2009, Consumer Focus estimated that misleading and aggressive practices cost GBP 3.3 billion<sup>586</sup>.

The Consumer Protection from **Unfair Trading Regulations 2008**<sup>587</sup>, as amended in 2014 with the Consumer Protection (Amendment) Regulations<sup>588</sup>, and the Consumer Rights Act 2015<sup>589</sup> form the basis of the UK's consumer protection legal framework. The 2008 Regulations are the instrument implementing the Unfair Commercial Practices Directive into domestic law. In addition, The UK Code of Non-Broadcast Advertising and Direct Promotional Marketing (**CAP Code**)<sup>590</sup> applies. While the Unfair Trading Regulations 2008 made it a criminal offence to use misleading or aggressive commercial practices, consumers had no private right of redress against a trader. The 2014 Amendment addressed this, introducing standard remedies and an entitlement to seek damages when a consumer has fallen victim to these practices. Moreover, the CAP Code **supplements the gaps in the existing legal framework**, prohibiting both misleading and harmful advertising, as well as promoting social responsibility around advertising of alcohol, motoring, lotteries, and gambling.

Generally speaking, the narrative around the Unfair Trading Regulations tends to be positive, in that they are seen as protecting consumers from unfair or misleading trading practices<sup>591</sup>. That said, the UK's data protection regulator is **concerned about the programmatic advertising process known as real-time bidding (RTB)**, which makes up a large chunk of online behavioural advertising<sup>592</sup>. It concludes that systematic profiling of web users via invasive tracking technologies such as cookies is in breach of U.K. and pan-EU privacy laws.

<sup>581</sup> PLUM, 2019, *Online advertising in the UK*, A report commissioned by the Department for Digital, Culture, Media and Sport.

<sup>582</sup> Competition and Markets Authority, 2020, *Online platforms and digital advertising: A Study*.

<sup>583</sup> This corresponds roughly to EUR 6 [exchange rate 31.12.2011].

<sup>584</sup> This corresponds roughly to EUR 59 [exchange rate 31.12.2019].

<sup>585</sup> Ibid.

<sup>586</sup> Department for Business, Energy & Industrial Strategy, 2018, *Misleading and aggressive commercial practices: new private rights for consumers*. The value corresponds roughly to EUR 4.0 billion [exchange rate 31.12.2020].

<sup>587</sup> See: UK Statute Book, 2008, *The Consumer Protection from Unfair Trading Regulations 2008*.

<sup>588</sup> See: UK Statute Book, 2014, *The Consumer Protection (Amendment) Regulations 2014*.

<sup>589</sup> See: UK Statute Book, 2015, *Consumer Rights Act 2015*.

<sup>590</sup> See: Advertising Standards Agency, 2014, *Non-broadcast Code*.

<sup>591</sup> Which?, 2021, *Consumer Protection from Unfair Trading Regulations 2008*.

<sup>592</sup> Tech Crunch, 2019, *Behavioural advertising is out of control, warns UK watchdog*, Article.

## 2. Design and implementation of response<sup>593</sup>

The 12<sup>th</sup> edition of the CAP Code came into force in September 2010. It was released because the digital remit of the Advertising Standards Agency (ASA) was **extended to cover online marketing communications**. Before this, Consumer Focus had in 2009 commissioned research into consumers' experience of unfair commercial practices generally<sup>594</sup>. The Committee of Advertising Practice (CAP) is the self-regulatory body that creates, revises and enforces the Code – it is responsible for monitoring. The main actor involved was the Advertising Standards Agency and its CAP Committee. CAP's members include organisations that represent the advertising, sales promotion, direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those businesses agree to comply with the Code so that marketing communications are **legal, decent, honest and truthful** and consumer confidence is maintained<sup>595</sup>. One of CAP's members is The Incorporated Society of British Advertisers (ISBA), which has over 400 members representing nearly all the UK's major advertisers.

It is the Advertising Standards Agency who is the UK's independent regulator of advertising across all media<sup>596</sup>. They apply the advertising Codes, written by the CAP. The **ASA is self-regulated and is a non-statutory organisation**, and so cannot interpret or enforce legislation. In addition to the CAP, the system receives support through three industry panels – the General Media Panel (GMP), the Sales Promotion and Direct Response Panel, and the Online Publications Media Panel. The CAP Code applies to all actors advertising or promoting goods or services in 8 categories of activities, including print (newspapers, magazines, brochures); materials in public places (posters, etc.); moving images (cinema, video, etc.) non-broadcast electronic media in paid-for-space (banner, pop ups, online advertisements, display, etc.); marketing databases which use consumer personal information; non-broadcast media, advertorials and advertisements; and other marketing communications in non-paid-for space online (e.g. own website)<sup>597</sup>.

The purpose of the CAP Code is to ensure that statements made about products or services are accurate and not misleading. The CAP Committee itself says that compliance with the Code should mean that "marketing communications are legal, decent, honest and truthful and consumer confidence is maintained"<sup>598</sup>. The CAP's purpose is therefore consumer-protection orientated. This is in line with the aim of the Unfair Trading Regulations 2008, which is to give consumers simple, standardised remedies against traders that have breached requirements. It aims to ensure that the previously relatively loosely regulated online marketing field is more strictly regulated, although specific details with regards to how it aims to change the business model are not clear. The response is focused on maintenance of consumer confidence through proper treatment of data, protection from unfair practices and standardised remedies against traders that have breached requirements.

## 3. Analysis and Evaluation

The value of self-regulation (inherent in the CAP Code) as an alternative to statutory control is **recognised in European legislation, including those on misleading and comparative advertising** (Directives 2005/29/EC and 2006/114/EC). Self-regulation is accepted by the Department for Business, Innovation and Skills and Trading Standards as a first line of control in protecting consumers and the

<sup>593</sup> Given that the 2008 Consumer Protection from Unfair Trading Regulations merely implements the EU's Unfair Commercial Practices Directive, the case study will mainly consider the 'additional' regulatory response, namely the CAP Code. Although the UK is no longer a member of the EU, the substance of the implementing national legislation remains the same even after the end of the UK-EU transition period.

<sup>594</sup> Consumer Focus, 2008, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices*.

<sup>595</sup> See: Advertising Standards Agency, 2014, *CAP Code: Preface*.

<sup>596</sup> See: Advertising Standards Agency, 2021, Website, <https://www.asa.org.uk/>.

<sup>597</sup> Ibid.

<sup>598</sup> Simply Business, 2011, *Online marketing and the CAP Code – What you need to do*.

industry<sup>599</sup>. Although ASA is non-statutory and so cannot enforce legislation, it **can refer cases to Trading Standards**, which can then impose fines and criminal sanctions. It is important to note that with its self-regulatory system, ASA depends upon the fact that practitioners in every sphere share an interest in seeing that marketing communications are welcomed and trusted by their audience: unless they are accepted and believed, marketing communications cannot succeed. If they are offensive or misleading, they discredit everyone associated with them and the industry as a whole<sup>600</sup>.

Given that it goes beyond the scope of the Unfair Commercial Practices Directive, the CAP appears to be **effective in filling in gaps left by the legislation**. In 2019, ASA resolved 34,717 complaints relating to 24,886 advertisements, 70% of which were potentially misleading. The same year, 62 sanctions were applied leading to compliance, and only 9 advertisers needed to be referred to Trading Standards for further action to be taken<sup>601</sup>.

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<sup>599</sup> See: Advertising Standards Agency, 2014, *CAP Code: Preface*.

<sup>600</sup> See: Advertising Standards Agency, *The CAP Code: How the System Works*.

<sup>601</sup> Advertising Standards Agency, 2019, *Using technology for good – Annual Report 2019*.

## United States

### 1. National context

Consumer protection laws apply **equally to online advertising** and recent issues include space-constrained screens and social media platforms. Privacy protection is also an important issue in the United States, and is the object of some of the Federal Trade Commission's regulations<sup>602</sup>. In 2020, there were 3 top complaints related to online advertising (excluding identity theft)<sup>603</sup>: imposter scams where someone gets tricked into sending money to someone else<sup>604</sup>; online shopping and negative reviews (a lot of this was attributable to COVID-19, e.g., unreceived items, undisclosed costs, non-delivery, no guarantees)<sup>605</sup>; and internet services.

The 1914 Federal Trade Commission Act empowers the Federal Trade Commission (FTC) to act in the interest of consumers to prevent deceptive and unfair acts or practices. The FTC is also in charge of enforcing the Children's Online Privacy Protection Act<sup>606</sup> which applies to online advertising. The 1946 Lanham Act also contains some provisions on false advertising. The FTC also enforces a number of other statutes and rules that relate to digital advertising. Examples include:

- The Restoring Online Shoppers' Confidence Act, which prohibits any post-transaction third-party seller from charging any financial account in an internet transaction without consent and demands clearly displayed terms and conditions;
- The Mail, Internet, or Telephone Order Merchandise Rule, which requires sellers to reasonably predict shipping time for products; and
- The Consumer Review Fairness Act, which protects consumers' ability to share opinions about a business's products, services, or conduct, in any forum, including online.

The FTC provides advice to online companies and commercial websites. It published a report<sup>607</sup> in 1998 with guidance to companies that collect personal information from users. In February 2009, the FTC released a revised set of principles for the self-regulation of online behavioural advertising<sup>608</sup>.

In the same area, the Obama administration issued the **Consumer Privacy Bill of Rights** which is enforceable by the FTC and includes 7 principles intended to protect consumers' rights and privacy.

In conjunction to federal law and guidelines, industry has also issued policies to which they voluntarily adhere. The "Do not Track" initiative for example, was **created by companies including Google, Yahoo, Microsoft and AOL**. It aims to provide consumers with opt-outs for behaviour-based marketing.

Most cases the FTC handles are by virtue of Section 5 of the FTC Act. However, the FTC also relies on more detailed guidelines (currently under review) to investigate cases. The FTC also issues significant guidance and FAQs on a range of consumer protection related issues.

<sup>602</sup> Federal Trade Commission, 2013, *Mobile Privacy Disclosures: Building Trust Through Transparency: A Federal Trade Commission Staff Report*.

<sup>603</sup> See: Federal Trade Commission, 2020, *Consumer Sentinel Network Data Book: Annual data book 2020*.

<sup>604</sup> See: Federal Trade Commission, *Consumer Advice: Imposter Scams*.

<sup>605</sup> See: Federal Trade Commission, 2020, *FTC Data Shows Record Surge in Online Shopping Complaints During Pandemic*, Press Release.

<sup>606</sup> Federal Trade Commission, *Children's Online Privacy Protection Rule ("COPPA")*, *Children's Online Privacy Protection Act of 1998*, 15 U.S.C. 6501–6505.

<sup>607</sup> Federal Trade Commission, 1998, *Privacy Online: a report to Congress*.

<sup>608</sup> Federal Trade Commission, 2009, *Self-Regulation Principles for Online Behavioral Advertising*.



An important part of the FTC's activity relating to digital advertising revolves around privacy protection. Unlike the EU, the **US does not have a separate data protection authority** or a single comprehensive privacy law at the federal level like the GDPR. The FTC uses Section 5 complemented by privacy-related statutes to protect consumer privacy, including the Children's Online Privacy Protection statute<sup>609</sup>. During the pandemic, children's time spent online has drastically increased with online learning which led to a range of new issues such as privacy issues in the educational technology area. Issues the FTC deals with also include Artificial Intelligence<sup>610</sup> and dark commercial patterns<sup>611</sup>. To kick off awareness around the issue, the FTC held a workshop in April 2021 to bring together consumer advocates industry professionals and will publish a report<sup>612</sup>. The FTC is able to use Section 6B of FTC Act, to issue orders which allow them to collect information from companies<sup>613</sup>.

## 2. Design and implementation of response

There is no set time period for the FTC guidelines review, contrary to rule making procedures (e.g. the negative option rule making), for which some very specified procedures are set out. **The procedure typically takes a few years.** The current revision of the guidelines seeks to update them to take account of new marketing techniques. Through its responses to specific cases, the FTC provides responses to issues which signal to the market how they interpret the law from the FTC Act and Section 5 in particular, which can sometimes become laws. The FTC can conduct investigations upon a complaint by the public or by a corporation and formal complaints are addressed by an administrative judge who may issue a cease-and-desist order or issue relief<sup>614</sup>. Complaints may also be brought before the largest Industry body, BBB National Programmes, which has a National Advertising Division<sup>615</sup>. Bringing enforcement cases is a privileged way for the FTC to tackle new consumer issues that arise and allow the law to keep up with the most recent market practices.

The FTC also seeks to influence market practices in the area of privacy and digital advertising. In December 2020, the FTC issued orders to 9 social media and video streaming companies under Section 6B of FTC Act, which allows them to collect information from companies<sup>616</sup>. The orders require the companies to provide data on how they collect, use, and present personal information, their advertising and user engagement practices, and how their practices affect children and teens. The FTC is also using this Section 6B tool in an ongoing study examining the privacy practices of broadband providers<sup>617</sup>.

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<sup>609</sup> See: Federal Trade Commission, *Children's Online Privacy Protection Rule ("COPPA")*, Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501–6505.

<sup>610</sup> See: Smith, A., 2020, *Using Artificial Intelligence and Algorithms*, blog.

<sup>611</sup> See: Federal Trade Commission, 29 April 2021, *Bringing Dark Patterns to Light: An FTC Workshop*, 29 April 2021.

<sup>612</sup> *Ibid.*

<sup>613</sup> See: Federal Trade Commission, 2020, *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information*, Press Release.

<sup>614</sup> See: Federal Trade Commission, *Truth in Advertising*, Media Resources.

<sup>615</sup> See: Bbb National Programs, *National Advertising Division, Information Page*.

<sup>616</sup> See: Federal Trade Commission, 2020, *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information*, Press Release.

<sup>617</sup> See: Federal Trade Commission, 2019, *FTC Seeks to Examine the Privacy Practices of Broadband Providers*, Press Release.

### 3. Analysis and Evaluation

The significant number of cases the FTC deals with, their variety, as well as the compensation it has issued to customers indicate **the FTC does meet its objectives in terms of consumer protection and privacy**. Last year, the FTC provided USD 483 million<sup>618</sup> to consumers in the US and other countries<sup>619</sup>. It also provided a number of reports to the Congress on digital advertising issues including one about social media bots and deceptive advertising<sup>620</sup>.

Two cases which reflect the FTC's activity in these areas are the Flo Health<sup>621</sup> and the Everalbum<sup>622</sup> case. The first which involved allegations that the developer of a period and fertility-tracking app shared users' health information with third parties such as Facebook, Google, and others after promising to keep the information private. The settlement requires Flo Health, Inc. to, among other things, obtain an independent review of its privacy practices and get app users' consent before sharing their health information. In the latter, the FTC sought action against Everalbum which involved allegations about an online company's use of facial recognition technology and its retention of the photos and videos of users who deactivated their accounts. The proposed order includes a novel algorithmic remedy, requiring the company to delete models and algorithms it developed by using the photos and videos uploaded by its users.

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<sup>618</sup> This corresponds roughly to EUR 393 million [exchange rate 31.12.2020].

<sup>619</sup> See: Federal Trade Commission, 2020, *Data on Refunds to Consumers*, Cases and Proceedings.

<sup>620</sup> Federal Trade Commission, 2020, *FTC Sends Report to Congress on Social Media Bots and Deceptive Advertising*, Press Releases.

<sup>621</sup> Federal Trade Commission, 2021, *Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data*, Press Release.

<sup>622</sup> Federal Trade Commission, 2021, *California Company Settles FTC Allegations It Deceived Consumers about use of Facial Recognition in Photo Storage App*, Press Release.

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In this research paper, we provide a comprehensive overview of online advertising markets and we analyse the challenges and opportunities concerning digital advertising. We review the degree to which existing and proposed legislation at EU level addresses the identified problems, and identify potential solutions, with reference to experience from EU Member States and third countries. We conclude with a synthesis and specific policy recommendations, drawing on stakeholder interviews.

This document was provided by the Policy Department for Economic, Scientific and Quality of Life Policies for the committee on the Internal Market and Consumer Protection (IMCO).

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PE 662.913  
IP/A/IMCO/2020-30

Print ISBN 978-92-846-8130-3 | doi: 10.2861/288740 | QA-02-21-683-EN-C  
PDF ISBN 978-92-846-8131-0 | doi: 10.2861/80 | QA-02-21-683-EN-N