



Navigating the Realm of Digital Technologies: The Protection of Minors under the Digital Services Act in the Era of Targeted Advertising

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Table of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DSA	Digital Services Act
EU	European Union
GDPR	General Data Protection Regulation
VLOP	Very Large Online Platform

Chapter I: Introduction

1.1 Background and problem statement

How often do you use the internet? The 21st century has been marked by the rise of digital technologies, transforming social affairs. This resulted in a number of challenges, such as spread of illegal content and discrimination. Concerns have been raised about safeguarding human rights online – a largely unregulated issue.¹ Digital technologies have changed human rights, altering their implementation and leading to the emergence of so-called digital rights, for instance the right to be forgotten. This means rethinking the legal methods to regulate fundamental rights online.²

One online practice that is particularly problematic is targeted advertising, defined as “*promotion measures, which address individual recipients, having been tailored in advance to their purchasing needs and desires*”.³ It involves prior collection and processing of users’ data, which is analysed to ascertain consumer behaviours. The information collected is vast and can include numerous categories, from websites visited to very sensitive personal information, like religious beliefs.⁴ This raises concerns about the potential misuse of users’ data and privacy infringements. Targeted advertising also brings a number of ethical concerns as it is misleading and can distort users’ behaviour.⁵ Consumers often cannot recognize targeted advertising because it is fully integrated in online content but even if they can, they do not know how to reject it.^{6 7} Children are particularly vulnerable as their capacity to make decisions and their cognitive abilities are weakened compared to adults.⁸ This can endanger children’s autonomy and can hinder the development of their identity.⁹ Therefore, a more proactive regulation was deemed necessary in order to tackle harmful practices online.¹⁰

Within Europe, the European Union (“EU”) has committed itself to strong protection of human rights online. It has announced its digital transformation to achieve Europe’s “Digital

¹ Rikke Frank Jørgensen and Lumi Zuleta, 'Private Governance of Freedom of Expression on Social Media Platforms: EU content regulation through the lens of human rights standards' [2020] 41(1) *Nordicom Review* 51

² Oleksandr V Petryshyn and Oleh S Hyliaka, 'Human rights in the digital age: Challenges, threats and prospects' [2021] 28(1) *Journal of the National Academy of Legal Sciences of Ukraine* 16

³ Eleni Tzoulia, 'Targeted Advertising in the Digital Era: Modern Challenges to Consumer Privacy and Economic Freedom: The Responses of the EU Legal Order' [2021] *EU Internet Law in the Digital Single Market*

⁴ Alexander Nill and Robert J Aalberts, 'Legal and Ethical Challenges of Online Behavioral Targeting in Advertising' [2014] 35(2) *Journal of Current Issues & Research in Advertising* 3

⁵ Tzoulia (n 3)

⁶ Nill and Aalberts (4) 18

⁷ Liselot Hudders and others, 'Editorial: Digital advertising and consumer empowerment' [2019] 13(2) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* 2

⁸ Normann Witzleb and others, *Privacy risks and harms for children and other vulnerable groups in the online environment* (Office of the Australian Information Commissioner, 2023) 8

⁹ *Ibid* 8-9

¹⁰ Andrej Savin, 'The EU Digital Services Act: Towards a More Responsible Internet' [2021] *Journal of Internet Law Copenhagen Business School Law Research Paper Series No 21-04* 3

Decade”.¹¹ Moreover, in 2022 the European Declaration on Digital Rights and Principles has been announced as a way to ensure a safe digital conversion and to familiarize EU citizens with their digital rights.¹²

The most recent legal development concerning digital rights is the EU Digital Services Act (hereafter “DSA”), coming into effect in August 2023. The DSA includes human rights protection into its regime, which is reinforced by the fact that it is drafted on the basis of the Charter of Fundamental Rights of the Union (“CFREU”), emphasizing that responsible behaviour of intermediaries is essential for a safe online environment.¹³ Thus, scholars have spoken of the DSA as a “human-rights infused regulation”.¹⁴

The DSA imposes a number of obligations, containing a layered structure.¹⁵ Important is the inclusion of targeted advertising into its scope, a practice which was deemed problematic, raising concerns about the privacy of users, discrimination and widespread profiling .¹⁶ Given the vulnerabilities of minors and their susceptibility to online marketing, the DSA specifically addresses targeted advertising for children, which is important when ensuring minors’ safety online.¹⁷

While targeted advertising has been regulated under the General Data Protection Regulation (“GDPR”), this has proven to be insufficient. Although the GDPR provides for rights and obligations to tackle information asymmetries between consumers and companies, gaps remain as a result of large-scale processing of personal data.¹⁸ Moreover, the GDPR is a broad instrument, which applies to most instances where personal data is used, making some of its provisions more general.¹⁹ As targeted advertising was not expressly considered when drafting the GDPR, it does not directly regulate it, whereas the newly adopted DSA specifically addresses the practice, considering its particularities and challenges.²⁰

¹¹ Aina Turillazzi and others, 'The digital services act: an analysis of its ethical, legal, and social implications' [2023] 15(1) Law, Innovation and Technology 84

¹² European Commission, 'Europe's Digital Decade: Digital Targets for 2030' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en> accessed 20 September 2023

¹³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ 2 277/1, Preamble

¹³ Turillazzi and others (n 11) 85

¹⁴ Amélie P Heldt, 'EU Digital Services Act: The White Hope of Intermediary Regulation' in Terry Flew and Fiona R Martin (eds), *Digital Platform Regulation* (Palgrave Macmillan, Cham 2022) 76

¹⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ 2 277/1

¹⁶ Ana Maria Corrêa, 'Regulating targeted advertising: Addressing discrimination with transparency, fairness, and auditing tests remedies' [2022] 46(1) Computer Law & Security Review 2

¹⁷ Brian Geremia, 'Chapter 336: Protecting Minors' Online Reputations and Preventing Exposure to Harmful Advertising on the Internet' [2014] 45(3) Pacific McGeorge School of Law 438

¹⁸ Peter J Van de Waerd, 'Information asymmetries: recognizing the limits of the GDPR on the data-driven market' [2020] 38 Computer Law & Security Review 11

¹⁹ Tom Dobber and others, 'The Regulation of Online Political Micro-Targeting in Europe' [2019] 8(4) Internet Policy Review 7

²⁰ Ibid

Some experts believe the DSA will lead to profound changes in digital services, bringing greater protection for users, including minors.²¹ Other scholars argue that the significance of the DSA will be limited in practice and it is unlikely to strengthen consumer protection because the ban on targeted advertising is limited in scope.²² Furthermore, they maintain that in practice, children content may be difficult to monitor, especially considering that it may not reach adult supervision at all.²³ ²⁴ This comes to show that scholars disagree on the impact of the DSA. While some of them believe it will be sufficient to protect minors, others are sceptical about its significance. Therefore, it is essential to assess the Regulation in order to establish whether it can contribute to the safety of minors online.

Focusing on the DSA is relevant for several reasons. Firstly, it is recent, meaning its study is highly relevant for assessing the newest legislative initiatives in the area. Secondly, the DSA has become the primary instrument governing targeted advertising within the Union, which makes its study important when evaluating the regulatory framework. Moreover, given that the EU is considered a leader in privacy protection, the DSA can have wide implications on the global level as it can be used as a model for the adoption of future laws beyond the Union. Consequently, this thesis will critically explore the DSA in light of heated debate among scholars.

1.2 Research question

Targeted advertising is a practice that can bring significant risks for users, which has prompted the EU legislator to regulate it. This will be the object of this thesis. Thus, the following research question has been formulated:

How does the Digital Services Act regulate targeted advertising for minors, building on the already-established legal framework proposed by the GDPR, and what is the potential of the DSA to be effective in ensuring the protection of minors' rights?

This research question has been divided into 3 sub-questions:

1. What constitutes targeted advertising and what are its implications for users' rights, specifically for the rights of minors?
2. How does the DSA regulate targeted advertising for minors, and how does it build on the legal framework offered by the GDPR?

²¹ Sam Wrigley and others, 'My name is personalised_ political_ advertiserpy and I approve this message: Regulating automated and targeted political advertising in EU Law' [2023] University of Luxembourg Law Research Paper No 2023-13 16

²² Catalina Goanta and Bram Duivenvoorde, 'The regulation of digital advertising under the DSA: A critical assessment' [2023] 51Computer Law and Security Review 13

²³ Tinhinane Medjkoune, Oana Goga and Juliette Senechal, 'Marketing to Children Through Online Targeted Advertising: Targeting Mechanisms and Legal Aspects' in *Proceedings of the 2023 ACM SIGSAC Conference on Computer and Communications Security* (Association for Computing Machinery 2023) 192

²⁴ Pietra Daneluzzi Quinelato, 'Consumer manipulation through behavioural advertising: regulatory proposal by the Data Services Act' [2024] 2(1) Brazilian Journal of Law Technology and Innovation 9

3. What is the potential of the DSA to effectively address the challenges posed by targeted advertising for minors in light of the EU Declaration on Digital Rights and building on existing literature and enforcement action?

1.3 Literature review

Although the DSA is a new instrument, some research has already been conducted. Duivenvoorde and Goanta have critically assessed the regulation of targeted advertising, arguing that the transparency obligations under Article 26 DSA will raise consumer protection.²⁵ However, they are pessimistic about the effectiveness of the obligation – consumers often do not read or understand information and thus information duties are in many cases ineffective.²⁶ Similarly, Galli, Lagioia and Sartor describe the so-called “privacy paradox” – consumers value their privacy but will either disregard privacy policies or give their consent without considering the implications of this.²⁷

Zard and Sears comment that the DSA’s prohibition of targeted advertising for minors, as well as the ban on advertising on the basis of special data, are a reason to believe that DSA contributes to a de facto prohibition of behavioural advertising.²⁸ Even without such prohibition, the DSA’s transparency obligations can help regulators explore to what extent targeted advertising misuses humans’ vulnerabilities and courts will have the final say in ex post assessments.²⁹ Therefore, the authors conclude that the DSA has increased the consumers’ position against targeted advertising, although gaps remain. Moreover, Duivenvoorde and Goanta have argued that Article 26(3) of DSA goes further than the GDPR in protecting customers as it fully bans targeted advertising based on special data, whereas the GDPR allows it, provided consent has been obtained.³⁰ Similarly, Wrigley, Hiltunen and Leino-Sandberg conclude that the DSA will significantly restrict some harmful advertising practices, such as political advertising.³¹ Leiser also confirms this by arguing that the DSA effectively regulates harmful and deceiving advertising practices, while safeguarding fundamental rights.³²

On the other hand, Laux, Wachter and Mittelstadt are critical of the DSA, arguing that it lacks substantive rules that go beyond existing laws. In their view the DSA offers no additional restrictions on targeted advertising.³³ Moreover, the authors claim that by focusing on very large online platforms (VLOPs), the DSA creates a legal void as smaller platforms are left

²⁵ Goanta and Duivenvoorde (n 22) 8

²⁶ Ibid

²⁷ Federico Galli and others, 'Consent to Targeted Advertising' [2022] 33(4) European Business Law Review 500

²⁸ Alexander Zardiashvili and Alan M Sears, 'Targeted Advertising and Consumer Protection Law in the EU' [2023] 56(3) Vanderbilt Journal of Transnational Law 844

²⁹ Goanta and Duivenvoorde (n 22) 4

³⁰ Ibid 9

³¹ Wrigley and others (n 21) 16

³² Mark Leiser, 'Reimagining Digital Governance: The EU's Digital Service Act and the Fight Against Disinformation' [2023] Amsterdam Law and Technology Institute 11

³³ Johann Laux and others, 'Taming the few: Platform regulation, independent audits, and the risks of capture created by the DMA and DSA' [2021] 43 Computer Law and Security Review 11

mostly unregulated – a view which is also expressed by other scholars.^{34 35} Similarly, Griffin believes the provisions of the DSA are largely symbolic.³⁶ She asserts that the simple ban on targeted advertising using sensitive data will be inadequate to counter one of the biggest issues associated with it – discrimination.³⁷

Medjkoune, Goga and Senechal briefly analyse targeted advertising directed towards children. They conclude that although the use of profiling to target children is forbidden under the DSA, placement-based advertising is not included in its scope.³⁸ Therefore, the authors believe that this is not enough to protect children.³⁹ In addition, they argue that content verification of children-directed content will be difficult in practice given that such content will be seen predominantly by children, to whom it is directed.⁴⁰

From the analysis above it becomes clear that there is significant disagreement in the literature on the regulation of targeted advertising under the DSA. For instance, Laux, Wachter and Mittelstadt are critical of the potential of the DSA to effectively regulate targeted advertising, while Wrigley, Hiltunen and Leino- Sandberg believe it will restrict harmful advertising. Moreover, certain imitations can be identified in the literature. While the matter has been explored to some extent, few studies have actually delved into the implications of targeted advertising for minors under Article 28. The existing studies have more broadly analysed the DSA, without focusing on the specificities stemming from its application to minors. Consequently, there is a gap in the literature concerning the regulatory framework for children’s targeted advertising under the DSA. This is problematic not only when understanding regulation but also when assessing the broader societal challenges posed by targeted advertising and its impact on children. Therefore, it is important to build on current studies by focusing on Article 28 DSA and explicitly on its implications for minors. This involves not only critically analysing the provisions of the DSA but also the underpinnings of minors’ targeted advertising acts. In this way, this thesis can add to the literature by exploring possible undiscovered insights in order to offer a comprehensive analysis into the potential of Article 28 and the DSA as a whole to be effective in regulating targeted advertising, focusing on minors.

1.4 Methodology

³⁴ Ibid

³⁵ Advait Deshpande, Lucie Lechardoy, Francisco Lupiáñez-Villanueva, ‘Towards a comparative and integrative framework for regulatory oversight of online advertising: Challenges, mitigation strategies, outcomes, and areas of intervention’ in 31st European Conference of the International Telecommunications Society (ITS): Reining in Digital Platforms? Challenging Monopolies, Promoting Competition and Developing Regulatory Regimes (International Telecommunications Society 2022) 17

³⁶ Rachel Griffin, ‘Tackling Discrimination in Targeted Advertising’ (Verfassungsblog, 23 June) <<https://verfassungsblog.de/targeted-ad/>> accessed 24 October 2023

³⁷ Ibid

³⁸ Medjkoune, Goga and Senechal (n 23) 2

³⁹ Ibid 3

⁴⁰ Ibid 7

To answer the main research question and subquestions, the doctrinal research method will be used, which involves the analysis of legal instruments, case law and other legal documents.

In order to answer the first subquestion, relevant legal instruments, mainly DSA and the GDPR, will be analysed in order to explore whether they define targeted advertising and how. Academic literature from different fields, such as privacy and data protection and psychology, will be analysed in order to acquire a thorough understanding of targeted advertising, its effects on users and why it may be problematic. This will constitute Chapter II.

The answer to the second subquestion, constituting Chapter III, will involve an analysis of the relevant legal instruments in two parts. Firstly, the GDPR will be briefly analysed in order to determine which of its provisions relate to targeted advertising. Secondly, the text of the DSA will be assessed as a way to determine how targeted advertising for minors is regulated under the DSA. In addition, the interplay between the two legal instruments will be examined. Also non-legislative instruments will be analysed, such as the Proposal for the DSA, as well as its impact assessment.

In answering the third subquestion the provisions of the DSA, building on the previous section, will be critically analysed in order to ascertain whether they sufficiently regulate targeted advertising for minors. Possible weaknesses of the DSA will be pointed out. In order to assess effectiveness, and given the absence of empirical data because of the recent coming into force of the DSA, a normative framework will be used. Thus, the effectiveness of the DSA will be assessed from the perspective of the EU Declaration on Digital Rights and Principles. An analysis of the relevant academic literature will be conducted in order to gain a more thorough understanding of strengths and weaknesses of the DSA. Enforcement action by the EU will be examined, for instance the EDPS binding decision on TikTok.⁴¹

Lastly, it is important to clarify the scope of this thesis and possible limitations. This thesis will focus primarily on the DSA. The GDPR will be briefly analysed, to the extent that it relates to targeted advertising. Even though the DSA has been adopted in a package with the Digital Markets Act (“DMA”), the latter will not be examined. This is because the DMA is less relevant for answering the research question considering that it aims to target gatekeepers from a competition law perspective, whereas this thesis will focus on targeted advertising from a privacy and human rights perspective.

⁴¹ Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65 GDPR) [2023]

Chapter II: What is targeted advertising?

2.1 Introduction

Before further exploring the regulation of targeted advertising in the DSA, it is important to understand this practice, including definitions and technical underpinnings. Attention will be given to the risks it poses to the consumer, with a focus on minors. This is important in order to assess the potential of the DSA to effectively regulate targeted advertising and whether it sufficiently protects minors. Therefore, this chapter will aim to answer the following question: “What constitutes targeted advertising and what are its implications for users’ rights, specifically for the rights of minors?”.

2.2 Definition

Targeted advertising is more prevalent than ever. While this practice is not new, with some types of radio and television targeting from the 1940s-1950s, digital technologies have allowed the quick promulgation of various targeting practices, making it a successful business model.⁴² Targeting brings economic benefits, however it also poses significant risks to the rights and freedoms of consumers and is associated with persistent surveillance.⁴³

The European Parliament has defined targeted advertising as “*marketing practice that uses data about individuals to select and display ads or other forms of commercial content for marketing purposes*”.^{44 45} Nevertheless, relevant EU legal instruments such as the DSA and the GDPR do not provide a definition. The DSA for example only defines advertising as a whole, which is a broader definition that includes both commercial and non-commercial advertising and covers targeted advertising in itself, however does not specifically relate to it.^{46 47} Further clarification can be found in the Preamble of the DSA, where the serious impact of targeting methods used to correspond to the users’ “interests and potentially appeal to their vulnerabilities” is highlighted.⁴⁸ This talks of targeted advertising as a type of advertising that is personalised to the consumer. The DSA also refers to “advertising based on profiling” in both the Preamble and its provisions, whereas this term seems to refer to a subtype of targeted advertising. Nevertheless, neither are defined in the DSA. Arguably, the omission to define targeted advertising can be problematic. For instance, it can leave loopholes in the law to be exploited by platforms who can claim their practices do not constitute targeting. Moreover, it can result in enforcement which is not uniform as practically identical situations may be

⁴² Zardiashvili and Sears (n 28) 807

⁴³ Galli and others (n 27) 485-486

⁴⁴ European Parliament, 'Regulating targeted and behavioural advertising in digital services: How to ensure users' informed consent' [2021] Policy Department for Citizens' Rights and Constitutional Affairs 23

⁴⁵ For the purposes of this work, the definition by the European Parliament will be used.

⁴⁶ The definition is contained in Article 3(r) and states the following: “information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes...”.

⁴⁷ Goanta and Duivenvoorde (n 22) 5

⁴⁸ DSA, Recital 69

regulated differently. For instance, the advertising practices of the same platform may be interpreted differently by the regulatory bodies in different EU Member States depending on their definition of targeted advertising – in one Member State targeted advertising may be taken to mean only advertising which is explicitly based on profiling, whereas in another different types of personalized advertising will constitute targeted advertising and will thus be subject to the DSA. All in all, the lack of definition, which does not identify the concrete risks of targeted advertising to minors, can undermine minors’ protection against such risks.

While the GDPR does not define targeted advertising, it is relevant to the extent it defines notions such as profiling. Profiling is defined as “automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person”.⁴⁹ Therefore, profiling involves 3 elements: it is automatic; there is processing of personal data and it assesses certain personal aspects of consumers.⁵⁰ In such a way, the user is a “data derivative” – identified by data and by comparing her to others with similar characteristics, which have been compiled into profiles.⁵¹ Given that advertising increasingly relies on automated means and based on the definition by the European Parliament, in many cases targeted advertising will be considered a form of profiling based on the GDPR.⁵²

Moreover, it is interesting to observe the understanding of targeted advertising from the lens of the Court of Justice of the European Union (“CJEU”). For example, in its case law, the Court, while not expressly mentioning targeted advertising, has talked about advertising “tailored to the individual users” in accordance with their interests, behaviour and personal situation.⁵³ The Court further added that such advertising is performed by automated creation of profiles and by the collection of large masses of data in order to make conclusions about the users’ “preferences and interests”.⁵⁴ It is thus relevant to explore the technical underpinnings of targeted advertising, which will be done next.

2.2 Types of targeted advertising and the risks they pose

Targeted advertising consists of 4 main types – contextual, geographic, segmented and behavioural advertising. Contextual advertising relates to the website’s content or the searched keywords.⁵⁵ ⁵⁶ Geotargeting tracks the location of the consumer in order to deliver

⁴⁹ 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) [2016] OJ 2 119/1, Article 4(4)

⁵⁰ Goanta and Duivenvoorde (n 22)

⁵¹ Jeannie Marie Paterson and others, 'The Hidden Harms of Targeted Advertising by Algorithms and Interventions from the Consumer Protection Toolkit' [2021] 9 International Journal of Consumer Law and Practice 5-7

⁵² Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679' [2017] 22

⁵³ Case C-252/21 Meta Platforms Inc and Others v Bundeskartellamt [2023] ECR I-537, para 27

⁵⁴ Ibid

⁵⁵ Zardiashvili and Sears (n 28) 807

⁵⁶ European Commission, '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' [2018] 35

advertisements based on it.⁵⁷ Segmented advertising, also known as demographic targeting, uses data such as age, gender and location, provided by the data subjects themselves at the registration stage.⁵⁸ ⁵⁹ Behavioural advertising, which is most common and much broader, is most problematic because it analyses not only demographic data but also consumers' preferences and behaviour for longer periods of time and creates profiles based on certain patterns in their conduct.⁶⁰ Those are then used to target users with more personalized and optimized advertisements. When users receive advertisements after disclosing their interests online, such as monitoring what the user has added into her virtual shopping basket and re-occupying her with the same product on other platforms, this is referred to as "re-targeting" and it is described as "being followed by advertisements across the internet."⁶¹ However, behavioural advertising not only includes re-targeting but also deducing the preferences, characteristics, way of living of users from their behavioural data based on numerous variables and large quantities of data and making conclusions about one user based on her similarities with others.⁶² ⁶³

Importantly, what can distinguish segmented advertising from behavioural advertising is that while in the former case, the user voluntarily provides the data themselves, in the later data is observed or inferred about the consumer, known as profiling.⁶⁴ This not only may violate privacy and data protection laws due to lack of informed consent but poses further issues due to its impact on transparency, as well as the possibilities of discrimination and biases. Even when consumers have given consent for processing their data, this may be used to make profiles which are applied to all other profiled users, regardless of their consent, which essentially means the effectiveness of consent is diminished.⁶⁵ A consumer can be targeted not only based on the data that she has willingly provided but also on patterns that have been observed of her – when other persons that are similar to the user have expressed certain interests and preferences, it is also assumed that she will share common characteristics with them.⁶⁶

Profiling, which uses the data of the consumer in order to classify them to a certain group, can be exploited in a way which leads to discrimination, whether intentional or not, and can possibly exclude whole social groups.⁶⁷ A famous example of this is YouTube that has been accused of discriminating against LGBTQIA+ people by demonetizing such content. Based on certain key words, content would be considered LGBTQIA+-related and thus excluded from

⁵⁷ Benjamin E Borenstein and Charles R Taylor, 'The effects of targeted digital advertising on consumer welfare' [2023] 32(3) *Journal of Strategic Marketing* 324

⁵⁸ Niklas Fourberg and others, *Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice* (European Parliament 2021) 24

⁵⁹ European Commission (n 56) 35

⁶⁰ Zardiashvili and Sears (n 28) 809

⁶¹ *Ibid* 809

⁶² *Ibid*

⁶³ Claire M Segijn and Iris Van Ooijen, 'Differences in consumer knowledge and perceptions of personalized advertising: Comparing online behavioural advertising and synced advertising' [2020] 28(2) *Journal of Marketing Communications* 211

⁶⁴ Zardiashvili and Sears (n 28) 808

⁶⁵ Galli and others (n 27) 500

⁶⁶ Van de Waerdt (n 18) 15

⁶⁷ Paterson and others (n 51) 8

monetization on this basis alone.⁶⁸ Lack of data or data that is inaccurate can further complicate the matter, especially when automated decision-making excludes marginalised groups altogether from the data collection processes. At the very least, a point for concern should be that profiling is performed almost fully by algorithms, with very few opportunities to intervene in the results or to understand the decision-making process.⁷⁰

Although behavioural advertising is particularly problematic, this should not mean that other types of targeted advertising are harmless, especially when it comes to minors. Non-behavioural advertising can also pose significant problems, among which exposure to inappropriate content (for instance pornographic content), manipulation of minors, promoting impulsive purchases and discrimination. Non-behavioural targeted advertising, also when combined with profiling, can create powerful advertising networks that collect even more personal data about the consumer, resulting in serious privacy risks.⁷¹

2.3 The “secret” behind targeted advertising

Targeted advertising involves five main phases. Firstly, the behaviour of users is monitored and data is collected. Secondly, data is stored. In the third phase, the personal data is examined. Fourthly, data exchanges take place between different parties. Lastly, consumers are targeted with tailored advertisements on the basis of the collected information.⁷²

Targeted advertising is based on a model where the providers of online content (known as “publishers”) sell online advertising space on their respective platforms to advertisers.⁷³ Both advertisers and publishers can range from small blogs to large corporations,. Nevertheless, online platforms, and especially VLOPs, stand out as the biggest publishers, given their wide influence online. For instance, in recent years 90% of the online searches were performed via Google and Meta was responsible for 80% of social networking.⁷⁴ This allows such online platforms to collect large quantities of data, whereas they not only sell advertising space on the platform but also actively engage in profiling, making targeted advertising part of their business model. Thus, they are also the main actor that derives benefits from targeted advertising.⁷⁵ Contrarily, although smaller publishers can collect users’ data and can track them through cookies or other technologies, they merely provider advertising space but do not actively engage in profiling – for this they rely on VLOPs.⁷⁶

⁶⁸ Rachel Griffin, 'From Brand Safety to Suitability: Advertisers in Platform Governance' [2023] 12(3) Internet Policy Review 10

⁷⁰ Van de Waerd (n 18) 13

⁷¹ Emil Haglund and Johanna Björklund, 'AI-Driven Contextual Advertising: A Technology Report and Implication Analysis' [2022] 1 Department of Computing Science

⁷² Frederik J Zuiderveen Borgesius, 'Improving Privacy Protection in the Area of Behavioural Targeting' [2015] 33 Information Law Series 12

⁷³ Zardiashvili and Sears (n 28) 811

⁷⁴ European Parliament (n 44) 18

⁷⁵ Fourberg and others (n 58) 19

⁷⁶ Sourya Joyee De and Abdessamad Imine, 'Consent for targeted advertising: the case of Facebook' [2020] 35 AI and Society

From one point of view, thanks to targeted advertising the advertisements delivered to the consumers are more relevant to them and to their preferences.⁷⁷ Thus, irrelevant information is removed in a context where users are overburdened by the amounts of data they are met with daily.⁷⁸ After all, targeted advertising is not a new phenomenon. Moreover, some scholars argue that the exchange of personal data between advertisers and publishers can contribute to common welfare.⁷⁹ This is because it can help in predicting the preferences of consumers correctly, aligning them with the available offerings in order to reach market efficiency. Thus, customers' needs can be met by offering them with the relevant products and services, which is facilitated significantly by the data transfers.⁸⁰

Nevertheless, technologies allow advertisers and publishers alike to reach wider audiences and collect much more data compared to radio and television advertising in the mid-20th century. Nowadays, a typical data driven company can profile users on 52 000 characteristics.⁸¹ ⁸² The collection of so much personal data raises concerns for privacy, which is even more problematic taking into account lack of transparency and accountability characterising targeted advertising and the lack of awareness from the consumers.⁸³ Users' cognitive limitations to deal with their personal data have been well-documented. For instance, an analysis shows that it could take more than 70 days if reading 8 hours a day for the consumers to go through the privacy policies of websites they use frequently and that still does not mean they will understand their complicated texts.⁸⁴ Even if the users are well-informed of the issues that come with advertising, it is difficult and onerous to stop this practice, especially with newer technologies like fingerprinting.⁸⁵ In addition, technologies develop so rapidly that it is impossible for consumers to be aware of all forms of targeting they are subject to.⁸⁶

Once users' personal data has been collected, profiles are created. In addition, AI systems are used in order to predict how likely it is that a user interacts with an advert by means of the user profile and the data collected. Advertisers are given the freedom to personalise the advertisements based on users' reactions towards the content and adjust it, if necessary.⁸⁷ Importantly, bigger publishers and in particular online platforms, can move beyond the realm of their respective online platforms by means of the so-called "advertising networks".⁸⁸ In this case, platforms, often using both contextual and behavioural methods, are in the position of intermediaries and enable the connection between publishers and advertisers.⁸⁹ This allows

⁷⁷ Fourberg and others (n 58) 31

⁷⁸ Paterson and others (n 51) 7

⁷⁹ Veronica Marotta and others, 'The Welfare Impact of Targeted Advertising Technologies' [2021] 33(1) Information Systems Research 135

⁸⁰ Giacomo Calzolari and Alessandro Pavan, 'On the optimality of privacy in sequential contracting' [2006] 130(1) Journal of Economic Theory 190

⁸¹ Paterson and others (n 51) 7

⁸² Van de Waerd (n 18) 6

⁸³ Fourberg and others (n 58) 31

⁸⁴ Galli and others (n 27) 500-501

⁸⁵ Paterson and others (n 51) 7

⁸⁶ Fourberg and others (n 58) 31

⁸⁷ Zardiashvili and Sears (n 28) 813

⁸⁸ Ibid

⁸⁹ Fourberg and others (n 58) 20

them not only to gain more advertisers but also to acquire much more data throughout the whole network.⁹⁰

Tracking is performed via a variety of methods and can lead to significant issues, such as public and private surveillance, violation of privacy and even discrimination.⁹² The main method for tracking are the so-called cookies, small parts of data associated with each visited website. Through them it is possible to associate the user and track her activity on the website, as well as to measure how many times she visits it. Cookies vary from strictly necessary that enable the functioning of the site, through performance and functionality cookies that do not recognize the user but gather material about how she uses the website. However, most problematic are the so-called targeting cookies, which collect data from the user and are often connected to advertising networks, thus being able to build user profiles with a lot of data.⁹³ With the growing awareness of users and the requirement of consent for cookies, Zombie cookies, tracking instruments that can track the user, even if she has deleted or disabled her cookies, have been designed in order to limit the possibility to restrict cookies altogether.⁹⁴ Lastly, fingerprinting is a method by which a unique code is allocated to electronic devices in order to track their usage. This can identify the user's devices and in combination with other tracking methods, can contribute to large scale profiling. Importantly, fingerprinting allows for unrestricted tracking – the user cannot disable it by, for example, deleting the cookies or turning on incognito mode.⁹⁷

Moreover, through the so-called dark patterns, deceptive techniques are used in order to deceive consumers into doing something which is not in their best interest. Such deceptive practices can be used to collect further and more detailed data from the users to be subsequently used in targeted advertising or even to nudge consumers into hastily agreeing to targeted advertising. For example, users may unknowingly agree for their personal data to be used in targeted advertising through the use of pre-ticked boxes (even if they do not amount to valid consent).⁹⁸ Apart from the privacy violations, dark patterns are problematic because they take advantage of users' biases. This involves intervening in the decision-making of individuals. The main aim of dark patterns is to make it difficult for the consumers to choose the best option for them and to pressure them towards a certain outcome, which is particularly effective for vulnerable consumers.^{100 101} Such manipulative techniques are most prevalent in behaviour advertising but can also be seen in some of its other forms, such as contextual advertising.¹⁰²

⁹⁰ Zardiashvili and Sears (n 28) 814

⁹² European Commission (n 56) 42

⁹³ Zardiashvili and Sears (n 28) 814

⁹⁴ Joseph Newman, 'Cookie Monsters: Locally Stored Objects, User Privacy, and Section 1201 of the DMCA' [2013] 41(3) *AIPLA Quarterly Journal* 522-523

⁹⁷ European Commission (n 56) 45-46

⁹⁸ Case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Planet49 GmbH* [2019] ECR I-801, para 55

¹⁰⁰ Fourberg and others (n 58) 34

¹⁰¹ Tzoulia (n 3)

¹⁰² Paterson and others (n 51) 8

What this comes to show is that even when the consumers do not give their consent for data processing, it may be that their data, collected from many different sources, is still used for different purposes than what they agreed for, since complex data relations may reveal patterns not envisioned before, especially with AI and big data.¹⁰⁵ In any case, consumers lack full information and are in a weaker position. This power imbalance, where providers can easily force unfavourable conditions to the users who have little to no possibility to challenge them, renders legal intervention necessary, especially when minors are involved.¹⁰⁶

2.4 Targeting children

While targeted advertising brings a number of risks to adults, its impact on children is even more severe. Studies show that children younger than 7 years are rarely able to recognize the persuasiveness of advertising.¹⁰⁷ With age, this so-called “advertising literacy” improves, however children’s abilities to deal with possibly manipulative practices is diminished and they remain vulnerable, with studies showing that approximately one-half of those aged 17 years cannot comprehend persuasive techniques.¹⁰⁸

One issue to look out for is privacy risks. On the one hand, it is problematic when children’s personal data is retained and used by advertisers and publishers, usually for financial benefits. On the other, personal data can be used to feed automated decision-making technologies, which can steer discrimination and biases.¹⁰⁹ In any case, the rise of big data means that children are at risk of losing autonomy as a result of the loss of their personal data. Maintaining privacy is really important in the development of minors in order to allow them to build their own personality and identity, as well as to protect them from reputational harm, which is at odds with the narrow decision-making of algorithms.^{110 111}

The idea of privacy and data protection is difficult to understand for minors, as well as the idea that sharing personal data may have negative repercussions. Moreover, children are largely unaware that sharing data not only brings privacy risks but it can also be used for profit-making. For them protecting privacy has a largely personal aspect, for instance keeping certain information to themselves in order not to get bullied by their peers, without realizing that corporations can also abuse their data.^{112 113}

¹⁰⁵ Galli and others (n 27) 499

¹⁰⁶ Ibid 503

¹⁰⁷ Jenny Radesky and others, 'Digital Advertising to Children' [2020] 146(1) American Academy of Pediatrics 2

¹⁰⁸ Valerie Verdoodt and Eva Lievens, Targeting children with personalised advertising. in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure: Transatlantic tensions, EU surveillance, and big data* (Maklu 2017) 314

¹⁰⁹ Fourberg and others (n 58) 30

¹¹⁰ Ibid

¹¹¹ Verdoodt and Lievens (n 108) 321

¹¹² Ibid 320

¹¹³ Witzleb and others (n 8) 23

Another issue to take into account is children's reduced ability to react to dark patterns and nudging techniques which are specifically aimed at distorting their perception. As an example, they may be encouraged to make in-app purchases or be rewarded for desired behaviour.¹¹⁵ They also react particularly favourably to being re-targeted with an advertisement.¹¹⁶ Even if they can recognize the persuasive intent of such targeting, it is difficult to make rationale purchases. Often advertisements are placed in such ways that make it difficult for the child to recognize them from the other content they are interested in, let alone to assess them critically.¹¹⁷ Children are also more likely to focus on the recreational part of a game or platform, rather than think about its impact.¹¹⁸ Therefore, so-called "advergaming" are increasingly used as a way to blur the lines between content and advertisements in children-targeted content.¹¹⁹ Moreover, minors aspire to be like their favorite content creators and they often believe they share many characteristics with them, consequently they want to mimic their behavior, adopt their beliefs and use the same products.¹²⁰ Influencers in particular exert a lot of influence on minors and serve as their role models, which can further distort their decision-making.¹²¹

Lastly, through advertising children can be exposed to content which is inappropriate for their age. For instance, pop-up banners that promote gambling with promises for high compensations can attract the attention of underage users and prompt them towards engaging in harmful practices, with less possibilities that children rationally assess the dangers of this, leading to financial losses and addictions. A study cited by the OECD concludes that 9% of advertisements on children-centered webpages contain gambling content.¹²²

2.6 Conclusion

To conclude, this chapter explored the intricacies of targeted advertising. It was concluded that the DSA and the GDPR do not define targeted advertising explicitly, which can potentially lead to loopholes in enforcement. Moreover, the technology behind targeted advertising was explored. This revealed that targeted advertising makes use of large quantities of data and often uses deceptive techniques, which not only is at odds with privacy and but also furthers discrimination, biases and lack of transparency. The pros and cons of targeted advertising were presented – although some benefits were identified, those were outweighed by the drawbacks and risks of this practice, such as privacy violations and consumer manipulation. A special section was dedicated to the dangers of targeted for children, which revealed that children are particularly vulnerable, often unable to recognize or resist advertising. The above-mentioned

¹¹⁵ Radesky and others (n 107) 3

¹¹⁶ Verdoodt and Lievens (n 108) 319

¹¹⁷ Beatriz Feijoo and Charo Sádaba, 'When Ads Become Invisible: Minors' Advertising Literacy While Using Mobile Phones' [2022] 10(1) Media and Communication 340

¹¹⁸ Ibid 340-431

¹¹⁹ Witzleb and others (n 8) 25

¹²⁰ Marijke De Veirman and others, 'What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research' [2019] 10 Frontiers in Psychology 5

¹²¹ Ibid 4

¹²² Witzleb and others (n 8) 26

findings indicate that targeted advertising has far-reaching negative implications on users and especially on minors. Therefore, it is relevant to examine the EU legal framework and whether it offers adequate safeguards for the protection of children.

Chapter III: How does the DSA regulate targeted advertising for minors?

3.1 Introduction

This chapter will assess critically the regulation of targeted advertising under the DSA, with a focus on minors. In addition, the GDPR will be explored in order to compare the two instruments. Therefore, the following question will be answered: “How does the Digital Services Act regulate targeted advertising for minors, and how does it build on the legal framework offered by the GDPR?”. Thus, the legal texts of the DSA and the GDPR will be analysed and in particular the provisions which are relevant for targeted advertising in order to provide a comprehensive analysis of the regulatory framework.

3.2 GDPR

According to the GDPR, processing of personal data requires a valid legal basis in accordance with Article 6. Two bases are relevant for advertising – consent and legitimate interest of the controller.¹²³ “Consent” is defined as “freely given, specific, informed and unambiguous indication of the data subject's wishes”.¹²⁴ Therefore, access to a service cannot be made conditional on consent – if the data subject has refused targeted advertising, this cannot be a reason to refuse her access to the service.¹²⁵ One potential issue with the requirement for consent is that if a number of users do not consent to targeted advertising, this can diminish the effectiveness of advertisements.¹²⁶ Consequently, some providers may argue that collecting data for targeted advertising is in their legitimate interest.¹²⁷ However, according to the GDPR this cannot be the case when the interests of the advertiser are overridden by the right to personal data protection of the data subject, particularly when this concerns a minor.¹²⁸ Determining this requires a balance between the legitimate interest of advertisers and the right to personal data protection of users.¹²⁹ However, as demonstrated in Chapter II, targeted advertising can in several ways violate the right to privacy and data protection, for instance because of lack of transparency or because of the vast amount of collected personal data. This is the reason why the legitimate interest of the controller cannot be applicable in this case and cannot be used to override the requirement for consent. This is especially so when concerning minors, whose personal data is subject to stricter protection in order to uphold their integrity and the right to privacy. Additionally, processing of special categories of data within the

¹²³ GDPR, Article 6(1)(a) and 6(1)(f)

¹²⁴ GDPR, Article 4(11)

¹²⁵ Frederik J. Zuiderveen Borgesius, Sanne Kruikemeier, Sophie C. Boerman & Natali Helberger, 'Tracking Walls, Take-It-or-Leave-It Choices, the GDPR, and the ePrivacy Regulation' [2017] 3 European Data Protection Law Review 361

¹²⁶ Vincent Lefrere and others, 'The impact of the GDPR on content providers [2020] Post-Print 13

¹²⁷ Virginia A. M. Talley, 'Major Flaws in Minor Laws: Improving Data Privacy Rights and Protections for Children under the GDPR' [2019] 30 Indiana International & Comparative Law Review 150

¹²⁸ GDPR, Article 6(1)(f)

¹²⁹ Klaus Wiedemann, 'Profiling and (automated) decision-making under the GDPR: A two-step approach' [2022] 45 Computer Law & Security Review 7

meaning of Article 9 of the GDPR, shall be prohibited, unless one of the exceptions applies.¹³⁰ When sensitive data is used for targeted advertising, the data subject must have given her explicit consent, the legitimate interest of the controller is not a valid basis.¹³¹

Moreover, it is relevant to examine Article 22 GDPR, which states that the data subject shall have the right to refuse to be subject to automated decision-making, including profiling, when this produces significant effects.¹³² Automated decision-making can take place only when the data subject has given her explicit consent.¹³³ As examined in the previous chapter, in many cases online advertising relies on profiling.¹³⁴ Thus, it can be argued that in a number of cases the explicit consent of the data subject will be required for targeted advertising and Article 22 GDPR will be applicable. Moreover, it is important to establish whether targeted advertising can have a significant impact on users and minors specifically. Looking back into the risks that come with targeted advertising – the large amount of personal data that is collected, the possibilities for manipulation of the consumer, the potential for biases and discrimination when using automated decision-making and the promotion of harmful behaviour for minors, including damage to their identity, the question can be answered positively. This has also been highlighted by the Article 29 Working Party that identified aspects such as the intrusiveness of profiling and the exploitation of vulnerabilities as particularly problematic, and especially so for vulnerable groups, such as minors.¹³⁵ ¹³⁶ All of those factors suggest that targeted advertising indeed can significantly impact consumers and especially minors. Nonetheless, at which point standard targeted advertising (including behavioural advertising which by default relies on automated decision-making and usually includes profiling)¹³⁷ will become a decision based on profiling that has significant effect on the user, similar to legal effect, is unclear.¹³⁸

WP29 has made it clear that special protection should be sought for minors, which is also reflected in the GDPR.¹³⁹ ¹⁴⁰ When processing the data of a minor, consent can be considered valid from the age of 16 years old – below that age, consent shall be given by the holder of

¹³⁰ Noor Ashikin Basarudin and Ridwan Adetunji Raji, 'Implication of Personalized Advertising on Personal Data: A Legal Analysis of the EU General Data Protection Regulation' [2022] 7(22) *Environment-Behaviour Proceedings Journal* 112

¹³¹ GDPR, Article 9

¹³² GDPR, Article 22

¹³³ Lefrere and others (n 126) 13

¹³⁴ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679' [2017] 22

¹³⁵ Van de Waerd (n 18) 10

¹³⁶ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679' [2017] 29

¹³⁷ Federico Galli, *Online Behavioural Advertising and Unfair Manipulation Between the GDPR and the UCPD*. in Martin Ebers and Marta Cantero gamito (eds), *Algorithmic Governance and Governance of Algorithms* (Springer 2020)

¹³⁸ Van de Waerd (n 18) 10

¹³⁹ Ibid; GDPR, Recital 38

¹⁴⁰ Recital 38 of the GDPR states that “specific protection should...apply to the use of personal data of children for the purposes of marketing.”

parental responsibility.¹⁴¹ However, under the discretion of Member States, a lower age can be sufficient, as long as it is not lower than 13 years of age.¹⁴²

This raises the question whether targeted advertising for minors, especially when using automated decision making, which may or may not constitute behavioural targeted advertising, is allowed under the GDPR. According to Recital 71, exclusively using automated decision-making, including profiling, “should not concern a child”.¹⁴³ Nonetheless, the recitals of legal instruments are not legally binding.¹⁴⁴ Moreover, it can be argued the legal language of Recital 71 is weak, as it lacks specificity, as well as binding grammatical constructions.¹⁴⁵ This is demonstrated by the use of the word “should” as opposed to the binding “shall”. Therefore, it would not be entirely true to say that the GDPR prohibits automated decision-making for minors, including profiling, and consequently also targeted advertising which is based on it. This is also the position of WP29 that has not considered Recital 71 to contain an absolute prohibition, although it has recommended controllers not to rely on the exemptions in Article 22(2) to substantiate profiling.^{146 147} It is also important to make clear that targeted advertising need not rely on automated decision-making, although it often makes use of it. Thus, when no automated decision-making is present in targeted advertising, for instance in geographic or demographic targeting, Recital 71 and Article 22 are not applicable at all.¹⁴⁸

Lastly, it can be maintained that Article 22 is to be interpreted rather strictly when it concerns minors, for instance when assessing whether automated-decision making has significant impact on children.¹⁵⁰ This is where the importance of Recital 71 becomes evident - without being binding, Recital 71 arguably can contribute to the stricter interpretation of Article 22, especially when deciding what constitutes “significant effects”.¹⁵¹

3.3 The DSA

3.3.1 Objectives and legal basis

The main objective of the DSA is enhanced consumer protection and the protection of fundamental rights on the internet.¹⁵⁵ It was adopted on the basis of Article 114 of the TFEU,

¹⁴¹ GDPR, Article 8

¹⁴² Ibid

¹⁴³ GDPR, Recital 71

¹⁴⁴ Milda Mačėnaitė, *Protecting Children Online: Combining the Rationale and Rules of Personal Data Protection Law and Consumer Protection Law, Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer 2018) 356

¹⁴⁵ Ibid

¹⁴⁶ The exceptions in Article 22(2) include the performance of a contract, explicit consent on the side of the user or when authorized by the law of a Member State or the Union.

¹⁴⁷ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679' [2017] 28

¹⁴⁸ Borenstein and Taylor (n 57) 320

¹⁵⁰ Mačėnaitė (n 144) 356

¹⁵¹ Isak Mendoza and Lee A. Bygrave, The Right not to be Subject to Automated Decisions based on Profiling. in *EU Internet Law: Regulation and Enforcement* (Springer 2017) 8

¹⁵⁵ Miriam C Buiten, 'The Digital Services Act: From Intermediary Liability to Platform Regulation' [2021] *Journal of Intellectual Property, Information Technology and E-Commerce Law* 365

which allows for the approximation of laws for the internal market.¹⁵⁶ ¹⁵⁷ The DSA aims to ensure safe environment online and to safeguard the protection of fundamental rights, empowering users.¹⁵⁸ Additionally, the DSA is a Regulation, which leaves little discretion to the Member States and is directly applicable without the need of transposition.¹⁵⁹ National laws that conflict with the DSA must be set aside.¹⁶⁰

3.3.2 Scope

The DSA applies to all intermediaries who offer services to users established or located in the EU (territorial scope).¹⁶¹ Moreover, it is applicable when a substantial connection to the Union is established.¹⁶² Thus, the DSA, similarly to the GDPR, has extraterritorial effect.¹⁶³ Regarding the material scope, the DSA is applicable to intermediary services.¹⁶⁴ Moreover, it has a layered structure and distinguishes between three main services – mere conduit, catching and hosting services that together form the group of intermediaries.¹⁶⁵ The lowest layer of obligations are the basic obligations which concern all intermediaries, irrespective of size. This is followed by obligations for hosting services, platforms and VLOPs.¹⁶⁶ Importantly, the obligations are cumulative. Thus, a VLOP must comply not only with the requirements for large platforms but also with basic obligations.¹⁶⁷

3.3.3 Article 26

When assessing targeted advertising, most important are the obligations for online platforms, i.e. platforms that not only store data but share it to the public.¹⁶⁸ Relevant is Article 26, which specifically regulates advertising. It serves as a transparency requirement that obliges online platforms to clearly indicate to the user content that constitutes advertisements, who paid for it, why the particular user sees this advertisement, based on what parameters and how to change them.¹⁶⁹ It aims to inform the consumers whether they are being targeted and for what reason,

¹⁵⁶ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' 5-6

¹⁵⁷ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, Article 114

¹⁵⁸ European Commission, 'Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC' 137-140

¹⁵⁹ Buiten (n 136) 365

¹⁶⁰ Martin Husovec and Irene Roche Laguna, *Digital Services Act: A Short Primer, Principles of the Digital Services Act* (Oxford University Press 2023) 2

¹⁶¹ DSA, Article 2

¹⁶² Ibid, Recital 8

¹⁶³ Buiten (n 155) 366

¹⁶⁴ Folkert Wilman, 'The Digital Services Act (DSA) - An Overview' [2023] *Nederlands tijdschrift voor Europees recht* 4

¹⁶⁵ DSA, Article 3(g)

¹⁶⁶ Wilman (n 164) 3

¹⁶⁷ Ibid

¹⁶⁸ DSA, Article 19

¹⁶⁹ Goanta and Duivenvoorde (n 22) 8

providing them with information “directly and easily accessible from the advertisement” in order to understand the logic behind targeting.^{170 171}

The transparency obligation under Article 26 constitutes a new addition to EU consumer protection law and contributes to higher protection for users. Transparency is particularly important in order to increase the awareness of consumers about targeted advertising. This allows them to better understand targeting techniques, how their data is used and collected and why a certain advertisement is presented to them. In turn, it allows them to make informed choices about their data, whether they want to allow targeted advertising and helps them to identify manipulative techniques. Nevertheless, the effectiveness of such measure remains unknown. This is because providing consumers with information does not mean they will be able to understand how they are targeted and how to react against it. While Article 26 obliges platforms to list on the basis of which characteristics the user has been targeted, there is no requirement to state why the said features have been chosen. For example, the user will be given information she has been selected for a gambling website advertisement based on her age and online activity but that doesn’t mean she will understand this was based on her profile, which indicates susceptibility to gambling.¹⁷²

Moreover, Article 26 prohibits advertising which is based on profiling with the use of special categories of data.¹⁷³ As a result, platforms are prohibited from targeting users on the basis of their race, gender, health data.¹⁷⁴ The aim of this is to counter the “serious negative effects” of targeted advertising as a practice that can employ manipulative techniques, exploit the vulnerabilities of consumers and reinforce discrimination.¹⁷⁵ Importantly, inferred sensitive data is covered by Article 26, as demonstrated by the CJEU.¹⁷⁶ An example of inferred sensitive data is when a user searches for pregnancy information online, which leads the algorithms to believe that she may be pregnant and starts directing pregnancy advertisements to her. Therefore, the DSA offers stronger protection to consumers than the GDPR as it disallows targeted advertising on the basis of special categories of data, whereas this is allowed under the GDPR, as long as the consumer has given explicit consent.¹⁷⁷ However, as it is not a full ban on advertising, considered too far-reaching, Article 26 does not provide complete protection, especially concerning customer vulnerabilities. For instance, when the consumer has been targeted with a gambling advertisement, this may have been done on the basis of factors such

¹⁷⁰ Ibid

¹⁷¹ Recital 68, DSA

¹⁷² Goanta and Duivenvoorde (n 22) 8

¹⁷³ Francesco Decarolis and Muxin Li, 'Regulating online search in the EU: From the android case to the digital markets act and digital services act' [2023] 90 International Journal of Industrial Organization 6

¹⁷⁴ Erik Lampmann-Shaver, 'Privacy's next Act' (2024) 19 Washington Journal of Law, Technology and Arts 121

¹⁷⁵ DSA, Recital 69

¹⁷⁶ Case C-184/20 OT v Vyriausioji tarnybinės etikos komisija [2022] ECR I-601, para 123

¹⁷⁷ Goanta and Duivenvoorde (n 22) 9

as gender, age, connections with people that gamble and interest in certain types of games, which indicate that the consumer is prone to gambling, rather than on sensitive data.^{178 179}

3.2.4 Ban on targeted advertising for minors?

Article 28 of the DSA specifically regulates advertising to minors, which obliges online platforms to undertake the necessary measures to ensure the security, safety and privacy of children.¹⁸⁵ Article 28(2) states that “*Providers of online platform shall not present advertisements on their interface based on profiling... when they are aware with reasonable certainty that the recipient of the service is a minor.*” In practice, Article 28(2) means that certain forms of advertising, such as behavioral advertising, are banned for minors.¹⁸⁶ Nevertheless, besides the initial intentions of the European institutions and contrary to publications in the media, the final text of the Digital Services Act does not ban all types of minors’ targeted advertising – no prohibition applies for advertising not based on profiling.¹⁸⁷ For instance, if an enterprise uses segmented advertising to target consumers of a certain age, when they have provided this data themselves, this is allowed because the company is not performing profiling.^{188 189}

Similarly, a company can choose how to advertise and can address its adverts to a specific audience by directing them towards videos or profiles that will be most watched by children of a certain age or are more likely to exhibit certain interests.¹⁹⁰ This is significantly different than advertising on traditional media – it allows advertisers to use much more complex and precise advertising methods in order to reach specific audiences, which is not possible in traditional media. It also allows for adjustments in the advertisements based on the users’ behavior online and their perceived preferences. Moreover, it can be much more active and engaging for a child, for instance through the use of games. Online content is also much less subject to scrutiny from the parents, as in many cases only children will be exposed to such content, as opposed to a TV advertisement, for example. While this is not formally restricted by the DSA, it still raises significant privacy issues, similar to the ones identified previously. For instance, it allows for the collection of large amounts of children’s data over time to be used in “informal” profiling – a practice which is less structured than formal profiling and often uses observations about the behavior of the consumers in order to present them with relevant advertisements. This data can be used to build profiles about children and also to exploit their vulnerabilities, even without employing complex algorithmic systems to create profiles. Consequently, targeted advertising, especially when using profiling, results in significant privacy issues and can make use of minors’ vulnerabilities against their best interests. Even without the use of

¹⁷⁸ Ibid 10

¹⁷⁹ Even though this will constitute inferred data, the mentioned characteristics do not constitute inferred sensitive data, hence why this will not be in violation of the DSA, nor the case law of the CJEU.

¹⁸⁵ DSA, Article 28

¹⁸⁶ European Parliament (n 44) 10

¹⁸⁷ Ibid

¹⁸⁸ Goanta and Duivenvoorde (n 22) 11

¹⁸⁹ This would be an example of segmented advertising and in particular demographic segmented advertising.

¹⁹⁰ Ibid 11

profiling, however, it is still possible to construct targeted advertisements based on crucial characteristics (i.e age, interests and gender) in order to appeal to the minor's preferences and to effectively present advertising messages.¹⁹¹

Moreover, the notion of reasonable certainty is important. Only when a platform is informed with “reasonable certainty” that user is a minor will targeted advertising be banned – if not, no liability can be incurred.¹⁹² While the precise meaning of reasonable certainty is unknown, probably to be established by the CJEU later on, it can be argued that this is a sufficiently high threshold and platforms will be able to argue that they cannot infer with reasonable certainty that a user is a minor, even if the behaviour of users points towards that. There is also no requirement for the platform to be aware of users' ages – online platforms shall not be obliged to collect additional personal data.^{194 195} The lack of obligation to be aware of users' age is problematic as it leaves possibilities for gaps in implementation. In this way, platforms can target children by simply arguing that they were not aware the user is underage, allowing them a lot of leeway to continue their targeting techniques. This essentially leaves a significant loophole in the Regulation to be exploited by platforms. Additionally, proving that a platform has not met the standard of reasonable certainty will be difficult and will require complex investigations. Moreover, without age authentication, children may be targeted with adult content by the platforms, such as gambling advertisements, whether intentional or not. This is a reason to think that the lack of obligation to verify users' age is a significant drawback of the DSA that can diminish its effectiveness.

3.2.5 Very large platforms

VLOPs, meaning platforms and engines with 45 million or more active users, are considered to have a wider influence and reach, which necessitates their stricter regulation.¹⁹⁶ They must identify and address systemic risks that result from the running or design of the service. The risk assessments must include, among others, information about negative effects on the protection of minors.¹⁹⁷ Thus, VLOPs must identify in a risk assessment and address any negative effects of targeted advertising on minors as a practice that can bring significant harm to underage users, such as privacy violations, exploitation of minors' vulnerabilities and explosion to inappropriate content. Such obligations may offer more robust protection for the users of VLOPs as opposed to all other platforms, offering increased transparency, improved privacy protection and pre-emptive risk management. This is justified by the enhanced operative and financial resources and especially the wider influence of large platforms. For example, it was already established how Meta, considered to be a VLOP, is responsible for

¹⁹¹ Goanta and Duivenvoorde (n 22) 11

¹⁹² Ibid

¹⁹⁴ DSA, Article 28(3)

¹⁹⁵ Medjkoune, Goga and Senechal (n 23) 184

¹⁹⁶ DSA, Article 33

¹⁹⁷ DSA, Article 34(1)(d)

80% of social networking.¹⁹⁸ ¹⁹⁹ Establishing stricter transparency obligations for VLOPs is a measure to empower the users and to limit the wide impact of such platforms on consumer choices. Transparency is empowering for a number of reasons: firstly, it allows users to make informed choices about their personal data, for instance how much personal information they share online. Secondly, transparency is essential for the exercise of digital rights of users, in particular the right to privacy and data protection, it allows users to seek information about their data, as well to exercise their right to erasure. Thirdly, through transparency it is possible to monitor the operations of VLOPs more easily, including to detect any possible violations and to react against them.

VLOPs have to also comply with the positive obligations in Articles 34 and 35 DSA. According to the former, in a risk assessment VLOPs must “identify, analyse and assess any systemic risks ...stemming from the design or functioning of their service”.²⁰⁰ This applies to four different categories of risks, such as actual or foreseeable negative impacts on fundamental rights, including on the rights of the child.²⁰¹ Moreover, Article 35 requires VLOPs to execute mitigation measures in accordance with the systemic risks identified via the risk assessment.²⁰² When it comes to advertising for minors, two main systemic risks can be identified according to the DSA. Firstly, risks to the rights of the child can arise as a result of the design and operation of the service and it is thus important to examine to what extent minors can understand it and whether they can be exposed to content that can hamper their physical and mental health. A specific instance where the said risk can arise is related to design of platforms which exploits minors’ vulnerabilities.²⁰³ A second risk concerns the design, operation or use of platforms that can negatively impact minors, for example via manipulation or design that promotes undesirable behaviour, such as addictions.²⁰⁴

With millions of consumers using a small number of VLOPs, such platforms exert significant influence in society and guide the flow of information. Their business model is based on amplifying profits through advertisements.²⁰⁵ The design of VLOPs that collect and accumulate personal data over extensive periods of time and from multitude of sources, is not only in violation to children’s privacy but significantly increases the possibilities that children are exposed to harmful content that abuses their weaknesses. It can be argued that targeted advertising, especially when used by VLOPs, leads to a number of systemic risks, as it can exploit the biases and weaknesses of vulnerable users, especially children, who lack the knowledge and abilities to identify advertising and are largely unable to counteract

¹⁹⁸ Berrak Genç-Gelgeç, ‘Regulating Digital Platforms: Will the DSA Correct Its Predecessor’s Deficiencies?’ [2022] 25 Croatian Yearbook of European Law and Policy 46

¹⁹⁹ European Parliament (n 44) 10

²⁰⁰ DSA, Article 34

²⁰¹ Ibid

²⁰² Ibid, Article 35

²⁰³ DSA, Recital 81

²⁰⁴ DSA, Recital 83

²⁰⁵ European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC’ 9

manipulative practices.²⁰⁶ This clearly resonates with Recital 81. As established in Chapter II, children's cognitive abilities to recognize targeted advertisements are not as developed compared to adults and even if a minor is able to identify a personalised advertisement, she can rarely realise it has been based on her browsing history online.²⁰⁷ Therefore, children are not knowledgeable about the ways their data is being collected, processed and utilized to target them, which makes them unable to make informed choices as consumers.²⁰⁸

Furthermore, the design of VLOPs and the extensive use of automated decision-making amounts to a systemic risk due to the lack of transparency on the operation of algorithms and the possibilities to magnify discrimination and biases. This means that such algorithms, including dark patterns, can have a negative impact on users' choices.²⁰⁹ Understanding the design and functioning of automated decision-making is difficult and unpredictable for adults and let alone children. Moreover, advertising techniques employed by VLOPs are used to make personalised advertisements that cater to children's interests and provoke them to make irrational purchases, also making it possible that children are presented with inappropriate and harmful content.²¹⁰ To illustrate this with the gambling example, a VLOP that has gathered information about a minor occasionally playing competitive games against her peers can use this to target the child with advertisements that promote seemingly harmless games that amount to gambling.

Consequently, providers of VLOPs are legally obliged to examine and to address the risks to minors which are associated with targeted advertising.²¹¹ When conducting a risk assessment, large platforms should focus on the data collection and processing practices that may contribute to the systemic risks.²¹² When mitigating the systemic risks for minors, they should consider the best interest of children²¹³ and adopt measures such as altering the design and functioning of the platform and adapting their terms in order to comply with the DSA.²¹⁴ Moreover, minors should be provided with complaint tools and should be protected from advertisements on the platform that can impact their physical or mental well-being through conditional access in order to restrict children's access to them.²¹⁵ When advertising systems by providers of VLOPs, meaning the technological processes used by platforms and search engines to deliver

²⁰⁶ Eva A Van Reijmersdal and others, 'Processes and effects of targeted online advertising among children' [2014] 36(3) *International Journal of Advertising* 397

²⁰⁷ Verdoodt and Lievens (n 108) 318

²⁰⁸ Valerie Steeves and Milda Mačėnaitė, Data protection and children's online privacy. in A A (ed), *Research Handbook on Privacy and Data Protection Law: Values, Norms and Global Politics* (Cheltenham: Edward Elgar Publishing 2023) 361

²⁰⁹ European Commission (n 205) 16

²¹⁰ DSA, Recital 83

²¹¹ Lisa Kusters and Oskar Josef Gstrein, 'TikTok and Transparency Obligations in the EU Digital Services Act (DSA) – A Scoping Review' [2024] *Zeitschrift für Europarechtliche Studien (ZEuS)* 129

²¹² DSA, Recital 84

²¹³ Based on Recitals 89 and 90, this should be done in accordance with "industry best practices", scientific methods and information best available, as well as Commission guidance.

²¹⁴ *Ibid*, Recital 87, 89

²¹⁵ *Ibid*, Recital 89

advertisements, are found to constitute risks, corrective measures should be taken, for instance altering the systems' structure.²¹⁶

3.4 Comparison between the DSA and the GDPR and concluding remarks

When examining the interaction between the DSA and the GDPR, it is important to note that the DSA is not to replace the GDPR – rather the two build on each other.²¹⁷ For example, the DSA adopts some definitions from the GDPR, as it is the case with the definition of profiling. Consequently, advertisers must comply with both Regulations. Overall, the GDPR aims to regulate the processing of personal data more generally, while the DSA focuses on a broader range of activities and concretely regulates advertising.²¹⁸ The GDPR does not prohibit advertising as such, although it limits it by restricting the use of automated decision-making. It also lays foundational transparency obligations that are applicable for all controllers. The DSA, on the other hand, prohibits advertising which uses profiling based on special categories of data.²¹⁹ It also introduces specific advertising transparency obligations for platforms.²²⁰ When it comes to the protection of minors, it is clear that the DSA contains stricter obligations.²²¹ It bans targeted advertising that is based on profiling for children. Moreover, it obliges VLOPs to assess and mitigate risks to minors that arise as a result of advertising. Contrarily, the GDPR does not prohibit advertisements based on automated decision-making for minors and targeted advertising for minors has not been explicitly dealt with in this Regulation.²²² Provoked by the challenges posed by targeted advertising, the European institutions have taken further action to protect children online by means of the DSA.

²¹⁶ Ibid, Recital 88

²¹⁷ DSA, Recital 10

²¹⁸ Maitrayee Pathak, 'Data Governance Redefined: The Evolution of EU Data Regulations from the GDPR to the DMA, DSA, DGA, Data Act and AI Act' [2024] 10(1) *FintechX Technologies Zrt* 17

²¹⁹ DSA, Article

²²⁰ DSA, Article

²²¹ Pathak (n 218) 11

²²² Zardiashvili and Sears (n 28) 822

Chapter IV: How effective is the DSA in protecting minors against targeted advertising?

4.1. Introduction

Having established the problematic aspects of targeted advertising (Chapter II) and the framework of the DSA (Chapter III) it is necessary to determine the potential of the DSA to effectively counter the harms posed by targeted advertising. In order to do this and given the absence of empirical data, a digital rights framework will be used. Therefore, the sufficiency of the DSA will be assessed from the perspective of the EU Declaration on Digital Rights and Principles, which lays down concrete rights and principles that are specifically relevant for the digital environment. This chapter will explore the rights and principles in the Declaration that are most relevant for the regulation of targeted advertising. Consequently, it will answer the following research question: “What is the potential of the DSA to effectively address the challenges posed by targeted advertising for minors in light of the EU Declaration on Digital Rights and building on existing literature and enforcement action?”.

4.2. Setting the scene

The DSA aims to foster an environment where fundamental rights laid down in the CFREU are efficiently protected online.²²³ Therefore, fundamental rights are “at the heart of the DSA”.²²⁴ Pursuant to Article 52(1) of the CFREU, the Regulation has to respect the essence of rights and freedoms in the Charter, effectively balancing all fundamental rights in an equal way.^{225 226}

Nevertheless, the analysis in previous sections has demonstrated that targeted advertising can particularly impact the digital rights of users. With the increasing role of technologies in society, the opportunities for violating digital rights are also increasing. The protection of digital rights is essential in any discussion involving targeted advertising and therefore in order to assess the effectiveness of the DSA, it is important to do so from the perspective of the protection it awards to digital rights.²²⁷ In this way, it can be established to what extent the Regulation successfully mitigates the risks targeted advertising poses to digital rights. One of the most recent developments in this context is the Declaration on European Digital Rights, endorsed in December 2022.

4.3 Declaration on Digital Rights and Principles

²²³ DSA, Article 1(1)

²²⁴ Charter of Fundamental Rights of the European Union [2000] OJ 1 364/01, Article 52(1)

²²⁵ Giancarlo Frosio and Christophe Geiger, 'Taking fundamental rights seriously in the Digital Services Act's platform liability regime' [2023] 29(1-2) European Law Journal 42

²²⁶ European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' [2020] 12

²²⁷ Zardiashvili and Sears (n 28) 803

The EU Declaration aims to ensure users can benefit from of the digital transformation in a safe way.²²⁸ The Declaration does not qualify as a legislative instrument and is not legally binding on Member States, as it “has a declaratory nature.”²²⁹ However, it may be binding on the institutions that were involved in its drafting – the Parliament, Commission and Council.²³⁰ The Declaration is in line with similar international instruments, such as the UN Resolution on the promotion, protection and enjoyment of human rights on the Internet and UNICEF’s work in this context.²³¹

The Declaration consists of chapters and subchapters, where each subchapter contains a statement and commitments. While some of the statements invoke recommendations, seven of them are formulated as rights, based on the primary law of the EU. Even though the recommendations are non-binding, in the future they can become.²³² Therefore, an important question to determine is whether the text of the Declaration is precise enough to be regarded as claimable rights. Given that most of the digital rights in the Declaration are phrased in line with other human rights instruments, such as the CFREU, it can be argued that all statements constitute digital rights.²³³ Importantly, the Declaration provides guidance on the application of EU values and fundamental rights online, relying on a mixed normative approach that integrates rights with principles. Thus, it recollects rights from the CFREU by focusing on the ones that are most relevant in the context of digital services, such as the right to data protection.²³⁴ Moreover, it goes further that simply restating the contents of the Charter by formulating principles that are specifically applicable to the digital sphere and aim to help the application of fundamental rights online.²³⁵

Thus, the regulation of targeted advertising under the DSA will be assessed from the perspective of the Declaration, which will be used as a normative framework. There are several justifications for this. Firstly, given that targeted advertising is a phenomenon that takes place in the digital environment, it can substantially impact on the digital rights of users. Therefore, in determining whether the protection awarded by the DSA is sufficient, it is important to assess whether the provisions of the DSA comply with the digital rights and principles as stipulated in the Declaration. In this sense it provides a framework that is more relevant to targeted advertising given that it also recollects the fundamental rights most pertinent to the digital environment.²³⁶ An example of how the Declaration specifically relates to technology is the

²²⁸ European Declaration on Digital Rights and Principles for the Digital Decade [2023] OJ 1 23/01, Article 1

²²⁹ Ibid, Recital 10

²³⁰ Maksymilian Kuźmicz, 'European or Universal? The European Declaration of Digital Rights in a global context Authors' [2023] 1(1) International Conference on Computer Ethics 2

²³¹ Cristina Cocito and Paul De Hert, 'The transformative nature of the EU Declaration on Digital Rights and Principles: Replacing the old paradigm (normative equivalency of rights)' [2023] 50 Computer Law & Security Review 1

²³² Kuźmicz (n 230) 3

²³³ Ibid 3

²³⁴ Cocito and De Hert (n 231) 3

²³⁵ Some of the principles include ensuring that everyone has access to privacy-protected digital services; ensuring that the right to privacy is safeguarded and personal data – protected; ensuring that minors can make informed and safe choices online.

²³⁶ European Declaration on Digital Rights and Principles for the Digital Decade, Recital 6

commitment towards protecting children online by letting them make safe and informed choices online, as opposed to the broader provisions of other human rights instruments, such as the Charter that talks about the protection of children more generally.²³⁷ Moreover, the Declaration outlines the most recent goals and priorities of the Union in the protection of users online and it is important to assess whether the DSA reflects those.

If it is to be established that the DSA does meet the standards in the Declaration, this is significant as it demonstrates that the Regulation incorporates key privacy and data protection standards and norms, which are essential for effective consumer protection. For instance, this includes stricter transparency rights. For minors this means having room to make informed choices, as well as a right not to be subjected to illegal tracking in order to allow for safe browsing online. While the extent to which the DSA promotes the well-being of online users will depend on correct enforcement, alignment with the Declaration will at least demonstrate commitment towards the protection of users. If it is to be established, however, that the DSA does not meet the standards in the Declaration, this would mean that it is insufficient to provide the necessary protection to users online against the multitude of issues that come with targeted advertising. Moreover, contradictions between the DSA and the Declaration will reveal ambiguities in the policies of the Union and less protection for users. It is thus logical to consider whether the DSA successfully conforms to the EU commitments towards a safe digital environment, with a focus on minors.

4.3.1 Privacy and targeted advertising

Article 17 of the Declaration restates the right to privacy and data protection, which means that individuals should be able to control how their personal data is used.²³⁸ This is supported by the recommendation to guarantee the control of users over their data. In the digital environment the right to privacy is essential for promoting the enjoyment of other rights, such as safety.²³⁹ For minors, the right to privacy involves more stringent protection that can reflect on their vulnerabilities.²⁴⁰ This involves, among others, specific requirements for consent, restricting profiling of children and ensuring privacy by design. Specific protection is required when processing children's data for marketing.²⁴¹ ²⁴² Moreover, taking into account the increasing use of digital technologies and targeted advertising in particular, to distort and manipulate the behaviour of the consumer, measures should be taken to uphold users' autonomy. At least in principle, it seems that the DSA meets the standards by the Declaration, considering the obligations contained in Article 26 and 28 DSA, which specifically aims to ensure high level

²³⁷ Charter, Article 24

²³⁸ European Declaration on Digital Rights and Principles for the Digital Decade, Article 17

²³⁹ Alliance for universal digital rights, 'Securing our human rights in our digital world' (2023) <https://www.un.org/techenvoy/sites/www.un.org.techenvoy/files/230203_Alliance_for_Universal_Digital_Rights.pdf> accessed 1 May 2024

²⁴⁰ Talley (n 127) 140

²⁴¹ Sheila Donovan, 'Sharenting': The Forgotten Children of the GDPR' [2020] 4(1) Peace Human Rights Governance 38

²⁴² GDPR, Recital 18

of privacy for minors. There is no requirement in the DSA, however, which obliges providers to obtain the consent of the user before their data is used for targeted advertising – this is rather regulated by the GDPR.²⁴³

Article 18 of the Declaration protects the confidentiality of communication and information.²⁴⁴ According to this provision, everyone has the right “...not to be subjected to unlawful online surveillance” and “unlawful pervasive tracking”. This is relevant for targeted advertising - as established, targeted advertising uses a model which tracks the online presence of individuals. Therefore, Article 18 intends to regulate some of the most prevalent targeting advertising techniques that extensively track consumers. For minors, who are more vulnerable, this is of utmost importance and may require extra measures, such as ensuring informed consent in accordance with the age of the child and refraining from using profiling on children.

Moreover, the requirement for consent is important for several reasons – when consumers can freely choose how their data is used and handled, they can have more control over their privacy. Moreover, consent can serve as extra protection for sensitive data against misuse. It can also be used to counteract the business model of large platforms and to prevent them from collecting and analysing even more personal data from the consumers for their own benefit. Therefore, it is important to ensure consent for targeted advertising has been obtained in order to safeguard the right to privacy. Nevertheless, targeted advertising often evades this requirement and advertisers fail to obtain valid consent from the users. Moreover, minors require adjusted requirements for consent – consent for children is lawful from the age of 16 years old, whereas Member States can lower this age to 13 years. For minors below this age, the holder of parental responsibility should give consent.²⁴⁵

While the precise meaning of “unlawful” in Article 18 remains unclear, it can be argued, especially given the spirit of the Declaration, that unlawful should encompass most forms of targeted advertising, not simply the ones that make use of profiling. This is because the tracking of users online for the purposes of online advertising goes against the right to privacy since it is often being performed without the consent of the individual and through the collection of large amounts of data, thus violating the data minimization principle. Moreover, due to lack of transparency on the operation of targeted advertising, consumers remain largely unaware how they are being tracked and even that they are tracked at all. Thus, there is lack of control and choice on the side of the consumer, making targeted advertising not conforming to the requirement for informed consent under EU law.²⁴⁶

The use of manipulative techniques in advertising that can exploit the vulnerabilities of consumers and can potentially discriminate against them is questionable from a legal

²⁴³ DSA, Recital 68

²⁴⁴ European Declaration on Digital Rights and Principles for the Digital Decade, Article 18

²⁴⁵ GDPR, Article 8

²⁴⁶ Joyee De and Imine (n 76)

standpoint, allowing to classify misleading practices as unlawful.²⁴⁷ This is because such practices do not allow for the consumers to make informed choices in their best interest and are thus contrary to established consumer protection laws. All in all, the modern targeted advertising methods can be considered unlawful due to, among others, privacy violations, discrimination and exploitation of the consumers.²⁴⁸ Therefore, Article 18 of the Declaration gives users the right not to be subjected to targeted advertising and empowers them to reject harmful tracking practices. Unfortunately, the text of the DSA could not reach a full prohibition of targeted advertising and in this sense the Regulation lags behind the Declaration because it cannot ensure users are not unlawfully targeted. That being said, the DSA still goes further than the initial Proposal because of the prohibition of advertising via profiling that uses sensitive data.²⁴⁹ Such a prohibition was absent from the text of the 2020 Proposal.²⁵⁰ Moreover, for minors targeted advertising based on profiling has been outlawed, which is in line with the Declaration's text.

4.3.2 The rights of the child online

The Declaration includes a section dedicated to the protection of children online. Most relevant to targeted advertising is Article 20, according to which minors should be able to make “safe and informed choices” online.²⁵¹ They should be protected from “illegal tracking, profiling and targeting, in particular for commercial purposes”.²⁵² The vulnerabilities of minors, who require enhanced protection, are an even more important reason to consider targeted advertising, even such that does not use profiling, to be unlawful in order to protect the rights of children and to ensure their wellbeing – as established prior, even targeted advertising that does not use profiling can be used to effectively appeal to the vulnerabilities of children and can directly violate data protection rights and principles.

Importantly, the Declaration explicitly mentions targeting, tracking and profiling as a known risk for minors. Thus, it aims to ensure children can make choices online with the way their personal data is being used and to safeguard them against harmful practices that can undermine their rights. On the one hand, this has been taken into account in the DSA – the Regulation includes a provision to specifically regulate advertising for minors and ban advertising based on profiling for children. This is a step forward in the protection of minors. On the other hand, the DSA's text limited the scope of the ban on targeted advertising by making the prohibition conditional on the use of profiling – as demonstrated before, profiling is often used in targeting but this need not be the case.²⁵³

²⁴⁷ James P Nehf, Chapter 5: Misleading and unfair advertising. in Geraint Howells (ed), *Handbook of Research on International Consumer Law* (Edward Elgar 2018) 93

²⁴⁸ Sandra Wachter, 'Affinity Profiling and Discrimination by Association in Online Behavioural Advertising' [2020] 35(2) *Berkeley Technology Law Journal* 370

²⁴⁹ DSA, Article 26(3)

²⁵⁰ European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' [2020]

²⁵¹ European Declaration on Digital Rights and Principles for the Digital Decade, Article 20

²⁵² *Ibid*

²⁵³ Medjkoune, Goga and Senechal (n 23) 2

Moreover, it is regrettable that the drafters of the Regulation missed an opportunity to provide a definition of targeted advertising to avoid any confusion on what it entails. Not only that but the final text of the DSA, except in the Preamble, does not mention targeting at all which poses questions on the extent to which the Regulation can effectively regulate the intricacies of it as a practice that poses unique threats to users and minors in particular. The more general approach taken in the DSA, i.e. the choice to focus on “advertisements...based on profiling”, and the vague wording of the provisions that relate to targeted advertising can make enforcement significantly difficult and leave possibilities for escaping liability.²⁵⁴

4.3.3 Freedom of choice

The Declaration emphasizes freedom of choice which is important in targeted advertising. This is because targeting users makes use of their personal data, most often in ways not understood by them, in order to deliver advertisements that can distort their views and behaviours.²⁵⁵ For instance, individuals may be incited to make purchases by being repeatedly shown advertisements for the same products, with large possibilities to exploit their vulnerabilities, lack of knowledge and age. To take the case of a minor online, it is hardly surprising if the child cannot resist the temptation to buy a new game if that keeps being advertised to her. This was taken into account in the Declaration and is reflected in Article 9 according to which everyone should be able to make informed choices, while being safeguarded from the risks AI algorithms pose. Thus, according to this provision, consumers, including minors, should have knowledge of how their personal data is used to present advertisements. This can be done by ensuring a high level of transparency according to Declaration. However, ensuring freedom of choice for minors is more challenging and requires clearer information and explanations that are in accordance to their cognitive abilities, for instance through entertaining videos or games.

Moreover, according to Article 10 of the Declaration, everyone should be able to make choices as to what online services to use “based on objective, transparent, easily accessible and reliable information”.²⁵⁶ This requires that platforms provide extensive information to their users, especially about the extent and methods of personal data collection. For minors, this requires providing information that is more accessible to younger users, as well as providing it in a clear way, which can be understood by children. The information should be complete and should not be misleading.

Regarding transparency, it was established that the DSA requires platforms to be transparent about their advertising practices in order to empower consumers, which is in line with the Declaration. Nevertheless, it is doubtful to what extent this is enough to empower minors in order to allow them to make informed choices. This is because children may not be aware how targeted advertising works and may not realise its harmful implications, even with transparency

²⁵⁴ Ilaria Buri and Joris van Hoboken, 'The Digital Services Act (DSA) proposal: a critical overview' [2021] UvA Institute for Information Law 33

²⁵⁵ Tzoulia (n 3)

²⁵⁶ European Declaration on Digital Rights and Principles for the Digital Decade, Article 10

obligations. Moreover, they are much more vulnerable to manipulative techniques. Adult supervision is essential in ensuring choice not only in developing the digital literacy of children but also in making choices for minors who are below the age to do that themselves. Therefore, while achieving freedom of choice is important, its practical realisation is difficult due to the complex interplay between adult supervision and minors' choice. In this sense, even though the DSA provides for more stringent transparency, this may not be enough to achieve freedom of choice for minors.

Freedom of choice is further mentioned in Chapter IV of the Declaration, where it is stated that VLOPs should take measures to mitigate the risks arising from the functioning of their service.²⁵⁷ It is emphasized that individuals should be empowered to restrict “the exploitation of vulnerabilities and biases, namely through targeted advertising”.²⁵⁸ Therefore, users should be able to control how their data is collected and used, in a straightforward manner, and should be given clear information in a language which is understandable to them. Minors should be presented with information that is appropriate to their age, making sure they understand it. In order to limit the exploitation of users, VLOPs should disclose their advertising practices and provide clarity to the users as to how they collect their data for targeted advertising.

A very important part of this is the direct reference to targeted advertising as a practice that can significantly harm the consumer and can distort her perspectives, which clearly recognizes the harmful impact of targeting. Despite the explicit mentioning in the Declaration, however, the final text of the DSA did not make such a reference. While it is welcomed that targeted advertising was reflected upon in the Preamble of the DSA as a practice that can “have particularly serious negative effects”, this did not make its way in the provisions of the Regulation. Additionally, the Regulation only partially regulates the matter – advertising for minors is regulated to the extent it involves “profiling” and all other forms of targeted advertising do not fall within its scope. This shows that to an extent the DSA lowered the protection of users to make free choices in relation to targeted advertising compared to the Declaration.

4.4 A word on enforcement

Lack of enforcement can and has often been a reason for lack of effectiveness of Union laws.²⁵⁹ This can be due to a plethora of reasons, such as complex provisions and costly enforcement. Concerning the DSA, enforcement entails not simply complying with the literal text of the law but having an impact on, among others, the protection of digital rights.²⁶⁰ Therefore, the importance of enforcement for successfully achieving the goals of the DSA is immense. Enforcement consists of collaboration between multiple actors – EU institutions and the

²⁵⁷ European Declaration on Digital Rights and Principles for the Digital Decade, Article 15

²⁵⁸ Ibid

²⁵⁹ Agustín Reyna, 'DMA and DSA Effective Enforcement— Key to Success' [2024] Journal of Antitrust Enforcement 2

²⁶⁰ Ibid

Commission in particular who is the “watchdog” of EU law; national authorities on the Member State level; private parties, such as NGOs and digital service providers.^{261 262}

Nevertheless, the Commission remains the main enforcer for VLOPs, who are involved in targeted advertising on a large scale.²⁶³ While some authors have expressed their concerns with regards this centralization, others have welcomed it with the expectation it will bring efficient and fast enforcement actions.²⁶⁴ Already soon after the entry into force of the DSA the Commission has demonstrated its willingness to strictly prosecute violations and to uphold digital rights by opening proceedings against TikTok in February 2024, after the EDPS issued a decision criticizing the processing of children’s personal data by the same platform in 2023. The proceedings involve, among other, allegations for breach of advertising transparency and minors’ rights violations.²⁶⁵

It is also interesting to observe the case of Meta, that has taken a different approach in response to the changing regulatory framework. In 2023 it announced the introduction of subscription-based model, whereas users in the EU can either pay a monthly fee and remove all advertisements or continue using Meta services for free while being subjected to personalised advertising. According to Meta, such an approach constitutes a “*consent solution to comply with...connected and sometimes overlapping EU regulatory obligations*”. The legality of this new paradigm in line with the DSA and the GDPR obligations is highly doubtful, as well as the extent to which “buying” to remove adds can constitute valid consent within the GDPR. This is also probably why the Commission announced in May 2024 that it has started proceedings against Facebook and Instagram under the DSA for “deceptive advertisements”.²⁶⁶ This comes to show that protection against harmful advertising practices under the DSA will be taken seriously, especially when this concerns minors. While neither the full extent of the allegations nor the outcome of the proceedings is known at this moment, the Commission has given an indication it will strictly prosecute violations.

4.5 Concluding remarks: the bigger picture

Following extensive discussions and calls from civil society organizations, the final text of the DSA does recognize the harms of targeted advertising, albeit in the Preamble, which is a positive step for the protection of users and clearly resonates with the text of the Declaration on Digital Rights. Nevertheless, and due to extensive lobbying from corporations, the

²⁶¹ Ibid 3-4

²⁶² Frosio and Geiger (n 225) 33

²⁶³ DSA, Article 56(2)

²⁶⁴ Suzanne Vergnolle, 'Enforcement of the DSA and the DMA: What did we learn from the GDPR?' (VerfBlog, 3 September 2021) <<https://verfassungsblog.de/power-dsa-dma-10/>> accessed 5 May 2024

²⁶⁵ European Commission, 'Commission opens formal proceedings against TikTok under the Digital Services Act' (2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_926> accessed 3 May 2024

²⁶⁶ European Commission, 'Commission opens formal proceedings against Facebook and Instagram under the Digital Services Act' (2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2373> accessed 6 May 2024

provisions on targeted advertising remained largely weak.²⁶⁷ Firstly, the obligations in Article 28 apply only to platforms and not to intermediaries, websites and applications. This is problematic because targeted advertising works when online providers, known as publishers, sell advertising space to advertisers – whereas the most influential publishers are platforms, there are many more actors involved in the process, ranging from individual influencers to corporations.²⁶⁸ Secondly, the prohibition of targeted advertising for minors is applicable only to the platforms’ users, therefore platform providers are not constrained from placing advertisements anywhere else on the Internet (micro-targeting).²⁶⁹ In practical terms, this means that tracking technologies, such as cookies, will still be able to track children without violating the DSA. Thirdly, despite the prohibition of targeted advertising in the cases when the platform has reasonable certainty that a user is a minor, this can easily be avoided through the use of proxies and inferred data. For example, a category like interest in toys can implicitly point towards the fact that the user is a minor but the platform may be able to escape liability by arguing it was not reasonably aware the user is underage since it did not directly process age data. Consequently, it can be argued that even though the Regulation reflects on some of the principles stated in the Declaration, its provisions only partially conform to its safeguards. For minors this means some level of protection against targeted advertising, however gaps remain which can leave them vulnerable and can undermine their well-being. Advertisers can continue collecting and analyzing their personal data and exposing them to manipulative advertising, discrimination and harmful content, using advertising techniques that are legal under the DSA but can still bring harm to children. Therefore, the provisions of the DSA may not be robust enough to fully safeguard the digital rights of children. Despite this, the DSA is a welcomed initiative and positive development forward not least because it has shed light on the harms of targeted advertising.²⁷⁰

²⁶⁷ Sebastian Becker and Jan Penfrat, ‘The DSA Fails to Reign in the Most Harmful Digital Platform Businesses – But It Is Still Useful’ in Joris van Hoboken and others (eds), *Putting the DSA into Practice: Enforcement, Access to Justice and Global Implications* (Verfassungsbooks 2023) 57

²⁶⁸ Zardiashvili and Sears (n 28) 811

²⁶⁹ Becker and Penfrat (267) 58

²⁷⁰ Ibid 59

Chapter V: Conclusion

This thesis aimed to answer the following research question: “*How does the Digital Services Act regulate targeted advertising for minors, building on the already-established legal framework proposed by the GDPR, and what is the potential of the DSA to be effective in ensuring the protection of minors’ rights?*”. Having done that, the findings of this work will be quickly summarized.

Firstly, targeted advertising is a practice that uses personal data in order to present consumers with advertisements that have been specifically targeted to their interests and needs. Nevertheless, a precise definition of targeted advertising is missing from both the DSA and GDPR, which may create diverging interpretation of what it entails and can make enforcement difficult. It was also established that there are four main types of targeted advertising, behavioural advertising being the most problematic. Behavioural advertising creates profiles on the basis of the data subjects’ data by tracking their behaviour online, often without consent. This is contrary to privacy and creates possibilities for bias and discrimination. While targeted advertising can bring some benefits, those are outweighed by its drawbacks. VLOPs have built business strategies that use targeted advertising to gain more revenue, often through the deployment of deceptive techniques. Children are more vulnerable, making them react favourably to a number of deceiving and persuasive techniques, which is being exploited by advertisers. Through advertisements, children can be exposed to inappropriate content or incited to make irrational purchases. As a result of those findings, it was established that targeted advertising brings significant risks to minors, which necessitates its regulation.

Secondly, the legal framework was thoroughly examined, specifically the GDPR and the DSA. The analysis revealed that the GDPR does not explicitly regulate targeted advertising but some of its provisions are relevant. Based on Article 6, processing of personal data for the purposes of targeted advertising has to rely on an appropriate legal basis – consent or the legitimate interest of the controller. Article 22 states the data subject’s explicit consent is required concerning automated decision making, including profiling, that produces significant effects. It was concluded that targeted advertising using profiling can produce significant effects for consumers and minors specifically. Therefore, when profiling is used for targeted advertising, the explicit consent of the data subject is required, although that does not apply to all types of targeted advertising. Regarding the DSA, it was established that it provides stronger protection against targeted advertising compared to the GDPR. Article 26 bans advertising which uses profiling on the basis of special categories of data. Article 28, which is directed at minors, states that any targeted advertising based on profiling shall be banned for minors. Nevertheless, gaps were identified in both provisions, neither of which fully bans targeted advertising. Lastly, it was established that VLOPs must comply with stricter transparency and risk assessment obligations, considering their wide influence .

Thirdly, the effectiveness of the DSA was assessed using a normative framework, and in particular based on the Declaration on Digital Rights and Principles. This was justified given

the relevance of the Declaration to targeted advertising, which is a predominantly digital phenomenon. It was established that the DSA only partially meets the principles laid down in the Declaration. Even though it contains robust provisions with the aim of protecting users, and minors in particular, gaps remain and in certain aspects the DSA does not achieve the level of protection which has been envisaged by the drafters of the Declaration. For instance, while the DSA contains provisions that require platforms to be transparent about their advertising practices, it does not provide a comprehensive definition nor it fully bans the practice, which does not conform with the Declaration's commitment towards upholding minors' freedom of choice and their protection against illegal tracking and targeting.

It is also important to discuss the limitations of this work. Firstly, the biggest limitations are related to the scope of the thesis. Due to the constraints as a result of the word limit, in certain areas of this work it was not possible to provide more in-depth analysis. Also as a result of this, this thesis focused on certain aspects of the DSA, the ones most relevant to answer the research question, rather than exploring the whole Regulation in full, and included a predominantly legal analysis, without much analysis from other disciplines. Moreover, the focus was entirely on the DSA and the DMA was not explored, even though they were adopted in conjunction. A possible limitation is also the lack of data given the recent coming into force of the DSA, which made it difficult to assess its practical effectiveness and implications in the regulation of targeted advertising.

Lastly, it can be argued that the DSA is a step in the right direction and has achieved an important milestone – to clearly make it known to the public that platforms can and will interfere with the personal data of users in the search for profit. The Regulation outlines important provisions that can make a difference in protection awarded to consumers against the dangers of targeted advertising. In any case, the success of the DSA will strongly depend on its correct enforcement and the Commission has shown its readiness to prosecute any irregularities. In the following months and years, the full extent of its effectiveness in protecting minors will become clear, which will require further research in the future.

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