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The European Digital Services Act package: a preliminary assessment of the effects of public policy on underaged consumers' protection

Author:

Adriana Mutu, Professor, Ph.D.

Head of Academic Quality

ESIC Business & Marketing School

Calle Marià Cubí 124, 08021 Barcelona, Spain

Email: Adriana.mutu@esic.edu

Tel: +34934144444

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Abstract

This paper discusses the recent European regulatory developments affecting commercial advertising disseminated via linear audiovisual programs, video-sharing platforms, and social networks, shedding light on the effects of public policy on marketing and consumer protection. It provides a general assessment of the Directives included in the Digital Services Act package—the Audiovisual Media Services Directive, the Digital Services Act, and the Digital Markets Act—looking at the new set of rules and provisions applicable to audiovisual media services providers, video-on-demand, video-sharing, and large online platforms, ensuring enhanced protection of minors from harmful content, redefining the limits of commercial communications, and increasing the protection of consumer data by prohibiting the usage of personal data of children for commercial purposes, like direct marketing, profiling, or behaviorally targeted advertising. Based on a qualitative analysis, the study maps out the specific rules and obligations introduced by the Digital Services Act package. Data is taken from multiple publicly available sources, such as central government information, ministerial data, and regional agencies. This preliminary study provides several insights, contributing to recent research on regulatory developments at the EU level.

Keywords:

AVMSD, DSA, DMA, consumer behavior, digital privacy, advertising, audiovisual commercial communication.

Introduction, Objectives and Research Questions

On December 5th, 2023, the European Court of Justice issued a ruling to facilitate the imposition of fines for infringements of the General Data Protection Regulation (GDPR), making it easier for data protection authorities to sanction infringements of EU data protection rules. On December 1, 2023, the Spanish Association of Information Media (AMI) filed a lawsuit against Facebook owner Meta Platforms, citing unfair competition in the advertising market and non-compliance with European data protection regulations between 2018 and 2023. The Irish data protection authority (IE DPA) adopted on November 10, 2023, the final decision to impose a ban on Meta Ireland Limited (Meta IE) for the processing of personal data for behavioral advertising purposes. This follows the binding decision¹ adopted on 27 October, 2023 by the European Data Protection Board (EDPB) following a request made by the Norwegian Data Protection Authority (NO DPA) regarding infringements of the General Data Protection Regulation (GDPR) of Meta IE and Facebook Norway AS (‘Facebook Norway’), claiming an urgent need to act considering the risks for the rights and freedoms of the users in all European Economic Area states. Earlier in 2020, legal action was brought against TikTok in the UK by an anonymous 12-year-old girl², and in 2021, further legal action was taken there on behalf of all children who had used TikTok since May 25, 2018. In 2021, three Dutch foundations—the Foundation for Market Information Research, the Foundation Take Back Your Privacy (TBYP) and the Foundation on Mass Damage and Consumers—initiated a collective action against seven TikTok entities, including parent company Bytedance, for alleged infringement of privacy rights of children and adults and unlawful collection of personal data

¹ See https://edpb.europa.eu/our-work-tools/our-documents/urgent-binding-decision-board-art-66/urgent-binding-decision-012023_en

² See <https://www.bbc.com/news/technology-55497350>

(date of birth, phone number and email addresses, information on sexual orientation, religious beliefs, and biometric data) of 1.2 to 1.6 million Dutch children and trading this information for targeted advertising³. In 2019, TikTok was fined \$5.7 million by the US Federal Trade Commission for its handling of children's data. On a different note, earlier in September 2021, WhatsApp Ireland was fined €225 million by the Data Protection Commission (DPC) for infringements of data protection rules, lack of transparency, inadequate information, and lack of valid consent in ad personalization.

In the age of emerging data-driven business models, these recent events bring to our attention the ongoing discussion on the critical role played by digital platforms that 'have become the most widely used means not only of accessing and disseminating information but also of communicating in a broader sense' (Parliamentary Assembly of the Council of Europe, Doc. 15726 Draft Resolution, 2023), calling for stringent measures to increase the protection of consumers. The advent of new digital technologies and the increasing market power of global digital platform companies call for legal regulatory intervention to ensure online consumer protection, access to information, data protection, privacy, and safety measures. In this regard, market players including audiovisual media services providers, tech giants, video-sharing platforms, and social networks face significant impact as the European Union implements the European Digital Services Act package, which includes the Audiovisual Media Services Directive (AVMSD), the Digital Services Act (DSA), and the Digital Markets Act (DMA). Based on this background, this paper discusses the recent European regulatory developments aiming to tackle the challenges associated with unfair advertising practices, data privacy issues, and the dissemination of harmful or unsuitable commercial communication that could be detrimental for underaged consumers. The central research issue is: what are the main provisions and obligations related to the protection of underaged consumers from harmful content, commercial advertising practices including direct marketing, profiling, or behaviorally targeted advertising applicable to broadcasters, video-on-demand and video-sharing, and large online platforms under the Digital Services Act package?

Literature Review

At a policy level, the protection of young consumers was a key priority on the political agenda of the European Commission for decades (see the *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services*, European Commission, 1996a; the Communication on 'Illegal and harmful content on the internet' European Commission, 1996b; the *Conclusions on the European strategy for a better internet for children*, Council of the European Union, 2012). On April 2023, the Parliamentary Assembly of the Council of Europe calls on Member States to 'strengthen the role of data protection and competition authorities; in particular, ensure compliance with data protection rules for young people under the age of 18 and enforce appropriate measures to make corporate platforms comply with all the relevant requirements in terms of surveillance and the protection of privacy' and 'enhance the role of national media and advertising regulatory authorities and ensure compliance with measures to protect users, especially the most vulnerable, from online harassment and harmful content on video sharing platforms and social networks'⁴ (Doc. 15726 Draft Resolution, 2023).

Theoretical accounts of young consumers, children's consumer behavior, and underaged consumers' protection in the digital age have been discussed in academic research. Social

³ <https://conflictoflaws.net/2023/second-act-in-dutch-tiktok-class-action-on-privacy-violation-court-assesses-third-party-funding-agreements/>

⁴ See

[https://pace.coe.int/pdf/f083b2e21652b560542edfcaece0ef565b43d1ba286f5d996149664efc7047da/doc.%2015726%3A%20compendium%20of%20written%20amendments%20\(final%20version\).pdf](https://pace.coe.int/pdf/f083b2e21652b560542edfcaece0ef565b43d1ba286f5d996149664efc7047da/doc.%2015726%3A%20compendium%20of%20written%20amendments%20(final%20version).pdf)

scientists addressed the challenges and opportunities associated with the rapidly changing digital ecosystems (Bergström and Belfrage, 2018; Mutu, 2021a, 2021b; Nazzini, 2018; Labio-Bernal et al., 2020; Rozgonyi, 2020; de Cock Buning, 2014; Barata, 2021; Barata and Calvet-Bademunt, 2023). Marketing scholars deal with concerns related to user consent, transparency, the use of AI in advertising, the use of personal data sourced from core platform services, the use of non-public data, the use of third-party online intermediation services, offerings to end users, the pre-installation of apps, and the use of third-party app stores. Scholars analyzed the regulatory requirements of the AVMS Directive related to the obligation for Member States to appropriately identify television programs containing PP through disclosures. The integration of advertising into media content via product or brand placements (PP) was addressed by Spielvogel et al. (2021, p. 5), who argue that product placement—an advertising technique in which branded products or brand identifiers are deliberately placed—represents one of the most widespread examples of integrated persuasive communications in audiovisual content. Advertisers must ensure fair communication, given that consumers might not be able to identify and differentiate between editorial and commercial content. Covert advertising raises concerns for policymakers, researchers, and consumer organizations (Cain, 2011; Kuhn et al., 2010).

Young consumers are often exposed to a series of worrisome digital harmful material and advertising practices (Engblom, 2022; Efstathiou, 2019). As noted in the Youth and the Media Report of the Parliamentary Assembly of the Council of Europe⁵, in Spain, research published by the Audiovisual Council of Catalonia⁶ shows that ‘in more than 93.8% of cases, TikTokers do not indicate that their video content contains advertising. Children and teenagers are very frequently exposed to ads and subliminal advertising messages on YouTube channels, and products and brands are not clearly identified, which confuses consumers. Three out of four Youtubers (77.2%) build advertising stories loaded with gender stereotypes. Minors are exposed to pornographic content in audiovisual programs and on the internet, for example, playlists showing sexualization of minors on video sharing platforms such as Dailymotion, Vimeo, and YouTube. Minors are also exposed to digital content that peddles hatred and violence against women’. Gaps in prior academic research are related to the scarcity of comparative studies on the topic and the lack of available data that could facilitate cross-country measurements.

Methodology

This preliminary study introduces a qualitative assessment of the existing regulations—the Audiovisual Media Services Directive, the Digital Services Act, and the Digital Markets Act—tackling the challenges associated with advertising practices, data privacy, and the dissemination of potentially harmful or unsuitable commercial communication. The regulations apply to audiovisual media service providers, video-on-demand and video-sharing services, and large online platforms. The desk research included the examination of the legal texts and the reports published by the European Audiovisual Observatory (EAO), EPRA and ERGA. The study relies on the CELEX internet database, which compiles primary and secondary legislation, case law, and preparatory documents.

Preliminary Findings

The revised Audiovisual Media Services Directive (AVMSD) was adopted on November 28, 2018, and published in the Official Journal of the European Union. On December 19, the consolidated text came into force, and European Member States had 21 months to transpose the

⁵ See

<https://pace.coe.int/pdf/0c80e8b625c764dff323b52dbec935ea3f9fe5e5331ea91ea668de5bc1a81124/doc.%2015726.pdf>

⁶ See www.cac.cat/informes-del-cac-internet

new provisions into national law. The revised legislation on audiovisual media services applies to broadcasters and to video-on-demand and video-sharing platforms, and the new rules ensure enhanced protection of minors from harmful content, redefining the limits of commercial communications. The provisions of the AVMSD concerning the protection of minors in audiovisual media services are defined in Article 12 (for non-linear services) and Article 21 (for linear services). AVMSD also mandates that the personal data of children must not be used for commercial purposes, like direct marketing, profiling, or behaviorally targeted advertising (Article 28b). This aligns with the GDPR and the DSA. Article 9 clarifies the obligations of the audiovisual media service providers in relation to audiovisual commercial communication:

- (a) audiovisual commercial communications shall be readily recognizable as such; surreptitious audiovisual commercial communication shall be prohibited;
- (b) audiovisual commercial communications shall not use subliminal techniques;
- (c) audiovisual commercial communications shall not:
 - (i) prejudice respect for human dignity;
 - (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
 - (iii) encourage behavior prejudicial to health or safety;
 - (iv) encourage behavior grossly prejudicial to the protection of the environment;
- (d) all forms of audiovisual commercial communications for cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers shall be prohibited;
- (e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
- (f) audiovisual commercial communications for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
- (g) audiovisual commercial communications shall not cause physical, mental or moral detriment to minors; therefore, they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

On the other hand, the Digital Services Act introduces obligations for online platforms with significant impacts on digital advertising practices. Paragraph 71 outlines that

‘Providers of online platforms used by minors should take appropriate and proportionate measures to protect minors, for example by designing their online interfaces or parts thereof with the highest level of privacy, safety and security for minors by default where appropriate or adopting standards for protection of minors or participating in codes of conduct for protecting minors’.

Risks related to infringements of rights of the child and consumer protection are mentioned in Paragraph 81:

‘When assessing risks to the rights of the child, providers of very large online platforms and of very large online search engines should consider for example how easy it is for minors to understand the design and functioning of the service, as well as how minors can be exposed through their service to content that may impair minors’ health, physical,

mental and moral development. Such risks may arise, for example, in relation to the design of online interfaces which intentionally or unintentionally exploit the weaknesses and inexperience of minors, or which may cause addictive behavior’.

Article 26 outlines that ‘Providers of online platforms that present advertisements on their online interfaces shall ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise, and unambiguous manner, and in real time’. The DSA requires that on each advertisement the following information is displayed: clarify that the information is an advertisement, including through prominent markings; inform on which is the natural or legal person on whose behalf the advertisement is presented; inform who paid for the advertisement if that person is different from the natural or legal person; provide meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters. Bans on targeting minors are foreseen in Article 28 of the DSA. Providers of online platforms accessible to minors must ‘put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors on their service’ and to ‘not present advertisements on their interface based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679 using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor’.

The Digital Markets Act introduces obligations for gatekeepers in relation to the processing of personal data. Under the DMA, the European Commission has designated six digital platforms as ‘gatekeepers’ as they provide an important gateway between businesses and consumers in relation to core platform services: Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft⁷. Gatekeepers must comply with the requirements in the DMA at the latest by March 6, 2024. Article 5 enforces the following rules:

‘The gatekeeper shall not do any of the following:

- (a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper.
- (b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services.
- (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and
- (d) sign in end users to other services of the gatekeeper in order to combine personal data’.

The unprecedented legal scrutiny at the European level calls for a deep analysis of the Digital Services Act Package implementation measures across the Member States.

Conclusion, Implications, Limitations and Future Research

This preliminary study provides several insights, contributing to recent research on regulatory developments at the EU level. Earlier theoretical and empirical work has shown that the protection of young consumers represents a key priority. The marketing and managerial implications of these regulations can be discussed in relation to the rules and obligations to

⁷ See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

audiovisual media service providers and gatekeepers regarding the processing of users' personal data, consumer consent, and targeted advertising, among others. Gaps in prior research are related to the lack of interdisciplinary studies and empirical evidence for a systematic assessment of the protection of minors under the European Digital Services Act Package. Departing from this study, future research might address the implications of applying the provisions and obligations related to the protection of underaged consumers and the impact on stakeholders and market players. Future studies could advance cross-country comparative analyses on the transposition of the AVMS Directive, the DSA and the DMA, discussing the role played by the EU institutions and national authorities from the Member States during the legal procedures leading to the adoption of European legislation. In sum, this study gives a theoretically relevant view of European Directives involved in audiovisual media regulatory policies that not only addresses unanswered questions but also opens challenging avenues for future research.

REFERENCES

- Balkin, J. M. (2004). Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society. 79 N.Y.U. L. Rev.
- Barata, J. (2021). The Digital Services Act and Its Impact on the Right to Freedom of Expression: Special Focus on Risk Mitigation Obligations. DSA Observatory. <https://dsa-observatory.eu/2021/07/27/the-digital-services-act-and-its-impact-on-the-right-to-freedom-of-expression-special-focus-on-risk-mitigation-obligations/>
- Barata, J. & Calvet-Bademunt, J. (2023). The European Commission's approach to DSA systemic risk is concerning for Freedom of Expression. Tech Policy Press. <https://www.techpolicy.press/the-european-commissions-approach-to-dsa-systemic-risk-is-concerning-for-freedom-of-expression/>
- Bergström, A. & Belfrage, M. J. (2018). News in social media. *Digital Journalism*, 6(5), 583-598.
- Cain, R.M. (2011). Embedded advertising on television: Disclosure, deception, and free speech rights. *Journal of Public Policy & Marketing* 30, 2, 226–38.
- de Cock Buning, M. (2014). Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media. *Utrecht Law Review*, Vol. 10, No. 5, 9-30.
- Efstathiou, C. (2019). Role of education in the digital era: from “digital natives” to “digital citizens”. Report, Committee on Culture, Science, Education and Media. Council of Europe.
- Engblom, A. (2022). The role of the media in times of crisis. Report, Committee on Culture, Science, Education and Media. Council of Europe.
- European Commission. (1996a). Green Paper: protection of minors and human dignity in audiovisual and information services. Retrieved from <https://op.europa.eu/en/publication-detail/-/publication/8593679e-0099-4616-9fd0-c3b4fe67c8b4/language-en>
- European Commission. (1996b). Communication on illegal and harmful content on the internet. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0487:FIN:en:PDF>
- European Commission. (2012). European strategy for a better internet for children. Retrieved from <https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0196&from=EN>

European Parliament and Council of the European Union (2018). Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

European Parliament and Council of the European Union. 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)

European Parliament and Council of the European Union. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance)

Kuhn, K.L., M. Hume, and A. Love. (2010). Examining the covert nature of product placement: Implications for public policy. *Journal of Promotion Management* 16, 1(2), 59–79.

Labio-Bernal, A., Romero-Domínguez, L. & García-Orta, M.J. (2020). Protection of minors in the European digital audiovisual context: a necessary dialogue between parents, academy, regulators and industry, *Comunicação e sociedade*, 37, 127-146.

Mutu, A. (2021a). Media Literacy and the Protection of Minors in the Digital Age: Intermediary initiatives during the transposition of the AVMS Directive in Spain. In *Proceedings of the Weizenbaum Conference 2021* (pp. 1-4). Berlin: Weizenbaum Institute for the Networked Society - The German Internet Institute.

Mutu, A. (2021b). Intermediary roles in the transposition of the Audiovisual Media Services Directive into domestic legislation: Evidence from Spain. *Journal of Digital Media & Policy*, 12(3), 489–505.

Nazzini, R. (2018). Online Platforms and Antitrust: Evolution or Revolution? *Competition Policy International, Antitrust Chronicle*, 1-6.

Rozgonyi, K. (2020). Negotiating new audiovisual rules for Video Sharing Platforms: proposals for a Responsive Governance Model of speech online. *Revista Catalana de Dret Públic*, 61, 83-98.

Spielvogel, I., Naderer, B. & Matthes, J. (2021) Disclosing product placement in audiovisual media services: a practical and scientific perspective on the implementation of disclosures across the European Union, *International Journal of Advertising*, 40:1, 5-25, DOI: 10.1080/02650487.2020.1781478