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The regulation of digital advertising under the DSA: A critical assessment [☆]



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ABSTRACT

This article critically assesses to what extent the Digital Services Act (DSA) protects consumers in relation to three important developments in digital advertising: (i) the rise of influencer marketing as a new form of native advertising (ii) the personalisation of advertising and (iii) hybrid ads as advertising solutions that find themselves at the intersection of influencer marketing and personalised advertising. We describe and analyse these developments to better understand whether and how they are governed by the DSA. While the DSA specifically left influencer marketing outside of the material scope of its advertising rules, new forms of advertising (i.e. on-platform influencer marketing, which we refer to as hybrid ads) challenge this choice, as we argue they may fall under the DSA's advertising rules, just as personalised advertising. The resulting regulatory choice of differentiating between advertising practices on social media is odd at best, since it does not take into account the characteristics of these practices or the essential role of social media platforms in other forms of advertising than personalised advertising. The paper critically reveals three main pitfalls related to the way in which the DSA tackles consumer protection concerns in relation to the selected digital advertising developments: coherence/fragmentation; little consumer benefits; and limited future-proofing.

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1. Introduction

Driven by digitalisation, advertising has changed dramatically. This article focuses on three related developments, each giving rise to consumer protection concerns. Firstly, the participatory nature of Web 2.0 has given rise to more subtle forms of

online advertising such as influencer marketing. Propagated through parasocial relations, influencer marketing is a form of native advertising¹ consisting in the advertising activities of content creators who build “trust and authenticity-based relations with their audience (mainly on social media platforms) and engage online with commercial actors [...] for monetisation purposes.”²

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¹ Bartosz W Wojdyski and Guy J Golan, ‘Native Advertising and the Future of Mass Communication’ (2016) 60 *American Behavioral Scientist* 1403; Bartosz W Wojdyski and Nathaniel J Evans, ‘Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising’ (2016) 45 *Journal of Advertising* 157.

² Frithjof Michaelsen, et al., ‘The impact of influencers on advertising and consumer protection in the Single Market’ (Study

Consumer protection concerns here include hidden advertising, delivered via a complex off-platform supply chain, as a means of consumer manipulation. Secondly, digitalisation has given rise to personalised advertising, i.e. advertising that is customised to people's demographic characteristics, interests or behaviour. This form of advertising has raised concerns in terms of its potential to exploit the vulnerabilities of consumers (e.g. by targeting specific weaknesses associated with their profiles). Thirdly, platforms are also developing advertising solutions that find themselves at the intersection of influencer marketing and personalised advertising (hybrid ads), showing a general industry trend towards using content preferences as a proxy for targeted advertising. This is the case of on-platform influencer marketing, whereby social media platforms themselves amplify and reward native advertising made by content creators.³ This is particularly problematic because it combines the consumer harms of personalised advertising based on the asymmetric information power of social media platforms, with inconspicuous native advertising delivered on the basis of word-of-mouth.⁴ As we will discuss in more detail in this paper, online platforms play an important role in all three developments.

As Europe's most impressive reform on platform liability and transparency, the Digital Services Act (DSA)⁵ is meant to regulate online intermediaries in relation to their involvement in the harbouring of illegal content, as well as their actions with respect to the systemic harms posed by such content. This article critically assesses to what extent the DSA protects consumers in relation to the three developments in digital advertising identified above. To what extent does the DSA address these developments, and if it does, to what extent does it complement existing EU laws? This exploration pays particular attention to understanding the coherence between the DSA and specific instruments in the consumer *acquis*, as relevant sources of law that can shape the concept of illegal content. In addition, we aim to understand what consumer benefits it brings, as well as how future-proof the DSA's approach is in relation to the fast moving world of online advertising.

requested by the IMCO committee, European Parliament, February 2022) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)> accessed 10 December 2022, p. 15.

³ 'Introducing TikTok Branded Mission: Inspiring Brand and Creator Collaborations' (Newsroom | TikTok, 18 May 2022) <<https://newsroom.tiktok.com/en-us/introducing-tiktok-branded-mission-inspiring-brand-and-creator-collaborations>> accessed 10 December 2022.

⁴ Nina Meilatinova, 'Social Commerce: Factors Affecting Customer Repurchase and Word-of-Mouth Intentions' (2021) 57 *International Journal of Information Management* 102300; Paula Rodríguez-Torrico and others, 'Let It Flow: The Role of Seamlessness and the Optimal Experience on Consumer Word of Mouth in Omnichannel Marketing' (2021) *Journal of Research in Interactive Marketing* <<https://www.emerald.com/insight/content/doi/10.1108/JRIM-06-2021-0154/full/html>> accessed 10 December 2022.

⁵ 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 L277/35.

In doing so, this article specifically focuses on the role of social media platforms, since all of the identified developments play a particularly strong role on such platforms, and it makes two specific contributions to existing literature on consumer protection and platform liability: (i) influencer marketing and personalized advertising have been extensively discussed in legal scholarship, but separately, whereas analysing various advertising business models (which we will refer to as 'developments') can add much value to the understanding of how complex and diverse the digital advertising landscape is; and (ii) the DSA umbrella provides a much needed perspective reflecting the role of platforms in creating and/or amplifying potential consumer harms arising out of digital advertising.

The article will first discuss the three developments in digital advertising in more detail (Section 2). This is followed by an analysis of the DSA, discussing how it is relevant to digital advertising and to what extent it protects consumers in relation to the three developments identified (Section 3). Section 4 provides a synthesis, discussing the main pitfalls of DSA's approach to protecting consumers against digital advertising. The article ends with a conclusion (Section 5).

2. Digital advertising: three developments

2.1. Influencer marketing as native advertising

In the past decade, the popularity of social media has carved additional avenues for marketing. Initially building on the popularity of offline celebrities, social media platforms became incubators for a new type of cultural entrepreneurship dubbed influencer marketing.⁶ Gradually, this has changed to include much more granular, niche internet celebrities.⁷ Influencer marketing is not a new phenomenon, but rather a

⁶ Stuart Cunningham and David Randolph Craig, *Social Media Entertainment: The New Intersection of Hollywood and Silicon Valley* (New York University Press 2019); Laura E Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' (2017) 59 *William & Mary Law Review* 1123; Marijke De Veirman, Liselot Hudders and Michelle R Nelson, 'What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research' (2019) 10 *Frontiers in Psychology* 2685; Kelley Cotter, 'Playing the Visibility Game: How Digital Influencers and Algorithms Negotiate Influence on Instagram' (2019) 21 *New Media & Society* 895; Sophie C Boerman and Eva A van Reijmersdal, 'Disclosing Influencer Marketing on YouTube to Children: The Moderating Role of Para-Social Relationship' (2020) 10 *Frontiers in Psychology* 3042; Tyler Fredricks, 'Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure' (2019) 19 *Virginia Sports and Entertainment Law Journal* 29; Giovanni De Gregorio and Catalina Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) 23 *German Law Journal* 204; Veronica N Ramirez, 'Fashion Statements Turned Endorsements: How FTC Enforcement Could Cripple the Internet's Trendsetters Notes' (2018) 68 *Syracuse Law Review* [i].

⁷ Kelly Ehlers, 'Council Post: Micro-Influencers: When Smaller Is Better' (*Forbes*) <<https://www.forbes.com/sites/forbesagencycouncil/2021/06/02/micro-influencers-when-smaller-is-better/>> accessed 10 December 2022; Alice Marwick, 'Micro-celebrity, Self-Branding, and the Internet' in George Ritzer (ed), *The Blackwell Encyclopedia of Sociology* (John Wiley & Sons 2017).

combination of native advertising,⁸ electronic word-of-mouth advertising⁹ and parasocial relations developed with internet celebrities.¹⁰ In other words, it is advertising hidden in a message of a different nature, coming from individuals who consumers trust and admire due to their authenticity and relatability.¹¹ Influencer marketing has been a treasure trove for social media platforms, as it has nurtured a new dynamic between the users of such platforms. While initially, users could be generally divided into professional and non-professional (e.g. individuals), monetization models such as influencer marketing have given rise to a new category of users – the content creators, who are often neither companies nor consumers, but who mostly dwell in the grey space of ‘prosumers’.¹² While many successful creators accumulate a considerable volume of commercial activity and develop official commercial status (e.g. have registered companies), low market barriers make it easy for anyone to – at least in principle – try to become an influencer. In the process, it becomes increasingly difficult to identify traders as natural or legal persons engaging in professional commercial activities. However, regulators have the tendency to assess that once commercial activity happens regularly, the definitional threshold is achieved.

Influencer marketing is a highly lucrative marketing sector. In 2022, the global market size reached \$16.4 billion.¹³ In comparison, merely five years before, in 2017, the market was only \$3 billion.¹⁴ This growth is expected to continue amidst the numerous new content monetization strategies pursued by social media platforms, where regular users have been promoting an impressive array of goods and services in a diverse range of sectors. Unlike the personalised advertising practices described below, native ads embedded by influencers in their aspirational content have traditionally reflected off-platform supply chains. Influencers (and their representatives) conclude private contracts with brands (and their representatives) outside of social media platforms: influencers pro-

vide marketing services for a direct or indirect benefit offered by their contracting parties.¹⁵ Embedding sponsored content without any disclosure is the biggest harm faced by consumers in this industry. Given the relational proximity consumers feel towards their favourite influencers, not knowing whether they are paid to promote goods or services is a form of behavioural manipulation which affects consumers’ choice architecture.¹⁶

2.2. Personalised advertising

Through their online behaviour, consumers produce large amounts of personal data that are collected and processed by companies.¹⁷ This personal data can be used by companies to build consumer profiles and to disseminate personalised advertising, including through online behavioural advertising (i.e. individually targeted advertising based on monitoring online behaviour).¹⁸ Through personalisation, companies are increasingly able to target online advertising to specific groups of consumers. Similarly, the content of platforms and webstores is increasingly tailored to the specific interests and characteristics of individual consumers.¹⁹

Personalisation can be based on earlier online behaviour of consumers (such as search behaviour) that indicate their preferences. Similarly, personalisation can be based on the psychological characteristics of consumers, such as extraversion or impulsiveness, which are inferred from consumers’ digital footprints (such as their activities on social media). This results in so-called psychological targeting.²⁰ Online intermediaries (and in particular: very large online platforms) play an important role in personalised advertising. Companies like Google and Meta have been collecting large amounts of data on their users, allowing them to offer advertisers on their platforms to reach very specific audiences. For example, companies that advertise via Meta can target advertising to Meta users based on numerous detailed settings in relation to demographics (such as age, gender and educational level),

⁸ Wojdyski and Golan (fn 1).

⁹ Ana Babić Rosario, Kristine de Valck and Francesca Sotgiu, ‘Conceptualizing the Electronic Word-of-Mouth Process: What We Know and Need to Know about EWOM Creation, Exposure, and Evaluation’ (2020) 48 *Journal of the Academy of Marketing Science* 422; Shu-Chuan Chu and Yoojung Kim, ‘Determinants of Consumer Engagement in Electronic Word-of-Mouth (EWOM) in Social Networking Sites’ (2011) 30 *International Journal of Advertising* 47; Sun-Jae Doh and Jang-Sun Hwang, ‘How Consumers Evaluate EWOM (Electronic Word-of-Mouth) Messages’ (2009) 12 *CyberPsychology & Behavior* 193; Mira Lee and Seounmi Youn, ‘Electronic Word of Mouth (EWOM): How EWOM Platforms Influence Consumer Product Judgement’ (2009) 28 *International Journal of Advertising* 473.

¹⁰ Amanda N Tolbert and Kristin L Drogos, ‘Tweens’ Wishful Identification and Parasocial Relationships With YouTubers’ (2019) 10 *Frontiers in Psychology* 2781.

¹¹ Mariah L Wellman and others, ‘Ethics of Authenticity: Social Media Influencers and the Production of Sponsored Content’ (2020) 35 *Journal of Media Ethics* 68.

¹² Bodo Lang and others, ‘How to Grow the Sharing Economy? Create Prosumers!’ (2020) 28 *Australasian Marketing Journal* 58.

¹³ ‘Global Influencer Market Size 2022’ (Statista) <<https://www.statista.com/statistics/1092819/global-influencer-market-size/>> accessed 10 December 2022.

¹⁴ *Ibid.*

¹⁵ The benefit need not be solely money, see Joasia Luzak and Catalina Goanta, ‘#paidpartnership means more than money: Discussing influencer disclosure obligations in the aftermath of Peek & Cloppenburg’ (2022) *EuCML* 188.

¹⁶ European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320)’ [2021] *OJ C-526/1*.

¹⁷ Alessandro Acquisti, Laura Brandimarte & George Loewenstein, ‘Privacy and human behavior in the age of information’ (2015) 347(6221) *Science* 509–514.

¹⁸ See Sophie C Boerman, Sanne Kruijkemeier and Frederik J Zuiderveen Borgesius, ‘Online Behavioral Advertising: A Literature Review and Research Agenda’ (2017) 46 *Journal of Advertising* 363.

¹⁹ Joanna Strycharz, Guda van Noort, Natali Helberger and Edith Smit, ‘Contrasting perspectives – practitioner’s viewpoint on personalised marketing communication’ (2019) 53(4) *European Journal of Marketing* 635–660.

²⁰ Sandra Matz, Michal Kosinski, Gideon Nave and David Stillwell, ‘Psychological targeting as an effective approach to digital mass persuasion’ (2017) 114(48) *Proceedings of the National Academy of Sciences of the United States of America* 12714–12719; Sandra Matz, Ruth Appel and Michal Kosinski, ‘Privacy in the age of psychological targeting’ (2020) 31 *Current Opinion in Psychology* 116–121.

connections, interests (such as health and fitness or online games) and online behaviour.²¹ Meta and Google also offer possibilities to target ads to so-called “lookalike audiences”, i.e. users that have similar characteristics to the actual customers of the advertiser.²² Some of these practices have been widely used in marketing even prior to the age of data-driven marketing, and originate from social psychology methodologies of profiling individuals based on personality traits.²³

Personalised advertising offers benefits to consumers, such as increased relevance, informativeness and credibility.²⁴ However, personalised advertising also raises concerns in terms of consumer protection.²⁵ The targeting of consumers’ personal characteristics can make consumers more susceptible to persuasion attempts, blurring the line between persuasion and manipulation.²⁶ This can result in the exploita-

tion of vulnerabilities of consumers.²⁷ For example, companies can specifically target psychological weaknesses such as impulsiveness or insecurity, taking advantage of consumers’ vulnerabilities beyond the light of their own awareness.²⁸ Facebook allegedly offered advertisers the opportunity to target teenagers during moments of psychological vulnerability, such as when they felt insecure or stressed.²⁹ The exploitation of vulnerabilities through personalised marketing can be seen as harmful for consumers, threatening their autonomy to make informed decisions.³⁰

2.3. Hybrid ads: at the intersection of influencer marketing and personalised advertising

In their search of new ways to generate revenue, social media platforms are constantly developing new content monetization models. A latest example of these strategies is reflected by an emerging version of advertising found at the intersection of the two models discussed in the sections above, which we refer to as hybrid ads.

In an attempt to make influencer marketing more of an on-platform phenomenon, social media companies have turned their attention to creating marketplaces for advertising. In May 2022, TikTok introduced an ad programme called Branded Missions, defined by the platform as “an industry-first ad solution that enables advertisers to crowdsource authentic content from creators on TikTok, turn top-performing videos into ads, and improve brand affinity with media impressions.”³¹ In a nutshell, TikTok collects requests from brands, which are displayed to influencers in their specific ‘Creator’ accounts. These requests generally include specific tasks such as using a product and using a hashtag when making (preferably authentic) content. At this point, the only transaction concluded is between TikTok and the brand, who pays TikTok just as in the case of buying targeted advertising. Brands subsequently have the discretion to choose between the influencers who engage with the mission, and remunerate those who they consider have concluded the mission successfully, in what can be considered a separate transaction. Subsequently, influencers can receive their remuneration from brands via TikTok. Alternatively, Tik-

²¹ Meta, ‘Ad targeting - Help your ads find the people who will love your business’ (Facebook) <<https://en-gb.facebook.com/business/ads/ad-targeting>> accessed 10 December 2022. See for a guide to using these settings, from a marketer’s perspective: Michelle Morgan, ‘Facebook Ad Targeting in 2022: The Complete Guide + 10 Tips’ (WordStream, 22 June 2022) <<https://www.wordstream.com/blog/ws/2021/09/13/facebook-ad-targeting-privacy-first-world>> accessed 10 December 2022.

²² See Meta, ‘Ad targeting - Help your ads find the people who will love your business’ (Facebook) <<https://en-gb.facebook.com/business/ads/ad-targeting>> accessed 10 December 2022 and Google, ‘About audience targeting’ (Google Ads Help) <<https://support.google.com/google-ads/answer/2497941?hl=en>> accessed 10 December 2022.

²³ Catalina Goanta and Stephan Mulders, “Move Fast and Break Things”: Unfair Commercial Practices and Consent on Social Media’ (2019) 8 Journal of European Consumer and Market Law 136; Matthias Ziegler, Kai T Horstmann and Johanna Ziegler, ‘Personality in Situations: Going beyond the OCEAN and Introducing the Situation Five.’ (2019) 31 Psychological Assessment 567; Azmat Ali and others, ‘OCEAN Traits: Who Shares More Word of Mouth?’ (2022) 28 Journal of Promotion Management 749.

²⁴ See for instance Boerman, Kruikemeier and Zuiderveen Borgeusius (fn 18); Trang P. Tran, ‘Personalized ads on Facebook: An effective marketing tool for online marketers’ (2017) 39 Journal of Retailing and Consumer Services 230-242. In this paper, we look into consumer harms associated with accurate personalization approaches. However, it must be noted that personalization and targeting can also pose a lot of accuracy questions which go beyond the scope of this paper. See Christopher A Summers, Robert W Smith and Rebecca Walker Reczek, ‘An Audience of One: Behaviorally Targeted Ads as Implied Social Labels’ (2016) 43 Journal of Consumer Research 156.

²⁵ See also Martin Senftleben, ‘Trademark law, AI-driven behavioural advertising and the Digital Services Act – towards source and parameter transparency for consumers, brand owners and competitors’ (2021) IViR working paper <<https://ssrn.com/abstract=3947739>> accessed 10 December 2022, 3; Natali Helberger et al, ‘Macro and Exogenous Factors in Computational Advertising: Key Issues and New Research Directions’ (2020) 49 Journal of Advertising, 377, 382.

²⁶ Ryan Calo, ‘Digital market manipulation’ (2014) 82(4) George Washington Law Review 995–1051; Giovanni Sartor, ‘New aspects and challenges in consumer protection: digital services and artificial intelligence’ (Study for the IMCO committee of the European Parliament, April 2020) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)648790](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)648790)> accessed 10 December 2022.

²⁷ OECD, ‘Online advertising: trends, benefits and risks for consumers’ (OECD digital economy papers January 2019); Joanna Strycharz and Bram Duivenvoorde, ‘Vulnerability arising from personalized marketing communication: are consumers protected?’ [2021] Internet Policy Review 1.

²⁸ Calo (fn 26); Ken Ward, ‘Social networks, the 2016 US presidential election, and Kantian ethics: applying the categorical imperative to Cambridge Analytica’s behavioural microtargeting’ (2018) 33(3) Journal of Media Ethics: Exploring Questions of Media Morality 133–148.

²⁹ Nitasha Tiku ‘Get Ready for the Next Big Privacy Backlash Against Facebook’ (Wired, 21 May 2017) <<https://www.wired.com/2017/05/welcome-next-phase-facebook-backlash/>> accessed 10 December 2022.

³⁰ Calo (fn 26); Quentin André et al., ‘Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data’ (2018) 5 Customer Needs and Solutions 28-37; Daniel Susser, Beate Roessler and Helen Nissenbaum, ‘Technology, autonomy, and manipulation’ (2019) 8(2) Internet Policy Review 1-22; Sartor (fn 26).

³¹ ‘Introducing TikTok Branded Mission: Inspiring Brand and Creator Collaborations’ (fn 3).

Tok can choose to reward influencers with free views, which is basically algorithmic amplification as a form of payment. TikTok calls this "a new form of two-way engagement between brands and creators",³² where it intermediates influencer marketing while promoting additional monetization options. A similar ad programme is available on Twitch. The platform features a Bounty Board, or "a way for creators to browse and accept paid sponsorship opportunities [...] directly from their Twitch dashboard".³³ The earliest platform to have used such a concept of matching demand and supply in terms of native advertising was YouTube. In 2012, long before influencer marketing became a self-standing industry, it launched the YouTube Marketplace, aiming at the same goal: connecting popular YouTubers with brands for advertising purposes.³⁴ Although no data is available to confirm the commercial popularity of this business model, its cyclicity, taken together with current platform monetization strategies, make it a noteworthy development which raises interesting questions under the DSA, from the particular perspective of platform responsibility.

As influencer reputation is fundamentally defined by discretionary social media recommendations, it is becoming increasingly difficult to separate the message (e.g. influencer content) from the platform. As we have seen above, platforms are even willing to offer additional engagement (e.g. views) to influencers who make use of their influencer marketing intermediation services. In this context, we need to be aware that virality or popularity are not achievements that creators can reach and maintain independently from platform architectures.

In the same vein, social media platforms are altogether transforming from their original social network roles (e.g. peer-to-peer engagement), to also include content delivery (e.g. streaming) and social commerce (e.g. Checkout button on Instagram³⁵). For this reason, social media platforms are generally moving towards recommending more content outside of the user's social graphs (i.e. content outside of the user's friend network). Such content recommendations are based on preferences inferred by platforms from their users, ranging from what kind of content they follow, watch and positively react to, to what ads they interact with. This type of recommended content may also include native advertising, and since recommender systems are a form of information retrieval that has the same goals as targeted advertising in that they are forms of targeting individuals with personalized content, we can argue that native recommended content is a new form of targeted advertising, where the platform is responsible for content amplification.

³² *ibid.*

³³ 'Bounty Board Program Information and FAQ' <https://help.twitch.tv/s/article/bounty-board-program-information-and-faq?language=en_US> accessed 10 December 2022.

³⁴ 'YouTube Launches "Marketplace" to Connect YouTube Stars and Brands' (*Ad Age*, 28 June 2012) <<https://adage.com/article/digital/youtube-launches-marketplace-connect-youtube-stars-brands/235699>> accessed 10 December 2022.

³⁵ 'Introducing Checkout on Instagram | Instagram Blog' <<https://about.instagram.com/blog/announcements/introducing-instagram-checkout>> accessed 10 December 2022.

3. Consumer protection against digital marketing harms in the DSA

3.1. The DSA and its relevance to digital advertising

The DSA's goal is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment. At the same time, the DSA aims to facilitate innovation, effectively protect fundamental rights and to attain a high level of consumer protection.³⁶ The DSA provides rules on issues like the liability of intermediary service providers,³⁷ notion and action mechanisms,³⁸ and dark patterns in online choice architectures.³⁹ Some of these rules apply to all online intermediaries, others to specific types of online intermediaries like 'online platforms' (Article 3(i) DSA) and 'very large online platforms' (Article 33 DSA).

In essence, the DSA is relevant to digital advertising in two ways. Firstly, it builds on the earlier E-Commerce Directive,⁴⁰ through provisions that do not specifically reference advertising but do apply to it. In particular, advertising that is disseminated through online intermediaries and that is in breach of EU or Member State advertising regulations, can be qualified as 'illegal content' under the DSA.⁴¹ This in turn gives rise to the applicability of several provisions in the DSA, such as the regime for intermediary liability and the obligation to act upon orders directed against illegal content.⁴² Secondly, the DSA introduces several specific obligations for online intermediaries in relation to advertising, such as the transparency obligations of online platforms (Article 26.1 DSA) and the obligation of very large online platforms to maintain an ad archive (Article 39 DSA). In this context it is relevant that the DSA defines the term 'advertisement' broadly. Article 3(r) DSA defines 'advertisement' as '*information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and presented by an online platform on its online interface against remuneration specifically for promoting that information*'. What is remarkable in this definition is that it covers both commercial and non-commercial advertising. Hence, it also covers e.g. advertising by NGOs and political

³⁶ See Article 1, read in connection with Recital 3 of the Preamble to the DSA.

³⁷ Articles 4-6 DSA.

³⁸ Article 16 DSA.

³⁹ Article 25 DSA.

⁴⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

⁴¹ See the broad definition of 'illegal content' in Article 3(h) DSA, which defines this term as "any information, which, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State, irrespective of the precise subject matter or nature of that law.

⁴² See in particular Article 6 DSA (on hosting service liability) and Article 9 DSA (on orders to act against illegal content).

advertising.⁴³ Our analysis of the DSA focuses on the implications of the definitions envisaged for advertising and illegal content.

In what follows, we will analyse the applicability of the DSA to each of the three developments described in [Section 2](#).

3.2. Protection against harmful influencer marketing

The DSA does not specifically govern influencer marketing. Importantly, influencer marketing is typically also not covered by the definition of advertising under the DSA. The definition of 'advertisement' (Article 3(r) DSA, see above) requires an explicit link between the remuneration of advertising and the platform offering this service. In contrast, influencer marketing is typically based on off-platform supply chains, and while platforms have an essential role to play in their dissemination, the remuneration element towards the platform is clearly missing. As a consequence, the specific obligations for online intermediaries (including social media platforms) in relation to advertising in principle do not apply to influencer marketing. In its proposed changes, the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) took a clear stance in adding influencer activities under the umbrella of the DSA's advertising definition.⁴⁴ However, these proposals have not been integrated in the final version.

Even so, influencer marketing can be analysed in the light of the DSA in a different manner, namely by looking at its general rules applicable to illegal content, as a bridge towards additional provisions in the consumer *acquis* relating to advertising.

3.2.1. The definition of illegal content

The notion of 'illegal content' in the DSA is a bridge between different types of content regulation, as illustrated by Article 2(g), according to which it means "any information, which, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State, irrespective of the precise subject matter or nature of that law." In consequence, any violation of European Union law, such as the rules embedded in the consumer *acquis*, can lead to illegal content. The Preamble to the DSA further explains this stance. Recital 12 specifies that the concept of 'illegal content' should be defined broadly as to cover "existing rules in the offline environment", thereby setting the regulatory expectations that everything which is illegal offline should also be illegal online. The recital goes on to elaborate that content can entail information which is illegal in itself (e.g. hate speech or terrorist content), or that relates to activities which are deemed illegal under specific frameworks. Most notably, Recital 12 also makes particular reference to consumer protection compliance, as it deems an illustrative

example to be "the sale of products or the provision of services in infringement of consumer protection law".

It therefore follows that the European law-maker wanted to include violations of consumer protection rules as illegal content under the DSA, particularly since the concept of illegality does not have a narrow meaning referring exclusively to criminal law standards. Illegality is a term of art also mirrored by the E-Commerce Directive.⁴⁵ For instance, Article 14 references 'illegal information' and 'illegal activity'. In the light of Recital 8 of the E-Commerce Directive, which states that "the objective of this Directive is [...] not to harmonise the field of criminal law as such", it can be said that while illegal information was not defined in the Directive, it very much envisaged specific examples of illegality (e.g. criminal law infringements). Nevertheless, in practice it also covered other types of unlawful content, such as infringements of intellectual property.

The DSA captures a more complex landscape of illegal content, given that it introduces additional obligations for online marketplaces, based on this broad understanding of illegal content. This is both a blessing and a curse for the DSA. First, it is a blessing because it clarifies the interaction between different areas of sectoral content regulation and platform liability. So far, the lack of clarity relating to legal compliance has led to platforms creating private hierarchies around norms that impact content moderation, giving criminal law and intellectual property almost exclusive attention in the voluntary monitoring of content.⁴⁶ The DSA clarifies that platforms need not only observe and comply with criminal law and intellectual property law standards, but also for instance consumer protection, media law, non-discrimination law, as well as any other regulatory sector with relevance for online content, particularly on social media platforms. One such example of consumer protection rules flows from the Unfair Commercial Practices Directive (UCPD),⁴⁷ prohibiting paid and undisclosed advertorials (see also 3.2.2. below).⁴⁸ Second, it is a curse because consumer protection is merely one of many categories of sectoral regulation the DSA implies to be substantively relevant for defining illegal content. To the extent that national

⁴³ This is different to e.g. the Unfair Commercial Practices Directive, which covers *commercial* practices only. See in particular Article 2(d) of that Directive.

⁴⁴ Catalina Goanta, 'Human Ads Beyond Targeted Advertising' (*Verfassungsblog*, 5 September 2021) <<https://verfassungsblog.de/power-dsa-dma-11/>> accessed 10 December 2022.

⁴⁵ Christina Hultmark Ramberg, 'The E-Commerce Directive and Formation of Contract in a Comparative Perspective' (2001) 1 *Global Jurist Advances*; Sophie Stalla-Bourdillon, 'Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well' in Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers*, vol 31 (Springer International Publishing 2017) <http://link.springer.com/10.1007/978-3-319-47852-4_15> accessed 10 December 2022.

⁴⁶ Xandra Kramer and others (eds), 'Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts', *Frontiers in Civil Justice* (Edward Elgar Publishing 2022) <<https://www.elgaronline.com/view/book/9781802203820/book-part-9781802203820-17.xml>> accessed 10 December 2022.

⁴⁷ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L-149/22.

⁴⁸ Luzak and Goanta (fn 15). See also Bram Duivenvoorde, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive', (2013) 2 *Journal of European Consumer and Market Law* 69; John Velentzas, Georgia Broni and Elektra Pitoska, 'Unfair Commercial Practices on Marketing - Advertising and Consumer Protection in Eu Member States' (2012) 1 *Procedia Economics and Finance* 411.

and European rules prohibit conduct that can be translated into content, any such legal framework can equally be used to interpret the meaning and consequences of illegal content. This can easily lead to competition in regulatory enforcement, resulting in the hierarchization of interpretations depending on complex enforcement factors and perceived levels of user harm.

3.2.2. *The UCPD and the interplay with the DSA*

As the instrument that governs unfair trade in the European Union, the UCPD covers advertising practices which may be unfair, misleading or aggressive towards European consumers.

Put plainly, influencer marketing may be in violation of European consumer protection when it is not disclosed.⁴⁹ In this situation, influencer marketing echoes earlier forms of hidden advertising practices wherein for instance newspapers would publish articles which audiences would consider to be neutral from a journalistic perspective, but which in fact were advertorials paid by the organizations at the heart of the story. In other words, if information is presented in a way which is perceived to be neutral, when in fact transactional interests affect it, this is seen by consumer law as an unfair practice that affects the consumer's freedom to choose own goods and services based on untarnished information. Particularly in the advertising world, such advertorials as exemplified above, have been identified as being in clear violation of the prohibition to use unfair commercial practices, if advertising is hidden. The UCPD Annex, which includes practices considered unfair in all circumstances, covers advertorials in point 11: "Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)". In *Peek & Cloppenburg*, the CJEU further clarified the concept of payment, and concluded that it needs to be interpreted broadly, and that while an exchange of money can certainly fall under this interpretation, money as such is not the only type of practice which fulfills the criteria of Annex point 11.⁵⁰

In spite of the fact that the *Peek & Cloppenburg* judgement does not analyse influencer marketing practices as such, the similarity with advertorials is undeniable, and it has been argued that this judgement confirms the applicability of the UCPD (as well as point 11 of the Annex) to advertising practices such as influencer marketing. This is in line with the stance already taken by the European Commission in its guidance on the application of the UCPD.⁵¹ The Commission points out that influencer marketing, when non-disclosed, can also fall under Annex point 22, as it often entails falsely representing oneself as a consumer, when in fact influencers act for commercial purposes.⁵² These developments reflect a general approach in consumer protection of considering hidden advertising by influencers as a harmful and prohibited practice

towards consumers. But how does this affect the DSA's stance on native advertising?

Resulting from the qualification of content infringing consumer protection rules as illegal in the meaning of the DSA is the obligation of platforms to act against illegal content "[u]pon the receipt of an order [...] issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union law or national law in compliance with Union law" and to "inform the authority issuing the order, or any other authority specified in the order, of any effect given to the order without undue delay, specifying if and when effect was given to the order" (Article 9(1) DSA). From this perspective, the DSA can be said to add further avenues for national authorities for a more effective communication and action channel vis-à-vis platforms, subject to existing national rules on administrative procedures which are available to the various relevant public authorities. While we do not extensively deal with administrative harmonization in this paper, it must be noted that the implementation of the DSA will be heavily influenced by the alignment of procedural frameworks which are aimed at curtailing platform practices, whether via platform regulation (such as the DSA) or sectoral laws (such as the consumer *acquis*). In brief, what we refer to administrative harmonization here reflects the body of national rules relating to the enforcement of specific European regulatory instruments.

The practical limitation of tackling influencer marketing as illegal content under the DSA is the sheer scope of this industry. Complementing the DSA with consumer protection legislation (and enforcement powers) would merely result in the notification of undisclosed advertising on a case-by-case basis. In other words, consumer authorities would have to notify platforms of individual posts which may qualify as illegal content. Yet influencer marketing, particularly on very large online platforms (VLOPs) remains overwhelmingly underdisclosed at a scale which is difficult to fathom.

According to a recent empirical study undertaken on 12 years of Instagram data based on 400 influencers and four jurisdictions, it was found that on average, content that is self-disclosed by influencers makes up slightly around 2.5% of the total amount of their posts.⁵³ Earlier research on YouTube and Pinterest equally showed that out of a selected dataset comprising of affiliate marketing which ought to be entirely disclosed, only 10% of the affiliate deals were disclosed. Although measuring undisclosed influencer marketing is in its infancy, evidence is piling up that this category of native advertising remains heavily and overwhelmingly undisclosed. This raises questions about the role of platforms in curtailing the harm generated by a large volume of hidden advertising amplified by the platform. The scale of underdisclosed advertising may thus pose what the DSA calls a 'systemic risk' (Article 34 DSA),⁵⁴ leading to due diligence obligations incumbent on social media platforms to identify and curtail such risks, particularly "stemming from the design, functioning and use

⁴⁹ See generally Michaelsen et al. (fn 2).

⁵⁰ Case C-371/20 *Peek & Cloppenburg* ECLI:EU:C:2021:674.

⁵¹ European Commission (fn 16).

⁵² Laura Clausen and Christine Riefa, 'Towards Fairness in Digital Influencers' Marketing Practices', (2019) 8(2) *Journal of European Consumer and Market Law* 64-74.

⁵³ Thales Bertaglia, Catalina Goanta, Gerasimos Spanakis and Anda Iamnitci, 'Influencer Self-Disclosure Practices on Instagram: A Multi-Country Longitudinal Study' (2022).

⁵⁴ According to Article 34(1)(a) DSA, the very dissemination of illegal content is a systemic risk.

of their services, as well as from potential misuses by the recipients of the service”.⁵⁵

3.3. Protection against harmful personalised advertising

Unlike with influencer marketing, the DSA’s specific obligations for online intermediaries in relation to advertising do apply to personalised advertising that is disseminated via platforms. The DSA introduces several rules which are specifically relevant for personalised advertising. These are the duty to be transparent about targeting (Article 26.1(c) DSA, see below under 3.3.1.), the prohibition to target advertising on the basis of sensitive personal data (Article 26.3 DSA, see below under 3.3.2.), the prohibition to use the data of minors for targeting advertising (Article 28.2 DSA, see below under 3.3.3.) and the obligation to maintain an ad archive (Article 39 DSA, see below under 3.3.4.). Apart from these specific rules in relation to advertising, the DSA can also be relevant to personalised advertising through its general rules on illegal content (see below under 3.3.5.). A full ban on online behavioural advertising was proposed by left-wing political groups in the European Parliament, but did not have support of the majority.⁵⁶

3.3.1. Targeting transparency: article 26.1(c) DSA

The primary way in which the DSA aims to protect consumers against personalised advertising is through Article 26.1(c) DSA, which introduces an information duty for online platforms that present advertising on their online interfaces.⁵⁷ This duty will apply to a wide range of online intermediaries, including e.g. social media platforms.

These online platforms will have to provide their users, for each ad shown, “*meaningful information about the main parameters used to determine the recipient to whom the advertisement is presented and where applicable about how to change those parameters*”. The information “*shall be directly and easily accessible from the advertisement*” and must be presented “*in a clear, concise and unambiguous manner and in real-time*”.⁵⁸ Recital 68 of the Preamble to the DSA stresses that the disclosure must provide “*meaningful explanations of the logic used*” for determining that a specific advertisement is presented to a user, “*including when this is based on profiling*”. The idea is that consumers will be able to understand whether and why they are specifically targeted by an ad.⁵⁹

An obligation to be transparent about targeting does not yet exist under EU consumer protection law. Since the adop-

tion of the Modernisation Directive, the Consumer Rights Directive does hold a duty for traders to inform consumers if prices are personalised,⁶⁰ but the existing consumer acquis does not force traders to be transparent about personalisation of advertising as such.⁶¹ In that sense, Article 26.1(c) DSA clearly contributes to raising the level of consumer protection.

However, the question will be how effective this mandatory disclosure will be to protect consumers against the exploitation of vulnerabilities through personalised advertising. There is reason to be pessimistic in this regard. Consumer research shows that information duties generally tend to have a limited effect in empowering consumers.⁶² Consumers often do not read the information, do not use it or are unable to understand it.⁶³

More specifically in relation to Article 26.1(c) DSA: even if consumers do read the disclosure, it is questionable whether the duty to give consumers “*meaningful information about the main parameters*” will actually enable consumers to understand whether and how their vulnerabilities are being targeted. On the basis of the text of Article 26.1(c) DSA, it will be sufficient for platforms to indicate to consumers on the basis of *what characteristics* in the platform’s database they have been chosen for targeting. Online platforms will not have to disclose *why* certain characteristics have been chosen.⁶⁴ For example, if it is disclosed to a user that an online casino ad is served to him because he is male, aged 25–34, likes to play competitive games on apps provided on social media platforms, and has friends on said platforms who share information about playing at online casinos, will that user understand that he is targeted because these characteristics are known to the online casino operator to be strong indicators of him being prone to gambling addiction, and thus a serious source of income for the online casino?⁶⁵ It seems unlikely that users

⁶⁰ Article 6.1(ea) CRD.

⁶¹ Such a duty can also not be derived from the UCPD. See more elaborately Strycharz and Duivenvoorde (fn 27).

⁶² See for empirical research on transparency and consumer empowerment in the context of consent for data collection and processing for personalised marketing Joanna Strycharz et al, ‘No to cookies: Empowering impact of technical and legal knowledge on rejecting tracking cookies’ (2021) *Computers in Human Behavior* 106750.

⁶³ Oren Bar-Gill and Omri Ben-Shahar, ‘Regulatory techniques in consumer protection: a critique of European consumer contract law’ [2013] *Common Market Law Review* 109, 110, 117; Christoph Busch, ‘The future of pre-contractual information duties: from behavioural insights to big data’ in Christian Twigg-Flesner, *Research handbook on EU consumer and contract law* (Edward Elgar 2016) 221, 226.

⁶⁴ Interestingly, in the Q&A (updated version of 14 November 2022) accompanying the DSA, the European Commission states that users should be “*clearly informed whether and why they are targeted by each ad*”. In this sense the text of Article 26.1(c) DSA does not live up to this promise. See European Commission, ‘Questions and Answers: Digital Services Act’ (European Commission, 14 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 10 December 2022).

⁶⁵ Fictitious example, inspired on Ricardo Twumasi & Prof Sukhi Shergill, ‘Problem gambling: Why do some people become addicted?’ (BBC, 23 January 2020) <<https://www.bbc.com/news/health-50828086>> accessed 10 December 2022; Mayo

⁵⁵ Recital 79, DSA Preamble.

⁵⁶ Clothilde Goujard, ‘European Parliament pushes to ban targeted ads based on health, religion or sexual orientation’ (Politico, 20 January 2022) <<https://www.politico.eu/article/european-parliament-bans-use-of-sensitive-personal-data-for-targeted-ads/>> accessed 10 December 2022.

⁵⁷ Article 26.1 DSA also introduces a duty for platforms to ensure that advertising can be recognized as such (Article 26.1(a) DSA) and to disclose the identity of the party behind the advertisement (Article 26.1(b) DSA). These duties already apply to traders (including platforms) on the basis of the UCPD.

⁵⁸ The latter requirement is stated in Article 26.1, first sentence.

⁵⁹ See European Commission, ‘Questions and Answers: Digital Services Act’ (European Commission, 20 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 10 December 2022).

will truly understand *why* they are being targeted, and that the reason may lie in their own vulnerability.⁶⁶ Without such knowledge, it seems unlikely that consumers will guard themselves toward such advertising.

3.3.2. Prohibition to target advertising on the basis of sensitive personal data: article 26.3 DSA

While a full ban on online behavioural advertising did not make it into the final version of the DSA, Article 26.3 DSA does prohibit online platforms to present advertising to users based on profiling using special categories of sensitive data. Together with the ban to target advertising to minors based on profiling (see 3.3.3. below), this provision was adopted by the European Parliament during its first reading of the DSA⁶⁷ and (although changed on some details) survived the tripartite negotiations with the European Commission and the Council. According to Recital 69 of the Preamble to the DSA, Article 26.3 DSA is meant to address the negative effects of targeted advertising that potentially appeals to consumers' vulnerabilities.

Article 26.3 DSA relies on two notions in the General Data Protection Regulation (GDPR).⁶⁸ Firstly, it relies on the definition of 'profiling' within the meaning of Article 4.4 GDPR. According to Article 4.4 GDPR, "profiling" means "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".⁶⁹ Profiling essentially requires three elements: (1) it has to be an *automated* form of processing, (2) it has to be carried out on *personal data* and (3) the objective of the profiling must be to *evaluate personal aspects* about a natural person.⁷⁰ Profiling works by creating derived or inferred data by individuals. Hence, it creates 'new' personal data that has not

been provided directly by the data subjects themselves.⁷¹ Online behavioural targeting is an advertising method that typically involves profiling.⁷² However, while many cases of personalised advertising will involve profiling, this will not always be the case. For example, if a social media platform is offering companies the possibility to target advertising to its users based simply on the gender and age data that are provided by its users, this does not constitute profiling.

Secondly, Article 26.3 DSA relies on the notion of 'special categories of personal data' as referred to in Article 9.1 GDPR, including e.g. racial or ethnic origin, political opinions, data concerning health and data concerning a person's sexual orientation. Interestingly, while Article 26.3 DSA is presented as a ban on targeted advertising based on special categories of personal data such as race or sexual orientation,⁷³ Article 9.1 GDPR refers somewhat more broadly to personal data *revealing* such sensitive categories. The Article 29 Data Protection Working Party Guidelines on Automated and Individual Decision-making and Profiling make clear that 'special categories of personal data' can also cover sensitive data by inference, such as inferred sexual orientation based on the behaviour of users on social media.⁷⁴ Recent judgments of the CJEU confirm this broad understanding of sensitive data.⁷⁵

Article 26.3 DSA goes further in protecting consumers in the sense that the GDPR does allow for profiling on the basis of sensitive personal data, provided that the data subject has given his express consent.⁷⁶ A prohibition that is similar to

Clinic, 'Compulsive gambling' (Mayo Clinic, 18 June 2022) <<https://www.mayoclinic.org/diseases-conditions/compulsive-gambling/symptoms-causes/syc-20355178>> accessed 10 December 2022.

⁶⁶ What will further obscure the picture is that the parameters that indicate the vulnerabilities in the example above will not be the only parameters used – and therefore also not the only parameters disclosed. Most likely, other parameters such as location and language will also be used.

⁶⁷ See European Parliament, 'Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825' – C9-0418/2020 – 2020/0361(COD))' P9_TA(2022)0014, amendment 500.

⁶⁸ 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 L119/1.

⁶⁹ See on the definition of profiling also Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 17/EN WP251rev.01 (last updated 6 February 2018), 6-8.

⁷⁰ Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 17/EN WP251rev.01 (last updated 6 February 2018), 6-7.

⁷¹ Idem, p. 9. See also Klaus Wiedemann, 'Profiling and (automated) decision-making under the GDPR: a two-step approach' [2022] 45 Computer Law & Security Review 105662, 5.

⁷² Federico Galli, 'Online behavioural advertising and unfair manipulation between the GDPR and the UCPD' in M Ebers and M Cantero Gamito (eds), *Algorithmic governance and governance of algorithms* (Springer 2021) 113.

⁷³ See, for example, See European Commission, 'Questions and Answers: Digital Services Act' (European Commission, 14 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 10 December 2022); Clothilde Goujard, 'European Parliament pushes to ban targeted ads based on health, religion or sexual orientation' (Politico, 20 January 2022) <<https://www.politico.eu/article/european-parliament-bans-use-of-sensitive-personal-data-for-targeted-ads/>> accessed 10 December 2022.

⁷⁴ Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 17/EN WP251rev.01 (last updated 6 February 2018), 15.

⁷⁵ See Case C-184/20 OT v Vyriausioji tarnybinės etikos komisija [2022] ECLI:EU:C:2022:601, in which the European Court of Justice makes clear that the publication of the name of a spouse or partner amounts to the processing of sensitive data because it could reveal sexual orientation. See also Case C-252/21 Meta v Bundeskartellamt [2023] ECLI:EU:C:2023:537, in which the European Court of Justice emphasizes that, for the application of Article 9.1 GDPR, it is neither necessary that the information is correct, nor that the controller aims to obtain the information in question.

⁷⁶ Giovanni Sartor, Federica Lagiola and Federico Galli, 'Regulating targeted and behavioural advertising in digital services - How to ensure users' informed consent' (Study for the IMCO Committee of the European Parliament, July 2021) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)694680](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)694680)> accessed 10 December 2022, 65 and 70. More generally, note that the CJEU recently handed down a judgment in which it severely limits

the one in Article 26.3 DSA can be found in the proposal for the Political Advertising Regulation.⁷⁷ For political advertising, profiling based on sensitive personal data will be prohibited not just for online platforms (as will be the case under the DSA), but also for political advertising via other media.⁷⁸

By prohibiting the use of special categories of personal data for targeting involving profiling, Article 26.3 DSA in particular addresses issues in relation to discrimination. Parties like Facebook have been criticised in the past for offering possibilities to specifically exclude groups based on ethnicity.⁷⁹ Coincidence or not, Meta (Facebook) announced in November 2021 that it was going to remove detailed ad targeting options based on sensitive topics like health, race or ethnicity, political affiliation, religion and sexual orientation as of early 2022.⁸⁰

Despite the generally formulated goal of Article 26.3 DSA to address the negative effects of targeted advertising that potentially appeals to consumers' vulnerabilities (see Recital 69 to the Preamble to the DSA), Article 26.3 DSA does not address these general consumer protection concerns in relation to consumer vulnerability. For example, it does not address issues such as targeting less rational consumers, or the exploitation of external circumstances. Similarly, relating this to the online gambling example (see 3.3.1.), Article 26.3 does not address the targeting of consumers on the basis of characteristics (like age, gender, liking competitive games and having friends that gamble) that indicate that these consumers may be prone to gambling addiction. In this sense Article 26.3 DSA can be regarded as a contribution to consumer protection, but only within its limited scope. The exploitation of consumer vulnerabilities through personalised advertising will therefore typically remain a matter that must be dealt with under the

social media platforms (in this case: Meta) in cross-site tracking and basing behavioural advertising on that basis. In essence, the court emphasizes that Meta must in principle have consent for behavioural advertising and cannot successfully invoke one of the other legal basis for processing in the GDPR. See Case C-252/21 *Meta v Bundeskartellamt* [2023] ECLI:EU:C:2023:537. Following this judgment, the Norwegian data protection authority Datatilsynet of imposed a temporary ban on Meta to run behavioural advertising on Facebook and Instagram in Norway. See Natasha Lomas, 'Meta's behavioral ads banned in Norway on Facebook and Instagram' (*Techcrunch*, 17 July 2023), including link to Datatilsynet's order against Meta.

⁷⁷ Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM (2021) 731.

⁷⁸ Article 12.1 Political Advertising Regulation.

⁷⁹ Julia Angwin and Terry Parris Jr, 'Facebook Lets Advertisers Exclude Users by Race' (*ProPublica*, 28 October 2016) <<https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>> accessed 10 December 2022.

⁸⁰ See Charlotte Hu, 'Facebook is making a big change in how it serves ads' (*Popular Science*, 10 November 2021) <<https://www.popsci.com/technology/meta-facebook-targeted-advertising-changes/>> accessed 10 December 2022; Anna Sonnenberg, 'How to Prepare for Facebook Audience Targeting Changes' (*Social Media Examiner*, 8 February 2022) <<https://www.socialmediaexaminer.com/how-to-prepare-for-facebook-audience-targeting-changes/>> accessed 10 December 2022.

UCPD⁸¹ – although the possibilities of this instrument to do so effectively are limited.⁸²

3.3.3. Prohibition to target advertising to minors based on profiling: article 28.2 DSA

Article 28.2 DSA specifically addresses advertising that is targeted at minors. In the (online) press, this provision has been coined as a prohibition to serve targeted ads to minors.⁸³ This is also what the European Parliament had in mind,⁸⁴ but the final version of Article 28.2 DSA does not go as far. Similar to Article 26.3 DSA, Article 28.2 DSA only prohibits advertising that is based on profiling as defined in Article 4 point 4 GDPR. As discussed above, this means that online behavioural targeting that is directed at minors will in principle be prohibited, and potentially also many other types of personalised advertising that is targeted at minors (see the discussion on the notion of 'profiling' above).

However, it is important to realize that Article 28.2 DSA does not encompass an overall ban of targeting minors with advertising. If the targeting is not based on profiling, it is not prohibited. Take for example YouTube's special platform for children, called YouTube Kids.⁸⁵ So-called pre-roll advertising videos are shown in YouTube Kids before selected videos are watched.⁸⁶ YouTube claims that it does not allow interest-based advertising and ads using remarketing or other tracking pixels in YouTube Kids,⁸⁷ which suggests that YouTube Kids does not apply profiling for targeted advertising. However, YouTube does allow advertisers to select specific channels, playlists or videos on YouTube Kids for their advertising.⁸⁸ So without relying on profiling, companies can select

⁸¹ Note that the DSA explicitly states that it is without prejudice to the consumer acquis, see Article 2.4(f) DSA.

⁸² Strycharz and Duivenvoorde (fn 27).

⁸³ See e.g. Igor Bonifacic, 'European Union limits targeted advertising and content algorithms under new law' (*Engadget*, 23 April 2022) <https://www.engadget.com/eu-agreement-digital-services-act-172049636.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAHcA9yt7Vr7Fy_IWMgco2kzjXcdpOjgdkD9yM9dISvio16nXP T0V3qLvKgVr39Ixuvxz0WaekP_Oyul6Snp_-_OveNGVRkop-vCQk1Y20z8ub0Pv05Z_epsp5Ebrg_XwsFa8q8PLWfgK66VVuzjiOXdq iAkbbWlBYS7rCPYjYtv0U> accessed 10 December 2022.

⁸⁴ See amendment 500, reading "Targeting or amplification techniques that process, reveal or infer personal data of minors or personal data referred to in Article 9(1) of Regulation (EU) 2016/679 for the purpose of displaying advertisements are prohibited."

⁸⁵ YouTube Kids <www.youtubekids.com> accessed 10 December 2022.

⁸⁶ See 'Advertising on YouTube Kids' (YouTube Help) <<https://support.google.com/youtube/answer/6168681>> accessed 10 December 2022.

⁸⁷ Ibid. See more generally on restrictions of the targeting of ads to minors by Google: Elizabeth Culliford, 'Google restricts ad targeting of under-18s' (*Reuters*, 10 August 2021) <<https://www.reuters.com/technology/google-restricts-ad-targeting-under-18s-2021-08-10/>> accessed 10 December 2022.

⁸⁸ See Barbara Ortutay, 'Lawmakers call YouTube Kids a 'wasteland of vapid' content' (*ABC News*, 7 April 2021) <<https://abcnews.go.com/Business/wireStory/lawmakers-call-youtube-kids-wasteland-vapid-content-76904201>> accessed 10 December 2022. See also the explanation by digital marketing agency Labelium directed at advertisers, 'YouTube Kids' Role as an

the right audience in order to best convey their advertising messages, selecting e.g. channels that are likely watched by children of a specific age and gender and that show a specific interest. As long as the targeting is not based on profiling, it is allowed under Article 28.2 DSA.

Targeting advertising to minors based on profiling is only prohibited when the platform is aware with reasonable certainty that the recipient of the service is a minor. If the platform does not know that the user is a minor and does serve targeted advertising to this user, the platform is not in breach of Article 28.2 DSA. Hence, there is no duty for a platform to assess the age of each user. In this context Article 28.3 DSA stresses that Article 28.2 DSA does not oblige providers of online platforms to process additional personal data in order to assess whether the recipient of the service is a minor.

Comparing the ban on targeting advertising to minors on the basis of profiling to existing EU laws, it is clear that the DSA does go further in protecting consumers (in this case: minors). The GDPR does not prohibit the profiling of children as such, although the Article 29 Working Party does advise companies against profiling consumers for marketing purposes.⁸⁹ Lacking a specific prohibition in the GDPR, the targeting of advertising to minors on the basis of profiling is subject to the general rules of the GDPR. As a consequence, targeting online behavioural advertising to children is only possible on the basis of consent, which for children under 16 (or potentially lower, depending on the national law of the EU Member State) requires verifiable parental consent.⁹⁰

3.3.4. Obligations for very big platforms to maintain an ad archive (Article 39 DSA)

The DSA also introduces an obligation for very large online platforms and very large online search engines to maintain an ad archive. This searchable database should be publicly available, providing data on the advertisements that were presented through the platform's online interface in the past year. Relevant for personalised advertising, the archive must include a range of data, including whether the advertisement was intended to be targeted at specific groups and, if so, on the basis of what main parameters these groups were targeted. This obligation is in line with the targeting transparency obli-

Advertising Platform in Online Video Strategies' (*Labelium*, 2 April 2020) <<https://www.labelium.com/blog/youtube-kids/>> accessed 10 December 2022. Labelium explains that marketers can choose to show advertising on specific channels or playlists in order to reach children of the right age.

⁸⁹ Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 17/EN WP251rev.01 (last updated 6 February 2018), 28-29. See also Valerie Verdoodt and Eva Lievens, 'Targeting children with personalised advertising - how to reconcile the (best) interests of children and advertisers' in Gert Vermeulen and Eva Lievens (eds), *Data protection and privacy under pressure - transatlantic tensions, EU surveillance, and big data* (Maklu 2017), 329.

⁹⁰ See Article 8 GDPR and Valerie Verdoodt and Eva Lievens, 'Targeting children with personalised advertising - how to reconcile the (best) interests of children and advertisers' in Gert Vermeulen and Eva Lievens (eds), *Data protection and privacy under pressure - transatlantic tensions, EU surveillance, and big data* (Maklu 2017), 323-324.

gation under Article 26.1(c) DSA (see above). This obligation may increase consumer protection against harmful personalised advertising, offering relevant data to enforcement authorities (like consumer protection authorities in the EU Member States) for the enforcement of substantive consumer protection rules in the consumer acquis (including the UCPD). However, similar to Article 26.1(c) DSA, the question will be whether the data provided by platforms will be sufficient for enforcement authorities to actually determine that consumer vulnerabilities are being targeted.

3.3.5. Relevance of the DSA's general provisions on illegal content

Finally, the DSA can also be relevant to the protection of consumers against harmful personalised advertising through its general provisions on illegal content. In particular, these provisions could strengthen enforcement of the UCPD, taking into consideration that unfair personalised advertising under the UCPD will qualify as illegal content under the DSA (see above). While the UCPD does not contain specific rules on personalised advertising, personalised advertising may be deemed unfair under specific circumstances, to be determined on a case-by-case basis.⁹¹ Similar to harmful influencer marketing, the DSA can e.g. give rise to the obligation of online platforms to act against unfair personalised advertising after receiving an order issued by a national consumer protection authority (Article 9(1) DSA).

3.4. Protection against harmful hybrid ads

As explained above (see 3.2.), influencer marketing is typically not covered by the definition of advertising under the DSA, since the definition of 'advertisement' (Article 3(r) DSA) requires an explicit link between the remuneration of advertising and the platform offering this service. This is different for hybrid ads. Influencer marketing that is mediated by platforms, to the extent that the payment is made via the platforms (e.g. brands pay TikTok to share Branded Missions with influencers, and TikTok pays influencers to engage in the missions), does involve remuneration of the platform and does therefore fall under the scope of the DSA's advertising rules. This section focuses on how hybrid ads, as on-platform influencer marketing, can be analysed from the perspective of the DSA in relation to two main issues: advertising disclosure and recommender system transparency.

Article 26, which entails an obligation to disclose advertising, is incumbent upon the platform. Advertising must be presented using 'prominent markings' (Article 26(1)(a) DSA), and must include reference to the brand paying for the ads (Article 26(1)(b) DSA), as well as the parameters on the basis of which a user has been targeted with those particular ads. In addition, according to Article 26(2), platforms are also required to provide 'functionalities' enabling - in this case - influencers to disclose commercial communications.

The difficulty in implementing this framework in the practice of social media algorithmic amplification is reflected by the very nature of native advertising, which is supposed to

⁹¹ See for an elaborate analysis of personalised advertising under the UCPD, Strycharz and Duivenvoorde (fn 27).

be relatable and authentic content, intimately linked to the identity and preferences of the advertisers, namely the influencers.⁹² This form of advertising was born out of the need to circumvent advertising rules and practices which made commercial communication less appealing to consumers.⁹³ Instead, influencers who take on subliminal challenges, and integrate the advertising of goods and services in their own identity do so as part of their performative role on social media. Unlike targeted advertising, the hybrid ads reflected by on-platform influencer marketing are not mere personalized advertising based on demographic profiling - they are content. Explaining to consumers why their algorithmic feed contains different types of content should, at least in principle, be a much more complex task than allowing third parties to use a more limited amount of profiling parameters and proxies. Social media content recommendations are based on a very sophisticated architecture aimed to train recommender systems based on user preferences,⁹⁴ inferred from their continuous activity on the platform. Of course, to make the analysis more concrete, it would be important to consider the specific features of recommender systems, which often vary depending on the platform. However, one mere look at such an architecture, for instance the general TikTok recommendation system,⁹⁵ should make us consider how the exponential complexity of algorithmic systems challenge the basic information duties mandated by rules such as Article 27. According to this article, platforms should “set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems”. Yet computer science research on recommender systems, currently largely based on unsupervised machine learning, shows that such a task might very well be practically impossible. For instance, when looking at the complex parameters of the TikTok recommendation system, which is a state of the art deep neural network, it is puzzling to consider how this complexity will be represented to users.⁹⁶ This raises legitimate concerns for some of the fundamental paradigms of consumer protection, focused on information duties and transparency as a means to empower consumers and reduce the power imbalance between consumers and - in this case - platforms.

Consequently, even though hybrid ads do fall under the scope of the DSA, the overlapping applicability of Articles 26 and 27, as well as the nature of native advertising and recommender systems shed a lot of doubt on the effectiveness of the disclosure or transparency duties with which the DSA was supposed to innovate platform regulation. This is a new way to target consumers with advertising, and further research should explore in greater detail particularly the transparency

challenges posed by hybrid ads with respect to consumer profiling, recommender systems and platform responsibility. As we have seen in the case of influencer marketing, further analysis is necessary to determine the qualification of hybrid ads as systemic risks, which goes outside of the ambit of this paper's aim to clarify the regime applicable to advertising under the DSA's definitions of advertising and illegal content.

4. Synthesis: three main pitfalls in the DSA's approach to protect consumers against the harms of digital advertising

In this paper, we explored the DSA's approach to protect consumers against harmful forms of digital advertising, with a particular focus on three practical developments reflecting the nature and versatility of business models in this industry and their impact on online consumer audiences: influencer marketing as an initial purveyor of the attention economy, personalised advertising as an early internet monetization option for tech companies, and hybrid ads as an example of how the digital advertising market is in a constant pursuit for new ways to permeate consumer activity on social media. While advertising is in itself a legal business, moving into the online world has allowed it to develop new means of deception. In turn, this can translate into worrying manipulative practices for consumers who either have no idea of the scale of surveillance to which they are subjected, or of the insincerity behind the parasocial relations influencers use to promote goods or services to their followers.

As we have seen in our analysis, the DSA does address some of the consumer protection concerns in relation to these developments. However, grounds for concern relating to the fitness of the DSA in governing digital advertising still remain. We identify three main pitfalls in this respect.

Firstly, the DSA has been adopted as an updated regulatory layer for platform liability. In the context of existing sectoral regulation, its wide range can pose a considerable cohesion and fragmentation problem. The DSA acknowledges the consumer *acquis*, but it also directly regulates issues which pertain to the *acquis*. As we have seen in the case of personalised advertising (see Section 3.3.), the DSA proposes new disclosure duties for platforms. Yet European consumer protection has already been relying on disclosures as tools for the improvement of fairness, albeit mostly focused on other traders than platforms. Now, questions arise in relation to how disclosures will be interpreted and complemented across the consumer *acquis* and the DSA. For instance, France's recent regulatory reform around influencer marketing, which considers undisclosed advertising explicitly as illegal content under the DSA but also as consumer protection violations, links the concept of illegal content to consumer disclosures.⁹⁷ This law crystallizes existing rules on advertising transparency and information duties found in instruments such as the UCPD. While

⁹² De Veirman, Hudders and Nelson (fn 6).

⁹³ Wojdynski and Evans (fn 1).

⁹⁴ Anitha Anandhan and others, 'Social Media Recommender Systems: Review and Open Research Issues' (2018) 6 IEEE Access 15608.

⁹⁵ Zhuoran Liu et al., 'Monolith: Real Time Recommendation System With Collisionless Embedding Table' <<https://arxiv.org/pdf/2209.07663.pdf>> accessed 10 December 2022; Maximilian Boeker and Aleksandra Urman, 'An Empirical Investigation of Personalization Factors on TikTok' (2022) WWW '22: Proceedings of the ACM Web Conference 2298–2309.

⁹⁶ Ibid.

⁹⁷ Article 10 of Law no. 2023-451 of June 9, 2023 aimed at regulating commercial influence and combating the abuses of influencers on social networks (*Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux*).

these duties are generally incumbent upon brands and influencers, they may be rendered ineffective by unsuitable infrastructures. If influencers disclose advertising by adding '#ad' at the end of a lengthy post, it might not even be visible. Instead, standardized disclosures that are native to the platform's interface (e.g. 'paid partnership with') play a vital role in the disclosure discussion. As a consequence, the DSA's role in governing platforms needs to also be understood in the light of the obligations intermediaries may have under the consumer *acquis*. The resulting overlap and fragmentation complicates platform liability regimes rather than clarifying them.⁹⁸

Secondly, focusing on the consumer harms we have explored in this paper, another important pitfall is the limited extent to which the DSA will likely contribute to consumer protection. For example, the DSA's provisions on personalised advertising seem to be helpful to consumers only to a limited extent. The targeting bans are limited in scope, and the transparency duties are unlikely to empower consumers in practice. We also highlighted the limited added value of the DSA in terms of consumer protection when discussing the applicability of the DSA to influencer marketing. The drafters explicitly left this advertising development outside of the ambit of the DSA's advertising rules, and the added value of the general provisions of the DSA (providing a link between the DSA and the UCPD via the definition of 'illegal content') remain unclear. Will this bridge give rise to more certainty in terms of how administrative requests to act upon content will take place in the future? Although not included in this paper, the discussion around the administrative harmonization (or lack thereof) which has stunted the effectiveness of the E-Commerce Directive is highly relevant for this debate as well. The DSA does little (if anything) to harmonize administrative procedures to govern the relationships between i.e. consumer protection authorities and social media platforms. In this case, linking the concept of 'illegal content' to the consumer *acquis*, amongst others, may bring no considerable improvement in the situation of consumers who may be suffering from harms relating to manipulative advertising practices. In addition, as indicated before, the sheer scale of influencer marketing entails tens if not hundreds of thousands of individuals who may qualify as traders under consumer law. The administrative paradigm behind the DSA's notice and action process does not seem to acknowledge that dealing with individual posts which may be considered 'illegal content' if linked to consumer protection violations is practically impossible.

Thirdly, hybrid ads challenge the future-proof nature of the DSA. Content monetization is a highly strategic agenda for social media platforms, who are scrambling to create new revenue sources, particularly since legislators are constantly reducing the legal grounds upon which they can rely for personalised advertising. On-platform influencer marketing as hybrid ads show the high paced nature of technology-driven advertising: social media platforms constantly evolve, adapt to

and shape volatile audiences. With the growth of influencer marketing, social media organizations found themselves in a position to generate new forms of monetization for themselves and for content creators, while catering to an ever-expanding market of native advertising hidden as authentic content and entertainment. The DSA excludes influencer marketing from its material scope, as the European legislator preferred to focus on governing advertising which is generated as a service by - and paid to - platforms. However, hybrid ads are still influencer marketing in nature, yet they do fit the advertising definition in the DSA. Even before the DSA becomes applicable, this shows a vulnerability which should have been given more thought to by its drafters: that advertising changes, and it changes fast. This fast pace of digital markets challenges the future-proofness of regulation. In the case of the DSA, this is already leading to a granularity of different legal regimes applicable to the same actors in this industry, without a compelling strategy for this regulatory outcome.

All in all, the DSA brings some important regulatory innovations in curtailing the negative impact of digital advertising, but it very much misses the mark in recognizing and effectively governing the complex world of digital advertising, and the consumer harms that are associated with it. What results is a myriad of interconnected legal rules, and little if any guidelines for how these rules are supposed to apply. These are the legal frameworks which are supposed to reign in the complex and sophisticated global advertising industry. It remains to be seen how these pitfalls are to be overcome, and if the Commission can still mend them through guidelines or other policy actions.

5. Conclusion

This article critically assessed the extent to which the Digital Services Act (DSA) protects consumers in relation to three important developments in digital advertising: (i) the rise of influencer marketing as a new form of native advertising (ii) the personalisation of advertising and (iii) hybrid ads as advertising solutions that find themselves at the intersection of influencer marketing and personalised advertising. We described and analysed these developments to better understand whether and how they are governed by the DSA from the perspective of consumer protection. While the DSA specifically left influencer marketing out of the material scope of its specific rules on advertising, new forms of advertising (i.e. on-platform influencer marketing, which we referred to as hybrid ads) challenge this choice, as we argue they do fall under the advertising rules in the DSA, just as personalised advertising. The resulting regulatory choice of differentiating between advertising practices on social media is odd at best, since it does not take into account the characteristics of these practices or the essential role of social media platforms in other forms of advertising than personalised advertising.

The paper critically revealed and discussed three main pitfalls related to the way in which the DSA tackles the selected digital advertising developments: coherence/fragmentation; little consumer benefits; and limited future-proofing. The relationship between sectoral regulation such as consumer protection and the DSA is complex and thus far remains

⁹⁸ On the complex relationship between the UCPD and the DSA, see also Bram Duivenvoorde, 'The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act' [2022] *Journal of European Consumer and Market Law* 43 (specifically in relation to the position of online marketplaces).

uncertain, until we see more evidence of how national authorities and the European Commission will interpret this interplay. In addition, questions relating to the administrative harmonization between consumer and digital service authorities procedures, which have been generally left out of the ambit of this paper, will play an important role in determining the ambitions of the DSA.

In the light of this discussion, we cast some doubt regarding the effectiveness of the DSA in addressing the consumer harms which may arise out of digital advertising. While it is supposed to set out regimes applicable to platforms, the cherry-picking of practices which ought to fall under its ambit reflects a missed opportunity to cohesively harness the

previous fifty years of consumer protection legislation in the European Union for the purpose of redressing the new types of power imbalances digital platforms created in the online world.

Declaration of Competing Interest

The authors declare no conflict of interests.

Data availability

No data was used for the research described in the article.