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In Comparative International Relations – Americas

Final Thesis

ONLINE ADVERTISING AND THE ISSUE OF PRIVACY:

A comparative analysis of the EU and the USA policies towards online advertising regulation

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ABSTRACT

La fondazione dello spazio Web nel secolo scorso ha porta alla creazione di nuove piattaforme e nuovi metodi di condivisione senza precedenti che, con il supporto di tecnologie all'avanguardia, hanno creato un nuovo mondo a cui le persone possono interfacciarsi. In questo nuovo spazio la pubblicità si è evoluta adottando nuovi sistemi che potessero permettere alle aziende di creare contenuti pubblicitari su misura, in base alle preferenze degli utenti, che ogni giorno utilizzano internet per diversi fini.

La pubblica digitale, il "relativamente" nuovo metodo di proporre un determinato prodotto e servizio al pubblico, ha creato nuove minacce sia per il consumatore, sia per la protezione dei dati. Lo sviluppo di siti web, blog e vlog ha dato la possibilità alle imprese di avvicinarsi maggiormente agli utenti e proporre, grazie alla cosiddetta pubblicità comportamentale, prodotti sempre più inerenti hai bisogni delle persone.

I social network, creati conseguentemente alla fondazione del web, hanno ulteriormente ampliato i mezzi di interazione con il pubblico disponibili per le aziende operanti nel settore della pubblicità. La creazione del cosiddetto influencer marketing, avvenuta nell'ultimo secolo, ha visto un incremento sia in prodotti pubblicizzati che in prodotti venduti, grazie all'utilizzo di questi personaggi considerati "affidabili" dal pubblico.

Nonostante la fiducia posta dal consumatore nei confronti di un individuo "noto", la minaccia che comporta il possibile utilizzo di pratiche sleali da parte di questo costituisce una fonte di preoccupazione per gli organismi che operano negli interessi delle persone. Quest'ultime interagendo nelle piattaforme social sono molto spesso ignare dei pericoli e delle conseguenze che le pratiche sleali possono produrre nei loro confronti.

Le piattaforme social, come evidenziano diverse statistiche che la tesi riporterà, sono utilizzate da utenti che molto spesso non raggiungo la maggior età. Questa maggioritaria fascia di utenti considerata "ingenua" può essere facilmente influenza e condizionata da questo mondo che, imponendo stereotipi irraggiungibili, anche attraverso la pubblicità, vuole incentivare la vendita e il conseguente consumo di prodotti che avrebbero minor riscontro economico se non pubblicizzati nei social network ad un pubblico giovane che, non

consapevole delle pratiche pubblicitarie nascoste, si vede invogliato ad acquistare prodotti che in altre circostanze non valuterebbero utili.

La creazione di nuove tecnologie dovrebbe comportare anche l'implementazione di misure atte a regolare l'utilizzo di queste e a proteggere i diritti degli individui, specie se minorenni. Seguendo questa considerazione l'elaborato discuterà delle normative che si possono ricondurre alla pubblicità digitale, la quale, essendo protratta nell'internet, che non configura barriere statali, può riservare spiacevoli sorprese alle persone.

La tesi esaminerà quindi le principali normative introdotte, dall'Unione Europea e dagli Stati Uniti d'America, per fronteggiare gli eventuali pericoli che il nuovo metodo pubblicitario può riservare agli utenti del web.

La scelta di esplorare le normative di questi due attori è dettata dal fatto che questi risultano essere le principali potenze economiche al mondo. Considerando, quindi l'aspetto economico derivante dalla pubblicità, relazionare due potenze economiche può dar luce a dettagliati scenari nella regolamentazione e applicazione di normative relative alla pubblicità digitale, che d'altro canto possono servire come spunto nella implementazione di normative ad-hoc nei paesi che si basano sulle scelte normative di questi due grandi entità.

La differenza sostanziale nella conformazione politica degli Stati Uniti, uno stato federale, e l'Unione Europea, una organizzazione internazionale creata da stati che hanno delegato la sovranità in alcuni ambiti, costituisce un punto aggiuntivo nella codificazione delle normative riguardanti l'argomento trattato. Questo consentirà di evidenziare le differenze nell'approccio alla creazione di norme specifiche in ambito pubblicitario da parte di queste due potenze che risulterà in un confronto analitico.

Considerato il "relativamente" nuovo sistema di pubblicizzazione di prodotti e servizi, l'elaborato analizzerà il quadro normativo proposto dall'Unione Europea e dagli Stati Uniti d' America non solo in relazione alle pratiche pubblicitarie ma anche alla protezione dei dati personali. La decisione di prendere in esame il problema scaturito della violazione della privacy fa riferimento alla pubblicità comportamentale; come spiegherà infatti la tesi, questa attraverso l'utilizzo di dati riconducibili alla sfera privata di una determinata persona,

analizza e crea 'profili' utili alle compagnie pubblicare, le quali attraverso essi, sviluppano contenuti preposti al soddisfacimento degli interessi, delle preferenze e dei bisogni di questa. Il tema della protezione dei dati che vede applicazione in diversi settori è un tema centrale nell'era digitale; la circolazione di dati tra stato e stato è un punto importante sia nell'agenda europea che in quella statunitense. L'attuazione, l'implementazione e il controllo nel rispetto di norme relative alla protezione della privacy, infatti, è un punto focale sia per quanto riguarda i diritti umani sia per quello che concerne le decisioni prese da governi nella creazione di politiche in diversi ambiti.

Posto che la pubblicità comportamentale include al suo interno dati personali, questa indirettamente si configura come una pratica regolabile con normative relative proprio alla materia di dati personali, quindi ad un possibile rafforzamento della posizione degli utenti nel web.

L'elaborato, pertanto, prendendo in considerazione direttive e regolamenti e autoregolamenti implementati dall'Unione Europea e leggi federali, statali e autoregolamenti adottati dagli Stati Uniti analizzerà in modo analitico le politiche introdotte per regolamentare la pubblicità online, ciò nonostante, questo non comporterà solo l'analisi di norme direttamente indirizzate al mondo pubblicitario, ma anche all'esame di normative che indirettamente regolano questo mondo nel web.

La tesi introdurrà termini quali cookies, web bugs e indirizzi IP che costituiranno parte del contorno relativo al nuovo modo di pubblicizzare prodotti; questi nuovi dispositivi offerti dal web, infatti, sono parte integrante nella attuazione delle operazioni che le aziende pubblicitarie svolgono per pubblicizzare al meglio i loro prodotti.

Partendo da questi presupposti, l'elaborato cercherà di rispondere in modo analitico e approfondito a domande quali: In che modo l'Unione Europea e Stati Uniti definiscono la pubblicità digitale nel loro quadro normativo? Come vengono incorporate queste politiche a livello statale?

La tesi per analizzare e concretizzare tutti gli aspetti normativi rilevanti all'argomento e alle domande sopracitate, si avvarrà di fonti primarie quali direttive, regolamenti, leggi federali e statali; e di fonti secondarie quali autoregolamenti, sentenze, opinioni, guide, articoli e statistiche.

Con l'utilizzo di queste risorse la tesi provvederà al delineamento della materia pubblicitaria nel diritto europeo e statunitense creando, conseguentemente, una base teorica inerente alle fonti primarie che in seguito si tradurrà in una comparazione. Il background teorico fornito, successivamente combinato con la giurisprudenza, fornirà una spiegazione all'esecuzione delle normative nei casi analizzati, permettendo quindi di trarre le conclusioni più opportune ricavate dai dati elaborati.

Per fornire un approccio completo e sistematico la tesi si presenterà divisa in tre distinte sezioni, ognuna riguardante una sfera fondamentale nella esposizione delle norme relative alla pubblicità. Primariamente verranno analizzate le politiche dell'Unione Europea, partendo da un contesto storico, che prevedrà la presentazione delle organizzazioni che operano in materia di pubblicità, successivamente verranno analizzate, sempre nel contesto pubblicitario, le norme inerenti alla privacy; partendo dalla storica e abrogata direttiva sulla protezione dei dati (95/46/CE), seguendo con la Direttiva relativa alla vita privata e alle comunicazioni elettroniche (2002/58/CE) e, concludendo il capitolo con il Regolamento Generale sulla Protezione dei Dati. In seguito, sempre nella stessa sezione, verranno esaminate: la direttiva sulle pratiche commerciali sleali (2005/29/CE); la direttiva sui servizi di media audiovisivi (2010/13/UE) e; la Best Practice Reccomandation on Infleuncer marketing. Infine, la sezione sarà conclusa dalla spiegazione delle normative future che l'Unione Europea prevede di implementare.

La seconda sezione, invece, verterà sull'esposizione delle norme adottate dagli Stati Uniti; iniziando anch'essa dal background storico in cui verranno analizzate le organizzazioni inerenti alla pubblicità digitale, seguirà, in seconda istanza, l'analisi delle normative riguardanti la privacy a livello federale e statale e dell'autoregolazione sulla pubblicità comportamentale; infine, la sezione si concluderà con l'analisi della normativa sulle pratiche scorrette e sleali e delle guide quali "Guides Concerning the Use of Endorsement and Testimonial in Advertising "e "the disclosure 101 for social media influencer".

L'ultima sezione basandosi sulle informazioni dettagliatamente riportate nelle prime due sezioni esporrà in primo luogo, la comparazione teorica delle norme dell'Unione Europea e degli Stati Uniti e; in secondo luogo, fornirà una comparazione pratica attraverso l'analisi di sentenze e denunce di pratiche inerenti alla pubblicità digitali sulle più importanti piattaforme social, quali Instagram e Facebook, YouTube e TikTok, concludendo così l'elaborato.

Nonostante la pubblicità sia un argomento molto conosciuto e regolato, questo non comporta automaticamente che la pubblicità digitale sia una materia altrettanto ugualmente regolata. Sebbene questi due metodi pubblicitari abbiano punti comuni, quali le pratiche sleali, l'innovazione apportata dal web crea una mancanza nelle normative che regolano la pubblicità "tradizionale". L'analisi di questo elaborato quindi non introdurrà solo un elenco di norme incentrate sulla pubblicità ma, provvederà a fornire un'analisi normativa e un contesto appropriato al mondo della pubblicità digitale così da evidenziare eventuali incertezze nella regolamentazione dell'argomento trattato.

Essendo una tesi prettamente compilativa, non saranno introdotto nuove nozioni ma saranno esaminate normative già note ma contestualizzate e collegate in un filo logico che vede come protagonista la pubblicità digitale.

Il web, lo sviluppo di nuove tecnologie e piattaforme, oltre a comportare benefici sia per le aziende che vi operano che per gli utenti che vi navigano, costituiscono una fonte inesauribile di minacce che sebbene individuate non sempre riescono ad essere neutralizzate dalle normative imposte dai governi. Questo elaborato, pur non tenendo conto di tutte le normative implementate da ogni stato americano ed europeo, per arginare i rischi nascosti che la pubblicità digitale può creare, può essere comunque proposto come base di riferimento per future integrazioni e ampliamenti. Considerando l'attualità dell'argomento e di alcune fonti analizzate, le ripercussioni di alcune politiche non possono essere incorporate nell'elaborato in quanto non ancora pervenute ma, data l'analisi sistematica delle fonti, questo elaborato può fornire: da un lato un funzionale mezzo per individuare incertezze nelle leggi già attuate e; dall'altro un elemento utile per l'analisi e l'implementazione di nuove normative che vedono protagonista la pubblicità digitale del futuro.

INTRODUCTION

"The best marketing doesn't feel like marketing." – Tom Fishburne

Since the creation of the webspace, dated at the end of the 20th century, the digital era has brought plenty of changes in customers' daily life. The internet, which is known to be a fundamental tool for the globalized world, is also the engine for the creation of new policies. Not only is it a place in which sellers and customers can relate directly to each other through a device, but it is also the ground on which businesses are constantly relying to expose their products to a larger number of users.

The concept of 'Shrinking world' gives a primer explanation to the purpose of this work. Firstly, used by Dickens in 1998, this term refers to the fact that the globe is becoming smaller due to the advancement of new technologies.

For instance, globalization brought about the implementation of an international law common to every nation which intended to regulate policies in relevant fields (such as environment and human rights).

However, from another point of view, the platforms which helped render the world smaller created new uncertainties from the regulatory standpoint. As a matter of fact, and as this dissertation will try to interpret, the advertising industry, which is expanding its horizons on the World Wide Web and the Social Networks, created a new threat to the consumer's rights and the concept of privacy. ¹

The knowledge of people about online advertising practices is still lacking in some aspects as a small survey, which counted the answer of 27 people among university colleagues and friends, displays. The research, which has no scientific basis, was conducted only for the personal purpose of understanding how a small group of people conceive online advertising. This showed that while on the one hand most of the

¹ The numerous uses of the internet and of the social platform are not part of this dissertation, though it is relevant to mention that the world wide web that is known nowadays is a complex entity which is trying to be regularized through national and international policies.

interviewee was aware of what, for example, cookies were, on the other hand, in the context of behavioural advertising the answers displayed that only a little part was knowledgeable in the matter. (the tools just mentioned will be extensively analyzed in the subsequent sections, in this part they are only useful for narrative purposes).²

Given these premises, the ultimate purpose of this dissertation is to survey and compare the regulatory framework of the two major economies around the world: the USA and the EU.

From a jurisdictional perspective, the two entities that the thesis will analyze have little in common; as a matter of fact, while the USA is a federation of states with constitutional power, the EU is an international organization whose purpose is to promote cooperation and integration among sovereign member states, through the development of common policies in areas in which the latter have decided to "delegate" sovereignty (single market, environment).

However, despite the political diversities, the regulation of digital advertising and the privacy issue it involves is a common issue in either of these economies.

How do these two superpowers define advertising in their policy framework? How are these policies incorporated at the state level? And, with which policies do they manage to regulate digital marketing in order to safeguard consumers' rights and the right to privacy?

Starting from a general overview of the policies implemented by these entities, a practical comparison will highlight the policies discrepancies regarding social media platforms such as Facebook/Instagram, YouTube, and TikTok: thus, the thesis will survey the USA and EU laws in the digital advertising field and will try to identify, through primary sources, namely EU regulations, directives, and USA policies; secondary sources such as books, articles, and guides related to the topic, and specific case studies, if and how policies are implemented at the national level.

The work is divided into three sections: the first and second sections will highlight, respectively, the EU and the USA institution and policies regarding digital advertising,

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² Annex 1

starting from a historical background, structuring the privacy paradox, and culminating in the ultimate regulations regarding the advertising world. While the last section will explore the differences between the digital marketing regulatory framework of these two superpowers.

To better comprehend the further analysis some terms will be addressed in this part so as to disclose some features of the policies implemented by the EU. As a matter of fact, the dissertation will survey both directives and regulations, therefore, a proper definition of the two can clarify the different incorporation from the beginning.

The term directive refers to a legislative act which imposes a goal that every member states need to achieve by enforcing or amending policies on their own; on the contrary, the term regulation refers to a binding legislative act which has to be incorporated into the member state law in its entirety.³

Given the actuality of the topic under discussion while portraying legislation theoretically and then, practically in judgment and complaints cases it is important to be aware that some policies are still under discussion and others have still not been enforced. As the conclusion will highlight the discussion on online advertising is still a work in progress as the policies implemented by both USA and the EU are. Nonetheless, the critical analysis which will follow can turn out to be a good starting point for the individuation of inconsistencies, in the application of law related to the enquiry question, and for the implementation of the policies displayed.

Since its creation, the internet space is a complex environment for the enactment of policies mostly related to privacy protection. In this regard, this dissertation, considering the regulation of digital advertising, will try to understand if the policies enacted until this moment can concretely protect consumer rights and their privacy.

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³ European Union, Types of legislation, Available at: < https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en>

ADVERTISING

What is advertising from an economic and juridical perspective? This paragraph, which is a preamble designed to briefly explain the concept of advertising, its historical background and its importance for business development, will pave the ground for the systematic analysis of the policies, directives and regulations related to digital advertising.

Advertising is a form of communication that try to promote and present goods, services, and ideas. It is an essential part of a marketing strategy because it helps a given business to acknowledge and promote a product to the public.

Historically, trading was the engine for the creation of advertising, however, after that advertising was used for other purposes as Jeremy Bullmore⁴ claims in "What is advertising".

In this article, Mr Bullmore defines advertising as:

"Any communication, usually paid-for, specifically intended to inform and/or influence one or more people" 5

He uses the term "usually paid-for" which can partially explain the aim of this dissertation. As a matter of fact, with the development of social networks, initially YouTube and Facebook and afterwards Instagram and Tik Tok, people without knowing are exposed to advertisements which can be paid or not (a practical example is an influencer who recommends a certain designer just because she/he likes it).

The role of social media platforms has shaped how advertising is made; it, indeed, can reach a wider audience than the traditional means of communications (YouTube alone can reach 1.5 billion views monthly). ⁶ This claim gives a reasonable explanation of the

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⁴ Jeremy Bullmore is currently the executive director of WPP and a member of the WPP Advisory Board: He started his career as a copywriter; however, throughout his life, he covered plenty of important roles such as chairman of the Advertising Association and non-executive director of the Guardian Media Group

⁵ J. Bullmore, *What is advertising?*, Advertising Association, https://adassoc.org.uk/resource/what-is-advertising/.

⁶ Source: *YouTube*, https://socialimpact.youtube.com/why-youtube/>.

ongoing development of new policies concerning this subject, which will be fully explained in the next chapters.

From the juridical standpoint, given the importance of the protection of consumer rights sets of laws are implemented. Relevant to this work are advertising laws which involve every kind of policy, regulation and directive used so as to avoid deceiving, unfair, and misleading advertising; in other words, these laws are carried out to sets rules and boundaries that can prevent advertising businesses to commit any kind of wrongdoing that can breach consumer rights.

Nowadays, the laws concerning advertising are more and more implemented due to the continuous growth of means by which businesses advertise. Indeed, the development of social networks has created new liabilities in advertising laws; thus, these new means of communication can pose a threat to the consumer's right to privacy as the subsequent chapters try to analyse.

The advertising field is constantly developing as the laws related to this topic are. This brief paragraph attempted to define both economically and juridically the aspects of advertising and, lays the first stone for the critical analysis that will follow in the next chapters; starting with the survey of the EU advertising law framework.

SECTION 1 EUROPEAN UNION LEGISLATION AND POLICIES

CHAPTER 1: HISTORICAL BACKGROUND

Although, the concept of advertising was briefly described in general terms both from the economic and juridical perspective, to begin this case study is fundamental to contextualize the historical background of the policies and organizations related to the topic of the dissertation.

The European Union features advertising as an essential tool for the economic success of businesses and a valuable instrument, at customers' disposal, to know and confront products all over the Union. For this reason, and to protect smaller enterprises, the EU throughout the last 35 years has been implementing regulations and directives to ensure that companies' advertisements are truthful and fair.

The first European directive related to advertising is Council Directive 84/450/ECC, dated 1984 and it concerned misleading advertising.⁷ The directive which aims was mainly on the importance of advertising, was the first step toward the regulation of this topic. Hence, despite this first step, its implementations at the national level were limited due to the already existing policies in the member states.

The directive was afterwards amended firstly, with directive 97/55/EC in order to include the harmonization of member states' policies related to comparative advertising;⁸ and afterwards with Directive 2005/29/EC in 2005, so as to implement a concise policies framework in order to protect consumer rights.⁹

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⁷ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising; OJ L 250 of 19.09.1984.

⁸ Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC.

⁹ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council (The Unfair Commercial Practices Directive), OJ L 149 of 11.06.2005.

The Directive on Misleading and Comparative Advertising and the just mentioned amendments were consolidated in 2006.¹⁰

The delineation of the historical background has shown that the advertising implementation policies are a recent matter, and that the EU was efficient in developing directives that promise to safeguard consumers' and companies' rights. A practical case is "Lidl Belgium GmbH & Co. KG v Etablissementen Franz Colruyt NV" in which the European Court of Justice was called to interpret the directive above mention.

The policies related to advertising, however, are not the only means that advertising companies can rely on to facilitate their operations. As a matter of fact, and, as the following paragraphs of this chapter will try to suggest there are plenty of organizations whose ultimate purpose is to implement self-regulation policies in advertising.

1.1 WORLD FEDERATION OF ADVERTISERS, EUROPEAN ASSOCIATION OF ADVERTISING AGENCIES AND EUROPEAN ADVERTISING TRIPARTITE

Now that a concise EU historical advertising policies framework has been drawn, the attention will shift to the organizations that historically and currently are working to help the advertising businesses copying with or, be defended by "unfair" treatment provoked by the enactment of the European Union policies.

In this paragraph, there will be analyzed 3 organizations, that have some purposes in common namely: to promote the advertising industry and, to defend advertising companies from any mistreatment caused by the European Union policies implementation.

The first organization which will be analyzed is the only organization, among the ones that are going to be explained, to operate internationally: The World Federation of Advertisers (WFA)¹² which is a non-profit organization based in Brussels.

¹⁰ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising *OJ L 376, 27.12.2006*.

¹¹ Judgment of the Court (Grand Chamber) of 19 September 2006. Lidl Belgium GmbH & Co. KG v Etablissementen Franz Colruyt NV. Case C-356/04.

¹² World Federation of Advertisers, *Statutes*, April 2017, < https://wfanet.org/about-wfa/who-we-are>.

The organization's purpose is not only to represent the interests of advertisers and advertising companies but also to study any issue related to advertising, so as to remove any obstacle which can affect the promotion of products. Moreover, it aims to promote advertising as an important means in the economic scenario. Thus, cooperation among its members is fundamental in order to achieve its goals.¹³

In 2019, the organization, in cooperation with the US government has launched the Global Alliance for Responsible Media (GARM) which identified 11 issues to work on; among them, there is "online privacy" which is a central topic of this dissertation and that will be analyzed in the next chapter.

Going back to the EU as the central geographical point of this section. Two organizations are important historically: the European Association of Advertising Agencies (EAAA) and the European Advertising tripartite (EAT).

The European Association of Advertising Agencies is an association founded in Oslo in 1959, it was named by the Council of Europe as a non-governmental organization, and it is recognized by the European Council.¹⁴

Among its tasks EAAA offers opinions in every matter related to advertising; it also promotes advertising self-regulation and the freedom of speech in the advertisement industry; beyond this, it is responsible for the formulation of amendments concerning advertising before the parliament.

Lastly, the European Advertising Tripartite, which headquarter is in Brussels, is an organization whose purpose is to make every member of every branch in the European advertising industry cooperate to achieve common interests. It practically works as an umbrella Group. ¹⁵ The EAT also established the EASA, the European Advertising Standard Alliance, which will be presented in the next paragraph.

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¹³ World Federation of Advertisers, *Statutes*, op. cit.

¹⁴ A. MATTELART, M. PALMER, *Shaping the European Advertising Scene. Commercial free speech in search of legitimacy*, The French journal of communication, volume 1, n°1, 1993, pp.16-18.

¹⁵ A. CUNNINGHAM, *Advertising Self-Regulation in a Broader Context*, Journal of Promotion Management, 5:2, 2000, pp.63-68.

The fundamental point in this part, which will also serve as a presentation for the next paragraph is that the three organizations that had been mentioned, namely the WFA, EAAA and the EAT, worked together with the EASA for the creation of the European advertising self-regulation.

Therefore, the next and ultimate paragraph of the historical background chapter will analyze another organization the EASA. It will also explain more in detail what is the European Advertising Self-regulation so as to conclude the historical chapter (which tried to give an overall explanation of the advertising policies and related organizations).

1.2 EASA AND ADVERTISING SELF-REGULATION

The EASA (European Advertising Standard Alliance) is one of the most important organizations whose field of expertise is advertising. This organization, as this chapter will display is working on the implementation of adverting self-regulation.

Starting from an overview of the organization's purpose the paragraph will afterwards analyze the advertising self-regulation thereby closing the advertising background and, therefore paving the way to the introduction of the privacy issue related to advertising.

The European Advertising Standard alliance is a non-profit organization. It was founded in 1992 and its headquarter is situated in Brussels. Initially, it was formed by 15 SROs (self-regulatory organisations) of 13 European countries; however, nowadays it is formed by 28 standard bodies represented y 42 organizations, 1 digital pure-play company, and 13 organizations representing the advertising ecosystem. ¹⁶

The EASA "helps to make sure that ads are legal, decent, honest, truthful, prepared with a sense of social responsibility and created with due respect to the rules of fair competition."¹⁷. Therefore, the main purpose of the organization is to promote and implement advertising self-regulation. It also ensured a Cross-Border Complaint system which consists of mutual recognition among the member states' self-regulatory systems in order to safeguard

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¹⁶ About EASA, available at < https://www.easa-alliance.org/about-easa/what-we-do>.

¹⁷ Ibid

consumer rights. Moreover, to provide support for its members EASA commit itself to the production of the Best Practice Recommendation

Accordingly, to achieve its purpose the EASA's first goal is to ensure that the advertising self-regulatory system is recognized, meanwhile developing a European network to render its cross-border compliant system effective.

The EASA through the voluntary compliance of local ad ecosystems sets codes and principles: the Ad - standards. To work effectively, these standards need to be implemented by advertisers, agencies, and media. The codes incorporated in the self-regulation include not only aspects related to the decency and the legality of advertising, but also specific criteria that companies have to follow such as the creation of socially responsible advertisements and the compliance with the competition laws.¹⁸

The advertising self-regulation is created to complement and implement regulations and it is important firstly because it provides consumers with the prerogative to effectively trust advertising and, with the power to raise complaints against advertisements that, in their opinion, had breached the codes. Secondly, it helps advertisers to maintain reputation and trust, which is fundamental for businesses that rely on advertisements to promote their products.

This paragraph concludes the historical background which had displayed the advertising regulations and directives' history and, the organizations that operate in the advertising field. Given these premises, the next chapter will focus on the enquiries of this dissertation: why online advertising can pose a threat to privacy and which policies are implemented in order to cope with this issue?

¹⁸ The Advertising self-regulation concern advertising in issues as children, food and drinks, digital marketing communications, misleading advertising, marketing influencer, the portrayal of gender, online behavioral advertising, and alcohol.

CHAPTER 2: THE ONLINE ADVERTISING AND THE PRIVACY ISSUE

The "digital revolution" which is spreading in the last few years resonated also in the advertising field. The development of the internet, as it has been displayed in the introduction, has changed the way in which consumers interface themselves with the market. Through search engines and social media, advertising businesses are able to collect information about consumers related to their preferences and inclinations.

The collection of data, which enables enterprises to profile users' preferences, helps the development of ad-hoc advertising based on user interests. The information not only is useful for enhancing a consumer experience on the web but also to develop advertising more and more sophisticated. Thus, this consumers' profilation activity (which is commonly known as online behavioral targeting), is made possible through the use of cookies and many other tools. These means, as a matter of fact, has shown to be fundamental for businesses that want to promote their product through advertising.

Nonetheless, even if on the one hand, the development of these new tools has created new opportunities and new sources of revenues either for advertising companies or consumers, on the other hand, it has created new threats to users concerning the issue of privacy.

Privacy, which is the right of reservedness for a person is nowadays more and more regulated from the jurisdictional perspective. Thus, the development and the compliance with policies and regulations related to privacy is an important matter of enquiry for the European Union. Nevertheless, this preamble, which is meant to describe this chapter and to give the basic knowledge to comprehend the further normative analysis, is also going to give a brief definition of the above-mentioned tools used by advertising businesses. Some of these tools are more known than others, but they all are equally important for companies to track users' interests. Which tools are used for online behavioral tracking and why they can be considered a threat to privacy?

A partial answer to this question can be found in reports by the European Union Agency for Privacy Security¹⁹ which explained through which means behavioural targeting 'profile' users. According to its report, the most common tools are cookies, JavaScript, Browser Fingerprint, location tracking and web bugs.²⁰

However, despite the importance of all the tools just mentioned, it is not the purpose of this dissertation to explicate in detail what these are; therefore, only cookies, which are the most known, are going to be displayed.

"A cookie is a piece of text stored by a user's web browser and transmitted as part of an HTTP request. It consists of one or more name-value pairs containing bits of information and is set by a web server" 21

They can be divided into first-party and third-party cookies, the former is set and used by the owner of a given webpage; the latter instead are used by advertising businesses which, thanks to their ads located in a whatsoever webpage, can collect a user data.²²

Providers can use persistent and session cookies which differ in the expiration time; the former remains in a computer until the expiration date the latter on the other hand are deleted when the browser is closed.²³

For advertising purposes different types of cookies are used, however, the most notable thing that this thesis will try to display is that the collection and processe of data collected by these cookies raise questions concerning users' security and privacy.

This chapter will analyze how privacy policies operate within the online advertising domain. Starting with the Data Protection Directive 95/46/EC and then following with the E-privacy Directive 2002/58/EC, its amendment 2009/136/EC amendment and culminating with the General Data Protection Regulation EU/2016/679. This chapter encompasses on the one hand a central issue related to the online adverting field and, on the other hand a milestone for this

¹⁹ It is an agency which aim is to help EU member states to be able to anticipate and react to any issue related to information and network.

²⁰ C CASTELLUCCIA, A. NARAYANAN, *Privacy Considerations of online behavioral tracking*, European Network and Information Security Agency, 2012, pp. 6 – 8.

²² R. TIRTEA, C. CASTELLUCCIA, D, IKONOMO, *Bittersweet cookies. Some security and privacy considerations*, European Network and Information Security Agency, 2011, pp. 3 - 4.

dissertation due to the importance which it has for the enquiry of this thesis and for the subsequential comparison with the USA laws.

2.1 DATA PROTECTION DIRECTIVE

This paragraph will survey the Data Protection Directive 95/46/EC, thus beginning the legislative systematic analysis. The choice to survey a directive, that was afterwards replaced, is related to the issue that this dissertation is trying to elucidate. In 1995 the use of online advertising was not as preeminent as today in the EU; however, with this directive, member states made the first step to regularize the collection of data both in "non-automated filling systems"²⁴ and in "automated means"²⁵.

The Data Protection Directive was adopted in an attempt to harmonize at the EU level the national policies related to privacy. As a matter of fact, the degree of protection of personal data varied from member state to member state and, given the fact that those members - by entering the Union - were seeking to establish a single market and the free movement of people, services and things; it was clear that a harmonization on the regulation of personal data protection and transmission was needed in order to implement the effectiveness of the union.²⁶

The Data Protection Directive is formed of 34 articles, and it concerns the protection of individual personal data and the free movement of such. The directive is divided into seven chapters and the final provision.

The object as stated in article 2 of the directive 95/46/EC says that:

- "1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
- 2. Member States shall neither restrict nor prohibit the free flow of personal data between the Member States for reasons connected with the protection afforded under paragraph 1."²⁷

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²⁴ The term "non automated filling system" is define by the directive as files written in traditional pieces of paper.

 $[\]overline{25}$ The term "automated means" is defined by the directive as the collection of data in a computer.

²⁶ Council directive concerning the protection of individuals In relation to the processing of personal data, Commission of European Communities, COM (90) 314, 1990.

²⁷ Article 1. Directive 95/46/EC.

The directive, in this regard, formulates a series of criteria to distinguish when the processing of personal data is carried out lawfully and when it is not; a key point related to this matter is that the directive explicitly mentions that in order to comply with the lawfulness criteria the unequivocal consent is required.²⁸

Moreover, the Data Protection Directive set boundaries linked to the type of data collected, thereby prohibiting the processing of data concerning ethnicity, origin, health etc., mentioning, however, some exemptions for special or vital situations.²⁹

Beyond, the lawful processing the directive elucidate the rights that the data owner can exercise when his/her personal information is processed; thus, the owner can apply: the right to obtain information³⁰ related to the controller of the data, the use, and the recipient of such; the right of access³¹ to data directly connected to him/her from the controller; the right to object ³² to the collection of personal information for purpose of direct marketing. Nonetheless, such rights can be derogated and limited if the data under inquiry are indispensable for circumstances related to, among others, public security, defense, national security etc. ³³

Hence, given the directive overview just displayed and resuming the investigation question, when, in relation to online advertising, the processing of personal data can be considered lawful?

According to the directive, the lawful collection of data not only is related to the explicit and unambiguous consent given by the owner, but also to the owner's notification of such processing; beyond that, the person, whose personal information is been processed, has the right to object to the processing and the right to access to those data. Therefore, does, the type of data collected by means as cookies, fall within the definition of personal data given by the Data Protection Directive?

²⁸ Article 6, Directive 95/46/EC.

²⁹ Article 8, Directive 95/46/EC.

 $^{^{30}}$ Article 10 - 11, Directive 95/46/EC.

³¹ Article 12, Directive 95/46/EC.

³² Article 14, Directive 95/46/EC.

³³ Article 13. Directive 95/46/EC.

First of all, cookies store information as credentials and preferences but they can also track personal information about users as a B. Krishnamurthy and C. Wills study implies.³⁴ The tracking of such information can be related to an IP address, to specific information such as genre and age of a person if a website requires registration and, in this website, advertising companies have placed their ads.³⁵ The directive in this sense, clearly, gives a definition of the term personal data:

"shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"³⁶

In this regard, and as the 29 Data Protection Working Party³⁷ pointed out the information collected by cookies often are related to the definition of personal data given by the directive; as a matter of fact, an IP address, as stated in the 29 Data Protection Working Party opinion 1/2008, or a unique identifier collected by a cookie are in most cases considered persona data.³⁸ Therefore, the collection of such data is regulated by the Data Protection Directive and the controller³⁹ of such data should fairly process, prior consent by the owner, those pieces of information.

Nonetheless, what does the directive means when it talks about consent? The directive defines consent as:

"any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed." ⁴⁰

³⁷ Article 29 Data Protection Working Party was an advisory body instituted with directive 95/46/EC.

³⁴ B. Krishnamurthy, C. Wills, "On the leakage of personally identifiable information via online social networks", 2009.

³⁵ Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioral advertising, adopted on 22 June 2010.

³⁶ Article 2(a), Directive 95/46/EC.

³⁸ Article 29 Data Protection Working Party, opinion 1/2008 on data protection issues related to search engines, adopted on 04.04.2008. See also Article 29 Data Protection Working Party, Working Document on Privacy on the Internet - An integrated EU Approach to On-line Data Protection, adopted on 21st November 2000.

³⁹ The Directive define the term as the person or organization in charge of determining the means and the purpose of data processing.

⁴⁰ Article 2(h), Directive 1995/46/EC.

Not only the owner of the personal information has to be informed but he/she has to give his/her specific consent to the collection of such data. Thereby, how can a person give his/her consent to, for instance, web bugs?⁴¹

The user while surfing a webpage may not be aware of his/her movement being tracked, as a matter of fact, the tool used to track can be hidden, so how can he/she give his/her consent? Although the purpose of the directive is to harmonize at the EU level the protection of personal data, it was not enacted with the intention to regulate online behavioural advertising and the tool used to track consumers. It generally sets the guidelines to be fulfilled in order to process lawfully the personal information of a person. Therefore, the answer to the question is to be found in another directive.

The Data Protection Directive was the first attempt of improving and coordinating the privacy protection policies among member states; hence it paved the ground for the implementation of a directive directly correlated to online means of tracking: the Directive on privacy and electronic communications 2002/58/EC, which will be explored in the next paragraph.

2.2 PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

"The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy." ⁴²

The development of the internet at the end of the 20th century and throughout the 21st century had made necessary a complementation of the Directive 95/46/EC which could apply more directly to the telecommunication sector, so as to create a set of detailed provisions related to this field. Directive 97/66/EC concerning the processing of personal data and the

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⁴¹ The term web bug refers to a hidden 1x1 pixel image that is located on a website with the purpose of checking if the users have seen that specific page. For more information check C. CASTELLUCCIA A. NARAYANAN, *Privacy considerations of online behavioural advertising*, Op.cit.

⁴² Recital 6, Directive 2002/58/EC

protection of privacy in the telecommunications sector, ⁴³ was the first step for the complementation of the Data Protection Directive.

The telecommunication covered by Directive 97/66/EC included, among other also, the internet and, despite its scope, which was to implement the Data Protection Directive, it was soon abrogated in 2002 with the introduction of new and up to date legislative framework that could complement thoroughly the 95/46/EC directive.

Indeed, although the specification of the 97/66/EC directive related to privacy in the telecommunication sector, the technological advancement as pointed out by the article 29 Data Protection Working Party 29 document,⁴⁴ created the conditions for its revision. The direct processing of personal data from the internet, the new technical tools and the new method of targeting were only some of the major improvements in the technology sector that caused concern not only for the article 29 Data Protection Working Party itself but globally. Thus, these new means, whose goals were to improve consumer experience and businesses revenues, were seen as a possible threat to the correct processing of personal data. In order to overcome such menace, the working party addressed for a revision that could include an implementation of the policies related to the responsibility of the processing.⁴⁵

As a result of the ever-evolving technology sector and of the working party's concerns for a quick implementation of the directive in telecommunication, the 97/66/EC directive was abrogated in 2002 with the enactment of the Directive on data protection in the electronic communications sector 2002/58/EC, also known as the E-privacy directive.

The 2002/58/EC, which was created as a response to the risks that new technologies poses to consumers, is meant to "complement and a particularise" directive 95/46/EC.

⁴³Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

⁴⁴ Working Party on the Protection of Individuals with regard to the Processing of Personal Data, working document: Processing of Personal Data on the Internet, adopted on 23 February 1999.

⁴⁵ Working Party on the Protection of Individuals with regard to the Processing of Personal Data, working document: Processing of Personal Data on the Internet, adopted on 23 February 1999.

o Article 29 Data Protection Working Party, Working Document Privacy on the Internet - An integrated EU Approach to On-line Data Protection, adopted on 21 November 2000.

⁴⁶ Article 1(2), Directive 2002/58/EC.

The aim of the directive is not only to forbid unwanted communications (if the owner of personal data denied his/her consent) but also to ensure the implementation of a legislative framework meant to safeguard the processing of personal data, the confidentiality of communication and the notification of violation of such data.

The directive displays which duty the provider has concerning the users; the provider, as a matter of fact, has to guarantee that only authorised personnel can process data,⁴⁷ he/she also has to guarantee a level of security that can manage possible risks,⁴⁸ and finally he/she has to inform the subscriber about which data are collected and how,⁴⁹ ensure that those data are being collected only for the necessary amount of time required and, that the users can withdraw his/her consent at any moment.⁵⁰

The user's consent, according to this directive, is required before receiving unsolicited mail,⁵¹ and prior to the inserting of contact details in directories available to the public.⁵²

Furthermore, the E-privacy directive states that member states need to guarantee privacy and prohibit the storage, listening and recording of communications (except when authorised), and that the information concerning the processing of a user's personal data is clearly and comprehensively available for that person. ⁵³

The directive which is a *lex specialis* meant to broaden the context of the application of the *lex generalis* 95/46/EC, further discloses information related to the question stated in the previous paragraph; thus, for the first time, more precisely in Recital 24 the web bugs are mentioned:

"So-called spyware, web bugs, hidden identifiers and other similar devices can enter the user's terminal without their knowledge in order to gain access to information, to store hidden information or to trace the activities of the user and may seriously intrude upon the privacy of these users. The use of such devices should be allowed only for legitimate purposes, with the knowledge of the users concerned." ⁵⁴

⁴⁷ Article 6, Directive 2002/58/EC

⁴⁸ Article 4, Directive 2002/58/EC

⁴⁹ Article 6 and Article 9, Directive 2002/58/EC

⁵⁰ Article 6, Directive 2002/58/EC

⁵¹ Article 13(3), Directive 2002/58/EC

⁵² Article 12(3), Directive 2002/58/EC

⁵³ Article 5, Directive 2002/58/EC

⁵⁴ Recital 24. Directive 2002/58/EC

The recital, as a matter of fact clarify that those means used to obtain information, which are clearly designed to not be identified by users, can only operate after the user is properly inform about them. Thereby, rendering the advertisers' advantage of not being spotted by the users useless.⁵⁵

Nonetheless, debated is the word "knowledge" in recital 24 statement, which does not manifestly explain if it then requires an opt-in⁵⁶ or an opt-out⁵⁷ consent. Indeed, authors such as Gilbert in "Beacons, bugs, and pixel tags: Do you comply with the FTC behavioural marketing principles and foreign law requirements" states that it requires only opt-out consent as cookies do; however, opinions in this matter are still mixed.

Therefore, how does the E-privacy directive talk about cookies? Firstly, Cookies are mentioned in recital 25:

""cookies", can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line transactions. Where such devices, for instance cookies, are intended for a legitimate purpose, such as to facilitate the provision of information society services, their use should be allowed on condition that users are provided with clear and precise information in accordance with Directive 95/46/EC".

While stressing the importance of cookies and similar devices for advertising companies the directive once again expresses the provider's duty to properly inform the user involved. Altogether, the information about the function of such tools needs to be the most "user-friendly" possible so as to make the user aware of the data processed.

Not only cookies are contained in the recital, also as Sophie Louveraux and Maria Veronica Pérez Asinari stated in their article that cookies are also addressed implicitly in article 5, as a matter of fact, the directive use the term "technical storage of information" to include cookies and every tool used for store information in a user device. What the two authors

⁵⁵ A. GOLDFARB, C. E. TUCKER, *Privacy Regulation and Online Advertising*, Informs, 2011.

⁵⁶ The "term opt-in consent" refers to an explicit positive action taken by the user that confirm to the provider of the service that personal data can be processes.

⁵⁷ The "term opt-out consent" refers only to giving the right to refuse to the processing of personal data by the provider to the user, leaving aside the action of consenting the processing.

⁵⁸ F. Gilbert, Beacons, bugs, and pixel tags: *Do you comply with the FTC behavioural marketing principles and foreign law requirements?*, Journal of Internet law, 2008.

⁵⁹ Recital 25, Directive 2002/58/EC.

stressed concerning the directive is that a clear distinction between permanent cookies and session cookies is not provided; indeed while session cookies expired once the browser is closed, permanent cookies remain stored in the user's computer. ⁶⁰ In relation to this the directive does not give a limit in the conservation of such data, thereby in this context only the 95/46/EC directive give a "solution" to this matter, suggesting that these tools can stay in the computer till they have completed their purpose.

Despite the inclusion, in the E-privacy directive 2002, of cookies and web bugs, to keep at pace with times and technological development, an amendment of such directive was adopted in 2009, with the Directive 2009/136/EC.⁶¹

Directive 2009/136/EC not only amended the directive under enquiry but also directive 2002/22/EC. Although important, the latter is not a matter of inquiry for this dissertation, thus this paragraph will only focus on the amendments made on directive 2002/58/EC, with a particular focus on the articles related to the regulation of cookies and tools related to the online advertising field.

The amending directive 2002/58/EC as Vagelis Papakonstantinou and Paul de Hert explain in their article "The Amended EU Law on ePrivacy and Electronic Communications after its 2011 Implentation; New Rules on Data Protection, Spam, Data Breaches and Protection of Intellectual Property Rights" was not addressed to information society service providers⁶² but more generally to the electronic communication service providers, ⁶³ so the amended directive tried to cope with this flaw.⁶⁴

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⁶⁰ S. LOUVEAUX M., V. PÉREZ ASINARI, New European Directive 2002/58 on the processing of personal data and the protection of privacy in the electronic communications sector – some initial remarks, Sweet & Maxwell Limited, 2003

⁶¹ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws)

⁶² The term "information society service" refers to every kind of remuneration service provided by electronic means for data processing and storage.

⁶³ The term "electronic communication service" refers to any electronic service which allow to receive or send communications.

⁶⁴ V. PAPAKONSTANTINOU, P. DE HERT, *The Amended EU Law on ePrivacy and Electronic Communications after its 2011 Implentation; New Rules on Data Protection, Spam, Data Breaches and Protection of Intellectual Property Rights*, 2011, J. Marshall J. Computer & Info. L. 29, p.55.

Thus, for the scope of this analysis the most important amending is related to article 5(3):

2002/58/EC

"Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user"65

2009/36/EC

"Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service" 66

As it can be seen by this comparison special focus is applied to consent, as a matter of fact, in the amending directive, the article only requests providers to give users proper information about the treatment of personal data and the right to refuse the processing of such. Whereas the amended version clearly states that beyond the information explicit consent is required prior to personal data treatment.⁶⁷ Therefore, the amended directive takes a step forward imposing the consent requirement, shifting from an opt-out to opt-in consent.⁶⁸

However, regarding this matter, a dispute within member states concerning the general setting of the browser was raised. Although, the opt-in consent rule clearly states that the user needs to give his/her consent explicitly some member states discussed that the existing browser settings would be enough to express such consent.

Browser settings by default enable the use of cookies without information and consent. These settings also allow advertisers to place their cookies (which are used for behavioral targeting) on web pages bypassing the E-privacy directive. As matter of fact, only once a user is surfing through a specific website, where such a cookie is placed, become aware of the processing

⁶⁵ Article 5(3) of Directive 2002/58/EC.

⁶⁶ Article 5(3) of the amended directive 2009/136/EC.

⁶⁷ R. TIRTEA, C. CASTELLUCCIA, D, IKONOMO, *Bittersweet cookies. Some security and privacy considerations*, op.cit., pp.9-11.

⁶⁸ C CASTELLUCCIA, A. NARAYANAN, *Privacy Considerations of online behavioral tracking*, op.cit., p. 16.

of his/her personal data by the cookie placed by third-party companies and the right of denial, thanks to the information given by the provider of that website. This therefore means that in order to comply with article 5(3) of the e-privacy directive, settings must be disposed as to not enable cookies to be stored on a given user device without consent and prior clear information about the scope of the storing.⁶⁹

Moreover, as the 29 Data Protection Working Party, stated in the opinion 2/2010, an average user has no knowledge about the default settings of the browser, so he/she is not aware of the fact that such a search engine is set to not reject cookies nor he/she is conscious of what behavioral tracking and online behavioral advertising are. Following such claims, the 29 working party suggested browser default settings to shift to more privacy-protecting ones.⁷⁰ Furthermore, for what concerns advertising companies, and the consent requirement the 29 working party, explain that the possibility offered for some companies of an "opt-out" mechanism, such mechanism, although allows an easier way to refuse the tracking by companies, does not comply with the article 5(3) directive. Not to mention that in most of the cases the subject of the processing is not aware of what behavioral advertising is(as already stated).⁷¹

The 29 Data Protection Working Party opinion 2/2010 also provides information related to the situations in which article 5(3) of the E-privacy directive applies and when in its place, applies the Data protection directive 95/46/EC. Indeed, the Working party illustrates that matters which not fall under directive 2002/58/EC are regulated by directive 95/46/EC, given this statement the application of the Data Protection Directive is required in every inquiry with the exception related to the provision stated in directive 2002/58/EC (the *lex generalis* directive is overridden by the *lex specialis* one).

The implication of directive 2002/58/EC and mostly its amended version 2009/136/EC are especially tough, as a matter of fact, and as some authors highlight in their article, companies

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⁶⁹ Article 29 Data Protection Working Party, opinion 2/2010 on online behavioral advertising, op.cit. p.13. For more information concerning the consent see also Article 29 Data Protection Working Party, Opinion 04/2012 on Cookies consent exemption, adopted 7 June 2012, and Article 29 Data Protection Working Party, Working Document 02/2013 providing guidance on obtaining consent for cookies, adopted on 2 October 2013.

⁷⁰ Ibid pp.14-15.

⁷¹ Ibid p.15

which use online advertising to advertise their product are badly affected by this directive. Thus, the effectiveness of advertising in the EU is lesser than that of other states.⁷² The requirement of consent when tracking behavior or placing cookies is an important achievement for the protection of users' personal data. Nonetheless, as the analysis highlight there are still progresses that need to be made in order to achieve a level of protection and information that meet the standard imposed by the directive. The stressing of clear information and consent are the pillar of the Directive examined and they were altogether the most debated one, as the amount of 29 Article Data Protection Working Party opinions and working documents cited.

Nevertheless, as technological advancement can be seen day by day the implementation of a new legislative framework related to e-privacy is required to keep the EU policies at pace with the times. The next paragraph, as a matter of fact will survey the General Data Protection Regulation 2016/679 concluding the analysis of the privacy policies, related to the internet and for the scope of this dissertation to the online advertising field, implemented by the EU.

2.3 THE GENERAL DATA PROTECTION REGULATION AND THE E-PRIVACY REGULATION

The General Data Protection Regulation 2016/679 ⁷³ (hereafter GDPR) at which this paragraph is dedicated became effective in May 2017, after entering into force in 2016, and it is considered the toughest privacy law worldwide. ⁷⁴ The technological advancement rendered the polices already in place obsolete so that a new legislative framework was required to enhance the right of privacy relate to personal data.

Directive 95/46/EC, which failed to harmonize Data Protection policies among member states, resulted in a fragmentation in its application; different levels of protection were

⁷³ 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).

⁷² A. GOLDFARB, C. E. TUCKER, *Privacy Regulation and Online Advertising*, op.cit.

⁷⁴ GDPR.EU, What is GDPR, the EU's new data protection law, Available at < https://gdpr.eu/what-is-gdpr/>.

implemented within different member states causing uncertainties (mostly related to online application) among people. Indeed, the differences in the application of the directive could obstacle the free movement of personal data thereby, perhaps restraining the economic activity, and endangering in this way the single market. Thus, this was a crucial point in the creation of the single market in the European Union which for functioning correctly required the free movement of personal data that should neither be limited nor restricted.⁷⁵ Therefore, a remedy was needed in order to create a more homogenous and coherent level of application, thereby enhancing the pretext for the implementation of the GDPR.

This regulation composed of 99 articles will be displayed briefly in order to give an overview of why it is considered the strongest set of privacy rules worldwide. The overview is meant to define the scope and rules included in the GDPR without extensively portraying every article, which is not the purpose of the dissertation. The regulation, as a matter of fact, is being surveyed because it is a major cornerstone for the enquiry of this work; after having illustrated much older directive to showcase how online advertising was regulated throughout the 20th century and the beginning of the 21st one, it is now fundamental to comprehend how nowadays privacy policy framework deal with the increasing threats that the internet can cause to personal data. This is the reason why the focus is not in the GDPR itself but in how it operates in the advertising field.

The GDPR not only revises and implements rights already existing but also includes new sets of rights and the control over the data processed. As a matter of fact, the regulation includes the right to be forgotten, which state that the owner of personal data can have such data deleted if there is no legitimate reason to keep them.⁷⁶ Other rights comprehend the new instituted right of data portability which facilitate the process of transmission of data among providers⁷⁷ and, the right to be aware when the personal data have been breached in less than 72h.⁷⁸

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⁷⁵ Recital 13, Regulation 2016/679.

⁷⁶ Article 17, Regulation 2016/679.

⁷⁷ Article 20, Regulation 2016/679.

⁷⁸ Article 33, Regulation 2016/679.

Furthermore, the controller of the personal data needs to give every information related to the treatment of such data including the date of expiry of the processing (if possible) and such information is required to be understandable and clear. ⁷⁹ Concerning the consent the controller needs to be capable of demonstrating that the consent was previously given by the owner of the personal data. ⁸⁰

The provider, moreover, has to implement security in the treatment of data by adopting pseudonymisation where possible and encryption⁸¹ of data (privacy-friendly techniques).⁸² Additionally, the regulation illustrates that businesses not only have to perform impact assessment in order to individuate when the data being processed may be at risk, ⁸³ but also have to implement a by design and by default strategy when considering the processing of data; that means that businesses when launching a new website, for instance, need to establish methods to reduce the amount of data collected.⁸⁴

The regulation also establishes a data protection officer and penalties related to the breach of the regulation.⁸⁵ Whereas, to what concerns extra EU countries the GDPR explain to foreign companies that when they are processing personal data of EU citizens they must apply the GDPR in the collection of such data.

The overview just displayed is only a general and brief explanation of the regulation, there are more articles that could be displayed, however, given the focus on online advertising in this dissertation, a further explanation of the overall regulation will just shift the attention in less relevant matters.

Examining the GDPR, plenty of attention is given to electronic device as recital 32 displays. As a matter of fact, while illustrating consent it clearly states that if such consent is required by an electronic mean it has to be clear and needs to have and unambiguous indication of

⁷⁹ Article 12, Regulation 2016/679.

⁸⁰ Article 7(1), Regulation 2016/679.

⁸¹ Encryption may include end-to-end encryption or the two-factor encryption.

⁸² Article 32, Regulation 2016/679.

⁸³ Article 35, Regulation 2016/679.

⁸⁴ Article 25, Regulation 2016/679.

⁸⁵ Article 37, Regulation 2016/679.

such through, for instance, "ticking a box when visiting an internet website". 86 Those boxes, indeed, are designed to explain what cookies are used for and they, as displayed by the recital 32, must be accepted or rejected to express the consent of the processing of data.

The GDPR defines personal data as:

"...any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person" ⁸⁷

Thus, as previously seen in the paragraph related to the Data protection, the regulation finally explains that the Internet Protocol Addresses can be a reason of association with a neutral person; therefore, clarifying that such data has to be considered personal.⁸⁸

Altogether, this example is an explicit proof that the technological advancement has a great impact on the European Union and worldwide; before continuing the analysis of the article that can be related to online advertising two main statements need to be made.

First of all, which are the economic implication of online advertising? The question could be off topic, however, the relevance in the economic field of the free movement of personal data is one of the main reasons for the abrogation of directive 95/46/EC and the implementation of the regulation under examination.⁸⁹ Therefore, given that the centre of our discussion implicates economic revenues, it is useful to include some data so as to highlight the importance of the GDPR in regulating the processing of such. Reports of IAB.Europe⁹⁰ examining the revenues created through digital advertising state that in Europe the 37.2% revenues are hold by online advertising rendering it the largest medium of advertising in the field; it, as a matter of fact, produces €526 billion in income per year for the European Union.⁹¹ Furthermore, the use of online behavioural tracking in online advertising is used for the 66%, contributing to ad field growth for the 90%.⁹²

⁸⁶ Recital 32, Regulation 2016/679.

⁸⁷ Article 4(1), Regulation 2016/679.

⁸⁸ Recital 30, Regulation 2016/679.

⁸⁹ Recital 9, Regulation 2016/679.

⁹⁰ It is, at the European level, the association for the advertising ecosystem and the digital Marketing

⁹¹ IHS Markit, *The economic Contribution on digital advertising in Europe*, IAB.europe.

⁹² IHS Markit, *The Economic Value of Behavioural Targeting in Digital Advertising*, IAB.europe.

Secondly, until this paragraph, this dissertation only addresses advertising companies, the owners of personal data and a fictitious person called "provider". Indeed, the provider in the advertising field operates as an intermediary and, as such he/she needs to be taken into consideration for the processing of personal data. In the digital world intermediaries, are for instance google, when we talk about search engines, which connects publishers in blogs to the advertising companies or related to social networks, Facebook, Instagram, Twitter etc. are the intermediaries that connect advertising businesses with possible consumers.

Given the consideration above mentioned, what is the role of the GDPR in relation to online advertising practice? Starting with the consent, the regulation in article 5 describes consent as:

"any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her" ⁹³

Consent, as previously seen in the two directives, is an important factor for the processing of data, particularly in the advertising field which most of the time employ personal data through the use of behavioral tracking. The GDPR in this regard upgraded what the previous directive defined as consent. As the E- privacy directive, the GDPR employing the words "unambiguous indication" explains that opt-in consent is required for the processing of data, and as mentioned (before incorporated in recital 32) providers through the use of banners (the ticking box) can ask for the consent or the denial of the processing of data, tangibly this ticking box which includes (mostly) cookies information is what every person nowadays needs to accept or deny when entering in a website. Anyway, since consent must be freely given, it should not be biased by unfair practices such as cookie walls.⁹⁴

The consent to be considered lawful needs to be visibly distinct from other matters, easily and comprehensively accessible and, the information given are required to be written in an

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⁹³ Article 4(11), Regulation 2016/679.

⁹⁴ EDPB, Statement 03/2021 on the ePrivacy Regulation, 9 March 2021.

unequivocal and simple way. 95 Nonetheless, the provider has to demonstrate that the subject whose personal data are being processed had previously consented to such treatment. 96 Furthermore, another innovation, brought by the regulation, is the consent of minors, which is an important matter since social network platforms are mostly used by teenagers. The consent in the treatment of personal data can be expressed by minor which have more than 16 years old, to what concern under 16 people the consent must be given by their parents. 97 Social networks as seen are an important ground of revenue for online advertising and plenty of young people are affected by them.

GDPR furthermore for the first time give a definition of profilation:

"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." ⁹⁸

Profilation is used in online behavioral advertising to create advertisement ad-hoc for the person whose data have been processed; therefore, how data in behavioral advertising can be considered lawfully processed?

As seen before, advertising companies to access personal data on the internet principally rely on intermediaries or targeter, both parties ultimately can rely on two methods to justify the processing for the purpose of online advertising, and those are displayed in article 6.⁹⁹ The first one is related to the consent given by the owner. The other is related to the "legitimate interests". Concerning this matter, the court of justice deliberated that the pursuit of a legitimate interest must be carried out by both controllers (the targeter and the advertising company).¹⁰⁰

The targeter and the advertiser which invoke the article 6(1)(f), the legitimate interest, in social media, should at list offer and easy way to object for the subject to the processing of

⁹⁵ Article 7(2), Regulation 2016/679.

⁹⁶ Article 7(1), Regulation 2016/679.

⁹⁷ Article 8, Regulation 2016/679.

⁹⁸ Article 4(4), Regulation 2016/679.

⁹⁹ EDPB, Guidelines 08/2020 on the targeting of social media users, p. 14-15.

¹⁰⁰ CJEU, Judgment in Fashion ID, 29 July 2019, C-40/17, para. 95.

personal data. Nevertheless, the same article cannot justify practices such as the tracking of a subject through multiple websites or other manners considered intrusive profiling.¹⁰¹ Moreover, the GDPR states that the data should be transparently processed, and the information provided to the data subject, related to the processing must be understandable and accessible in an easy way.¹⁰² Regarding the main topic of this thesis, this means that, as EDPB suggest, the use of the word "advertising "is not to be considered enough appropriate to specify the way in which the processing and the monitoring of the subject are made by both the targeter and the advertising company.¹⁰³

The GDPR has shown gives new and stringent regulations to what concern the processing of data in online advertising. Such policies which are the result of the implementation of the directive 95/46/EC are a milestone for the processing of data in the digital era. However, as seen the regulation of the online world to matters related to the processing of personal data is still carried out by the directive 2002/58/EC. In this respect recital 172 of the GDPR state that a revision of the ePrivacy directive should be made after the adoption of the regulation so as to ensure consistency with it.¹⁰⁴

Given this premises a proposed regulation for the e-privacy is still being discussed between the commission and the parliament. This regulation will include new player in the internet scenario, the social networks, ¹⁰⁵ which as a matter of facts were created after the entry into force of directive 2002/58/EC. Moreover, as the GDPR, a regulation of E-privacy will guarantee to companies, such as advertising one, the same level of protection of personal data among member states, which will facilitate the development of their business.

Additionally, the ePrivacy will be implemented to keep at pace with the new threats created by social media and the internet in general, likewise, consent will still be a fundamental tool to process data. The proposal regulation in this sense will probably act accordingly to the GDPR.

101u., pp. 24-2

¹⁰¹ EDPB, Guidelines 08/2020 on the targeting of social media users, op.cit p.15.

¹⁰² Article 5, Regulation 2016/679.

¹⁰³ Ibid., pp. 24-25.

¹⁰⁴ Recital 172, Regulation 2016/679.

¹⁰⁵ Facebook, Instagram, YouTube, Skype and Tik-Tok.

Furthermore, the proposal regulation will include a facilitation of the use of cookie to ask consent so as to simplify the way in which such tools will be accepted or denied by the user. 106

The privacy issue, which this chapter analyzed both historically and presently, is a great concern for the European Union which through EDPB is still providing opinions and guidelines for the implementation of the GDPR as article 29 Data Protection Working Party previously did.

Online advertising, which is an important source of revenue for companies, continues its development day by day, as the tools of profiling and tracking do, this means that new threats are expected to arise in the future. Therefore, the implementation of the GDPR and the ePrivacy regulation are crucial points for the European Union agenda and for the protection of users' personal data.

The next chapter will analyze the influencer marketing, a new source of income for advertising companies and the unfair and misleading practice of advertising, which is another important set of directives implemented by the EU in relation to the topic of this dissertation.

¹⁰⁶ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

CHAPTER 3: UNFAIR PRACTICE, MISLEADING ADVERTISING AND THE INFLUENCER ADVERTISING MARKET

The digital advancement of the 21st century has created an escalation of new means of revenue for advertising companies as previously seen; the world wide web has shaped the world economy thereby creating new opportunities for the economic growth of companies which try to keep at pace with time.

The last chapter has shown to what extent the internet can be a threat to the right of privacy related to personal data, hence the directives and the regulation displayed have highlighted the importance of an up-to-date legislative framework, capable of dealing with any obstacle or casualty that the internet can reserve.

Online advertising, on the other hand, through profiling and tracking consumer behavior, has ensured companies the possibility of creating ad-hoc advertisements that can meet the expectation of the most suitable audience for the product advertised. Blogs, Vlogs, websites and social networks have produced new ground to experiment with a new form of advertising that deals directly with the final consumer. However, the exposition of the latter to these innovative forms of advertising, never seen before, can generate uncertainties concerning his/her rights. Therefore, the purpose of this chapter is to discuss the consumers' rights in this particular field by analyzing EU directives related to the matter.

The advent of social networks has to be individuated in the last two decades that in terms of history is a limited amount of time; nonetheless, the impressive results that such platforms had achieved in that few time is what makes them interesting. Not only interesting for people that use them so as to be interconnected with others through the posting of media, comments and stories but also for advertising companies that have found new method to place their products and increase the potential of their sales.

The social networks in general, despite the great impact among people, can as it was displayed before in the privacy chapter, result in a threat not only to personal data though. Indeed, the placement of a product, the advertisement or the sponsorship can endanger the consumer's rights. In this regard, the European Union throughout time implemented

directives (that encompass the world of online advertising) trying to deal with both business-to-consumer and business-to-business relations.

Consequently, this chapter will firstly analyze the directive on unfair commercial practice¹⁰⁷ and the misleading and comparative advertising directive,¹⁰⁸ afterwards the audiovisual and media service directive ¹⁰⁹ will be displayed and finally, the EASA Best Practice recommendation on Influencer marketing will be surveyed thus concluding the chapter. As the privacy issue analyzed previously the discussion about the unfair practice and misleading advertising alongside the influencer marketing are important matters of enquiry when talking about online advertising regulation. It is essential to be aware that in relation to the advertisement industry not only is important the right to privacy but also the consumer rights.

Before entering into detail in the analysis of the directives and, given the fact that a definition of online advertising has been displayed largely at the beginning of the dissertation, it is of utmost preeminence to identify what influencer and influencer marketing are and why they are relevant in a thesis related to online advertising.

Influencers are:

"Everyday, ordinary Internet users who accumulate a relatively large following on blogs and social media through the textual and visual narration of their personal lives and lifestyles, engage with their following in digital and physical spaces, and monetise their following [...]"¹¹⁰

Or as the EASA define: "independent third-party endorsers who shape audience attitudes through blogs, posts, tweets, and the use of other social media". 111 It is a recent phenomenon that has developed worldwide. The influencer that, as stated by the EASA definition "shape

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 $^{^{107}}$ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

¹⁰⁸ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

¹⁰⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹¹⁰ C. ABIDIN, *Communicative intimacies: Influencers and perceived interconnectedness*, Ada, 8, 2015. Available at: https://adanewmedia.org/2015/11/issue8-abidin/.

¹¹¹ EASA, EASA Best Practice Recommendation on Influencer Marketing, 2018.

the audience attitude" in order to do so is required to be a prominent figure wieldy know among people.

The particularity of being an "ordinary internet user" ¹¹² renders the person a suitable candidate to promote products, thanks to his/her authenticity. As a matter of fact, this figure is more likely to be seen as a trustworthy one by the public given that his/her following is created by himself/herself being a character instead of the result of being famous.

The influencer marketing thanks to social networks is developing more and more faster. In 2010 the creation of Instagram (among other social networks) generated a new source of revenue for advertising companies which till that moment had only placed advertising on websites. This revenue is largely related to the extensive use of this platform for buy-decision processes, ¹¹³ mostly among teenagers who see in influencers their reference figure.

Companies, by involving themselves with this type of marketing strategy and therefore by taking advantage of the reliability that influencers have among the audience, reduce the cost involved in reaching the right target for their products. However, the newness of this advertising method can reserve some unpleasant surprises given that the "authority" derived from being an influencer can result in commercial purposes that not always are explicit. ¹¹⁴

The next paragraph will initiate the discussion with the examination of the directive of unfair commercial practice and the misleading and comparative advertising directive. Thus, bringing to the fore another pillar on which this dissertation poses its groundwork.

3.1 THE DIRECTIVE ON UNFAIR COMMERCIAL PRACTICE AND THE MISLEADING AND COMPARATIVE DIRECTIVE

The online advertising and the influencer marketing which will be analyzed in this paragraph under the directive on unfair commercial practice and the misleading and comparative advertising directive are not directly appointed by these two directives. However, as the

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¹¹² C. ABIDIN, Communicative intimacies: Influencers and perceived interconnectedness, op.cit.

¹¹³ L.CHEN, Y SHUPEI, *Influencer Marketing: How Message Value and Credibility Affect Consumer Trust of Branded Content on Social Media*, Journal of Interactive Advertising, 2019 19:1.

¹¹⁴ Ibid.

examination will highlight the importance of the legislative framework related to consumer rights is extensively entangled in this new form of promotion.

The paragraph will firstly survey both directives giving a practical overview and displaying, if any, the amendment made by the Union, and then after having paved the juridical ground the focus will shift to detailing which parts of the directives are involved with the main topic of this work.

In 2005 the directive on unfair commercial practice was implemented by the European Union to promote fair commercial practices in order to incentive the cross-border market which was fragmentized due to the great number of national policies related to the topic. The harmonization was essential to remove the barrier created by the different legislations of member states that created uncertainties among consumers and costs for companies that wanted to pursue advertising campaigns in another member state country.¹¹⁵

The directive's scope is to approximately bring together the legislation on unfair practices (advertising among others) of member states because of the damages that those practices can exercise both to legitimate competitors and (mostly) to consumer rights. ¹¹⁶ Furthermore, the directive covers whichever practice is meant to exercise an influence on consumers' decisions about products. ¹¹⁷ This point, as a matter of fact, will be afterwards analyzed in relation to influencer marketing whose purpose, sure enough, is to influence people.

The delineation of the commercial business-to-consumer practices considered unfair, which are forbidden by the European Union, is the purpose of the directive. In doing so it tries to achieve an elevated level of protection for consumers, therefore, encouraging the function of the internal market. Besides this, the directive gives an explanation of important terms related to the subject of the investigation topic. Among those, there is the definition of product and, crucial for this paragraph, the definitions of "business-to-consumer commercial practice" which refers to:

¹¹⁵ Recital 3 and 4, Directive 2005/29/EC.

¹¹⁶ Recital 6, Directive 2005/29/EC.

¹¹⁷ Recital 7, of Directive 2005/29/EC.

¹¹⁸ See article 2(c), Directive 2005/29/EC.

"any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers"¹¹⁹

And of "invitation to purchase" which apply to:

"a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase"120

Subsequently, unfair commercial practices which are prohibited by the Union include any practice which can shift the average consumer¹²¹ conduct, in relation to a product and is against the professional diligence 122 prerequisites. 123 Moreover, special attention is also posed to the prohibition of unfair practices which are meant to specific categories of consumers addressed as "vulnerable" in term of age, mental and physical fragility and ingenuousness.¹²⁴

In addition to the meaning of unfair practice, the directive distinguishes these last into two categories, from the one hand misleading commercials practices are divided into misleading actions that concern practices which are possibly deceiving or contain false information(the characteristics of the product etc.) and therefore cause the consumer to behave differently as he/she would normally have done if he/she was rightfully informed; 125 and misleading omission which refers to the omission or the unclear explanation of information related to the product which will mislead the consumer in buying it. 126 From the other hand, it refers to aggressive commercial practices, which in general are the one that include coercion and harassment so that the consumer is not free to choose if buying or not buying a product. 127 To what concern the enforcement of the directive member states should implement it at the

¹¹⁹ Article 2(c), Directive 2005/29/EC.

national level including legal actions and penalties when the policies are breached. 128

¹²⁰ Article 2(k), Directive 2005/29/EC.

¹²¹ The term "average consumer" is defined by recital 14 of the 2005/29/EC as a reasonable and normally informed person.

¹²² The term "professional diligence" is defined by article 2(h) as the reasonable expectation of a trader' skills and standard in respect to the consumer.

¹²³ Article 5(2)(a-b), Directive 2005/29/EC.

¹²⁴ Article 5(3), Directive 2005/29/EC.

¹²⁵ Article 6, Directive 2005/29/EC.

¹²⁶ Article 7. Directive 2005/29/EC.

¹²⁷ Article 8-9, Directive 2005/29/EC.

¹²⁸ Article 11 and 12. Directive 2005/29/EC.

The 2005/29/EC directive which was meant to harmonize legislation related to business-to-consumer practices was amended in 2019 with the Directive (EU) 2019/2161¹²⁹ due to the technological advancement that created new markets and therefore new threats.

The amended directive, as a matter of fact, displays a refurbished definition of product so that it could include services and products offered by the digital world; and the term "online marketplace" which is exposed as:

"a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers."

Furthermore, articles 6 and 7 were implemented, the former with the inclusion of the misleading marketing practice of falsely peddling a product as identical to another, whereas the latter with an upgrade concerning the online sales, particularly related to the raking¹³⁰ criteria of a product adopted by the provider of a marketplace. Nonetheless, the consumer right to remedies through compensation was incorporated and new requirements for penalties were integrated.

The brief overview of the unfair commercial practice directive is the first step for the delineation of the lawfully advertising practice, now the directive on misleading and comparative advertising will be displayed to give further juridical information related to the topic.

The directive 2006/114/EC was introduced so as to harmonize the member states legislations to what concern business-to-business practices trying thereby to break down the barrier that the fragmentation of member states policies has created, hence promoting the free movement of services.

The scope of the directive is to display the condition under which comparative advertising is lawful and protects traders form misleading advertising.¹³¹ The meaning of trader is utmost relevant for this paragraph and the directive in this sense refers to he/she as:

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¹²⁹ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules

¹³⁰ The term ranking refers to the relative importance given to the products.

¹³¹ Article 1, Directive 2006/114/EC

"any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader" 132

Crucial are also the definition of misleading and comparative advertising: the former concern advertising that by including deceptive information can hurt a legitimate competitor and impact the economic decision of a consumer; whereas the latter refers to any advertisement which displays not only the product advertised but also (explicitly or implicitly) the competitor product one.¹³³

Furthermore, directive 2006/114/EC lay down the criteria under which misleading advertising can be distinguished. Thus, the price, the information about the product (for instance availability, composition) and the identification of the advertiser constitute the set of rules that determine the misleadingness of an advertisement. ¹³⁴ Moreover, to what concerns comparative advertisements, they can be considered lawful only if they respect some standards, among those the comparison must be objective and can happen only if the products/services serve the same purpose; the advertisements do not create confusion among consumer and; the origin of the products are the same. ¹³⁵

Finally, the directive addresses the duty of member states such as to ensure that the provisions implemented at national level are fulfilled by advertising company and that figures with a legitimate interest can take legal or administrative action against illicit advertising practice. 136

The overview of the two directives was meant to pave the ground for the analysis of unfair commercial practice and misleading advertising firstly in the online advertising sector and afterwards on the influencer marketing.

Thus, the European Union Parliament in 2010 submitted a directorate in which are explicated which practices are considered unlawful by the unfair commercial practice directive (hereafter UCPD). The paper by combining different member states legislations tried to provide an analysis of the enforcement in those countries of the UCPD directive.

¹³² Article 2(a), Directive 2006/114/EC.

¹³³ Article 2(b-c), Directive 2006/114/EC.

¹³⁴ Article 3, Directive 2006/114/EC.

¹³⁵ Article 4, Directive 2006/114/EC.

¹³⁶ Article 5, Directive 2006/114/EC.

The paper indeed shows which are the different types of unfair commercial practices that can be found on the internet.

The most common one is hidden advertisements which are forbidden by the 2005/29/EC more precisely by article 7(2); they are difficult to detect and constitute an example of misleading commercial practice; thus, the difficulty in spotting such advertising method is due to the fact that they can be hidden in reviews of products and the people involved in the review are paid by the producer of such product (Annex I (11) directive 2005/29/EC). 137 Moreover, another form of prohibited misleading practice displayed by annex I (2 or 4) is related to the labelling of a product with a quality label without having the right to use it, and employing outdated test results to prove the efficacy of a distinct product (Article 6 and 7 of UGPD).¹³⁸ Those last two advertisements, can refer both to the online and offline world, given the duality of use it is therefore reasonable to display them in this dissertation. Furthermore, information about the cost in advertisements can be considered unfair practice in three different cases: when a product is passed as free and then after, the consumer has to fill a questionnaire with his/her personal data and ends up being involved in a contract with fees; 139 when the price displayed on the internet not correspond to the total price of a product, for example, the fees are not included in the price shown when paying; 140 and when sites that show comparison prices does not give all the information necessary for the consumer before

Plenty are the practices that can be considered misleading actions or misleading omissions in the online advertising as just showcase. The threat that the internet can pose is due to the rapid advancement of the technologies involved and the limited knowledge that people have while using it. The internet is not the only place where misleading practices of advertising take place, as a matter of fact even the social network and the influencer marketing can reserve unpleasant surprises.

buying a product.¹⁴¹

¹³⁷ European Parliament, *Misleading advertisement on the internet*, Directorate general for the internal policies, Department A: Economic and Scientific Policy, IMCO, 2010.

¹³⁸ Ibid.

¹³⁹ Annex I (20)

¹⁴⁰ Article 6(1)(b), 7(1)(c) and 7(4)(d), Directive 2005/29/EC.

¹⁴¹ European Parliament, Misleading advertisement on the internet, Op.cit.

First of all, to determine if the directives analyzed can be related to influencer marketing it is important, as the European Commission suggest, to understand when the influencer can be considered a trader. He/she indeed can configure as a trader, from the Commission perspective, if he/she on regular basis utilizes such practices; nonetheless, the promotion of a product from an influencer can fall within the scope of acting "on behalf of the trader"; as a matter of fact, the promoter and the supplier can both configurated as trader even though they are not the same person.¹⁴²

Social Media platforms can actually be seen as a challenge for the enforcement of directive 2005/29/EC. Thus, the form of unfair commercial practices that can be displayed are plenty; among those, there are the hidden advertising when they are not distinguishable by the cultural content and, the native advertising, mostly used by influencers, that consists of uploading a commercial content mixed with other non-commercial ones. In this regard, not only can apply article 7(2) of the directive but also, since the social media are significantly employed by children and teenagers, article 5(3). 143

The case of *Peek & Cloppenburg*, ruled by the Bundesgerichtshof (the German federal court of Justice) can delineate some aspects of directive 2005/29/EC that can be relevant in the influencer market unfair practice. The case opposes two companies which sells clothes the P&C Düsseldorf and P&C Hamburg which are two distinct businesses that share an agreement in which they divide among themselves the German economic market in two zones. The dispute is related to the P.&C Hamburg advertisement in the Grazia magazine declared misleading, because of the not distinguishable nature for the practice as advertising in P&C Düsseldorf opinion.¹⁴⁴

The case itself does not affect the current analysis, though the judgment has brought about some clarification that are related to it. Hence, the ruling explains that under No. 11 of Annex

¹⁴² Commission notice, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, p.27.

¹⁴³ Ibid., p. 97.

¹⁴⁴ Case C-371/20, Peek & Cloppenburg, 2 September 2021.

I of the 2005/29/EC directive are to be considered misleading those advertorial contents that do not explicitly show their nature if related to paid advertisement.¹⁴⁵

Altogether, the non-clarification of a commercial endorsement by an influencer who is advertising his/her own product, or the product of a company is to be considered misleading under articles 6 and 7 of the UGPD. Nonetheless, the commercial purpose needs to be clearly visible to the audience. Consequently, given that influencers base their image on credibility the commission notice also displays that in certain cases articles 8 and 9 of UGDP can be addressed if the actions of that influencer could be regarded as an aggressive commercial practice, especially if young people are involved.¹⁴⁶

The online advertising and the influencer marketing are filed which are still developing, this means that the just exposed forbidden form of advertising cannot be the only one that exists or that will be used in the future. The purpose of this paragraph was to be displayed two directives (the unfair practice directive and the misleading and comparative directive) that the European Union had implemented to protect consumer rights and how those directives were applicable in the context of this dissertation. Nonetheless, another directive, with respect to advertising was enacted by the European Union and the next paragraph will centre on exposing it.

3.2 AUDIOVISUAL AND MEDIA SERVICE DIRECTIVE

The online world offers an extensive number of platforms for advertising that can render the regulation operations quite difficult for countries. Indeed, the recent developing of not only social network but also video streaming platform had increased the multitude of resources that advertising companies can dispose of. Nowadays, platforms as YouTube or the most recent TikTok, other than displaying videos, permits to advertisers (in exchange for payment), through the use of clips, to advertise their products. Nevertheless, those two are not the only

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¹⁴⁵ Ibid.

¹⁴⁶ Commission notice, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, op.cit. pp.98-99.

platforms that display audiovisual advertisement, even social networks do. However, for the scope of this paragraph, the attention will not be centered on any particular platform so as to not display a case-by-case scenario but a general one.

The audiovisual and media service directive (2010/13/EU)¹⁴⁷ which was enacted in 2010 will not be surveyed because of its preeminence in the television topic. However, its amended version, directive 2018/1808¹⁴⁸ comprehends modifications that are directly involved with the online advertising so instead of generally analyze the first source of the directive this part will only display the amended version.

The scope of the directive is to implement the protection of consumer and children's rights and to safeguard the functioning of the single market in the area of audiovisual media services. In doing so the amended directive was introduced so as to bind new types of audiovisual media services, that have developed in recent years, to follow the requirements of this directive.¹⁴⁹

First of all, audiovisual service means every content not related to radio services and audio transmission that include moving pictures equipped with or without sound.¹⁵⁰ Moreover the consolidated version introduced the definition of:

online sharing-platform as:

'a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the videosharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing"¹⁵¹

And of user-generated videos as:

¹⁴⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹⁴⁸ 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.

¹⁴⁹ Recital 1, Directive 2010/13/EU

¹⁵⁰ Recital, 23, Directive 2010/13/EU

¹⁵¹ Article 1(1)(aa), Directive 2018/1808

"user-generated video' means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other use" 152

Online sharing platforms in this sense can refer for instance to YouTube, and user-generated video, as to the extent to which the focus of the chapter is, can refer among others to influencer videos. Nonetheless, user-generated video is not limited to the influencer one but to every kind of video which is not edited by the provider of the platform.

The introduction of these two definitions is the first step to the analysis of the directive center in online advertising. Important is also to note that the directive in article 3 displays that the "freedom of reception" and retransmission, in other member states countries, is ensured and provide certain derogation concerning for instance the content of a video if related to the promotion of violence.¹⁵³ For this reason the implementation at a national level code of conduct is promoted by the EU.¹⁵⁴

Until this moment, this dissertation has never taken into account the advertisement itself; it only has shown how advertising is regulated when related to the protection of data or to the protection of consumers by misleading, comparative and unfair practices. This is one of the reasons why this directive is being analyzed, despite the inclusion of online advertisement among its feature the directive clears the ground concerning the content of the advertisement. As a matter of fact, the directive provides some insight in relation to audiovisual services. Advertising must be distinguishable as such and not hidden, moreover, it cannot rely on "subliminal techniques", including the promotion of discrimination based on sex, age, race (etc.), cause prejudice in the respect for human dignity or encourage harmful behaviors for the environment or the health and safety of people.¹⁵⁵

On the other hand, the directive lists a series of products or services that are banned to be advertised. Indeed, this concern: electronic cigarettes or tobacco itself; medical treatments;

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¹⁵² Article 1(1)(ba), Directive 2018/1808

¹⁵³ Addressed also in article 6(1)(a), Directive 2018/1808

¹⁵⁴ Article 4, Directive 2018/1808

¹⁵⁵ Article 9 (1)(a, b, c,), Directive 2018/1808

the promotion of the consumption of either alcohol or HFSS (for minors)¹⁵⁶ and, the encouragement of drinking to minors. Furthermore, advertisements shall in no way incite underage people to buy a product or urge them to convince their parents to buy such a product.¹⁵⁷

Special attention is posed to the protection of minors, in this regard, the directive includes policies to protect underage people from every kind of practice, as a matter of fact, it prohibits the processing of data for commercial purposes; thereby forbidding the profilation and the behavioral targeted advertising of this group of people. Video-sharing platforms have, to comply with the directive, to check the age of people who subscribe to their site and, if minor, the implementation of parental control dispositions is required.¹⁵⁸

The consolidated directive has created new regulations for video-sharing platforms that, to comply with the requirements, need to operate some changes in their general policies. Nonetheless, it is important to state that the prohibition on uploading videos that contain certain behavior is not only related to advertising but to the video content in general.

A special parenthesis needs to be made about the most recent video-sharing platform that it is spreading in the European Union, especially among the youngest. Tik-Tok, which was founded in 2016, is becoming one of the most used apps worldwide. Nonetheless, this platform, as a letter from the BEUC¹⁵⁹ to ERGA¹⁶⁰ state, breaches some policies related to Audiovisual Service Directive.

Indeed, the letter poses some concerns about potentially unlawful practices adopted by Tik-Tok. ¹⁶¹ Firstly, it is mentioned the profilation for hidden advertising purposes with a reference to the Catalan Audiovisual Council. The council found out that more in 16 videos

¹⁵⁹ The European Consumer Organization, which purpose is to defend consumer rights at the EU level

¹⁵⁶ It stands for high fat, salt and sugar food

¹⁵⁷ Article 9 (1)(e, f, g), Directive 2018/1808

¹⁵⁸ Article 28b, Directive 2018/1808

¹⁶⁰ European Regulators Group for Audiovisual Media Services, which purpose is to advice the commission in relation to Audiovisual Media service directive implementation

¹⁶¹ BEUC-L-2021-027/UPA/DMA/rs

created by 8 teenagers, with a vast amount of followers, contained hidden advertisements of product which under art. 9 are prohibited (for instance: sugar drinks, fast food). 162

Moreover, the BEUC has discovered some practices that Tik-Tok has suggested to advertisers, namely the hashtag challenges (that are interesting for youngers) which involve children and teenager in the advertising distribution. 163

As BEUC displayed the implementation of the audiovisual directive is fundamental to stop actions (like the Tik-Tok ones) that can breach the consumer rights and somehow endanger underage people.

This paragraph has analyzed the directive 2018/1808 from the advertising point of view, therefore including a new element to the online advertising regulation in the EU. The inclusion of this new part has shown how the online advertising world is a complex machine than is difficult to regulate and control. The next chapter instead will not survey a directive of the EU but the EASA best practice recommendation on influencer marketing thereby ending this chapter.

3.3 BEST PRACTICE RECOMMENDATION ON INFLUENCER MARKETING

Influencer marketing, as already mentioned, is an important source of revenue for an advertising company that wants to display their product and services to a specific group of people that could be interested in the purchase of such. Nevertheless, despite the prominence of this topic in the digitalized world, a clear regulation of this kind of practice cannot be found at the EU institutional level; to compensate for this absence the EASA has adopted the best practice recommendation on influencer marketing.

The purpose of this paragraph is, firstly, to showcase what a best practice recommendation is and then to explore the one related to the influencer marketing. Moreover, some national

¹⁶² CONSELL DE L''AUDIOVISUAL DE CATALUNYA, 'CAC reports TikTok videos with 30 million views for hidden advertising", 18 September 2020.

¹⁶³ BEUC-L-2021-027/UPA/DMA, op.cit.

level legislation in the matter will be displayed so as to comprehend how the SROs of member states has adopted the best practice recommendation.

The necessity of providing both support and advice to SROs is what promote the creation of best practice recommendations. Nonetheless, these recommendations are not binding, however, the purpose of their development is to achieve a high coherence level; without forgetting that the cultural and regulatory framework of member states can differentiate the implementation process of such practices.¹⁶⁴

Best practice recommendations are divided into blueprint recommendation (in which falls the directive under examination) that are meant to give guidance on the self-regulatory organisations' codes and remits; and operational ones which, as the term implicitly expose, give counselling on the operation, on the structure and SROs procedures.¹⁶⁵

Now that a definition of best practice recommendation is given the analyzation of the best practice recommendation on influencer marketing will be displayed. The scope of EASA best practice is to help national SROs in developing codes which can be reliable for the consumer, thereby elaborating strategies that assure that such practices are trustworthy and respectable.¹⁶⁶

The Recommendation displayed that the regulation of such practice was already in place with the 2008 BPR (revised in 2015), ¹⁶⁷ however such recommendation did not include third-party such as influencer, so an implementation was necessary in order to integrate the new form of online advertising created afterwards. Moreover, the Best Practice acknowledges the fact that influencer marketing can have a similarity with the meaning of user-generated content, and this could mislead consumers. ¹⁶⁸

To what concern the Recommendation, in practical terms, it distinguishes the editorial content and the commercial communication by stating that the latter have to respect to requirements to be consider such. The commercial communication indeed to be called as

¹⁶⁶ Ibid.

¹⁶⁴ EASA, EASA Best practice recommendation on influencer marketing, op.cit.

¹⁶⁵ Ibid.

¹⁶⁷ EASA, EASA Digital Marketing Communications Best Practice Recommendation, 2015.

¹⁶⁸ EASA, EASA Best practice recommendation on influencer marketing, op.cit.

such need to include a compensation and the editorial control by the company related to the product.¹⁶⁹

With the term editorial control the BPR highlight two types of involvement by the company which product is going to be advertise. The first one, and the less intrusive one concern every suggestion and proposal which are meant to regulate for instance the number of posts or the structure of such; the other one instead includes a stricter behaviour by the company which impose for example a specific script which the influencer need to portray.¹⁷⁰

To the extent of the compensation the best practice explain that the payment can be made through a regular monetary compensation after a contract is made; or through an influencer-company agreement which can contain free product and mutual commitment in exchange for the advertisement.¹⁷¹

It is important, though to mention that influencer not always advertise product as a matter of fact, for instance, a beauty influencer can insert in its stories the review of product just for pure editorial content without compensation of any kind by the producing company.

The rules, that influencers must follow when advertising a product, are that such commercial practice if not recognisable form the context must be displayed as such. The information of the commercial purpose of the content must be disclosed with the use of appropriate wording, hashtag labelling, timing, and placement of the disclosure. The implementation on these last measures must be undertaken by national SROs.¹⁷²

To was concern the responsibility, EASA invite national SROs to remember the duty and responsibilities that every party related to the commercial communication has in order to prevent any kind of misbehaviour that can cause harm to consumer, which is social network are mostly young people.¹⁷³

¹⁷⁰ Ibid.

¹⁶⁹ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

The implementation of this recommendation by national SROs differs from country to country. Some self-regulatory organisations have more concise information other instead had longer explanations to how an influence should display a proper commercial communication. From the one hand, for instance there is the Italian IAP Digital Chart, which with a detailed report give guidance, not only to influencer but also to blogger (Etc.), about what they are required to display when they advertise.

This concern: the inclusion on the top of the content of wording as "pubblicità", "promosso da", "in collaborazione con", or the incorporation within the first three hashtag of "#ad" one; and moreover, when a product is supplied by a company for free, the specification of it with the statement "product sent by". ¹⁷⁴

On the other hand, SROs like the Ireland ASAI use recommendation less detailed in which they express the important things to be mentioned and to consider when posting a commercial content without taking into account every platform in detailed.¹⁷⁵

This paragraph concludes the analysis of the policies related to the online advertising from the perspective of consumer rights. There have been displayed which contents and advertisements are prohibited to be upload and in which cases advertising is misleading and can constitute an unfair practice towards both competitors and consumers. Furthermore, the recent influencer marketing has been surveyed, therefore closing the analysis of the legislative framework adopted by the EU both in consumer and privacy rights. The next chapter will conclude the EU section by giving some insights of the next policies which will be developed in the future.

¹⁷⁴ IAP, *IAP digital chart*.

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¹⁷⁵ ASAI, ASAI Guidance Note: Recognisability of marketing communications, 2016.

CHAPTER 4: DIGITAL SERVICE ACT AND DIGITAL MARKET ACT

Throughout this section, it has been highlighted that the technological advancement required a legislative framework up to date to deal with any new creation that can harm somehow the population. Thought the directives and regulations analysed have implemented a policy harmonization in the member states so as to promote the free movement of good services and data, the necessity of an up-to-date legislation has paved the ground for the introduction in the future of the Digital Service Act and the Digital Market act.

This short chapter will discuss the two acts without detailing them, given that they have not been enforced yet. Thus, it will portray, with the information given by official institutions what the step, of the harmonisation and regularisation of the digital world, will follow to protect and further integrate the single market.

Both legislative initiatives were proposed by the commission in 2020 and only recently, respectively the 25 march (for the Digital Market act) and the 23 April (for the Digital Service Act) of 2022, a political agreement has been reached.

The purpose of the two acts is to establish together an open digital market (more open that it already is) and to implement the safety of it.

The Digital Service Act, meant to implement a legislative framework in which the digital single market is upgraded, the online platform can enjoy of a harmonised set of rules and consumers are safer.

In first instance it individuates four distinct categories of providers: hosting services that can include online platforms¹⁷⁶very large online platform (with more 450 million users in the EU) and intermediary services. The scope of the regulation is implementing this platforms' transparency and responsibility by promoting security and obligations for providers. Furthermore, illegal content removal mechanism will be upgraded, and traceability will be included so as to better identify the sellers of those product and services.

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¹⁷⁶ Platform which put together consumer and sellers (app stores, marketplaces).

The proposal regulation not only will establish policies related to transparency but will also introduce the obligation, for large online platform, to assess through risk-based action which can be the misuse of their platform.¹⁷⁷

To what mostly concern the enquiry of the thesis the regulation will ban the targeted advertising related to special category of personal data and to young people.¹⁷⁸

Instead, the Digital Market Act main purpose is to individuate which digital services can be delineated with the concept of "Gatekeeper". The proposal regulation defines this figure as a provider of a core platform service which can be distinguish by: its impact in the market, the fact that it is a fundamental portal to businesses and users and; that it has a lasting position in the Union. Nonetheless, for this type of provider, the regulation establishes a set of rules and obligations to which the gatekeeper needs to attain.¹⁷⁹

Among those obligations, the closer to this investigation is the one that prohibit a gatekeeper to use personal data for other services directly involved with it or third-party ones without the explicit consent of the owner, as regulation 2016/679 explains. ¹⁸⁰

The regulation just displayed the aim, without adversely affecting other regulations and directives in place, to even further regularized the digital world by creating sets of rules that will implement not only the safety of the consumer but the capacity for companies to benefit from the harmonisation in the European Union of regulation directly related to them.

This chapter is the last part of the European Union section. Throughout this, the thesis had tried to explain in detail historical, actual and future directives and regulations in the context of online advertising focusing on the issue of privacy and the regulation of online advertising. The next section, following the logical thread of this one, will survey firstly, the historical background, secondly, the privacy issue and thirdly, the influencer marketing in the legislative framework of the USA.

¹⁷⁷ 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

¹⁷⁸ Ibid

¹⁷⁹ Proposal for a regulation of the European Parliament and of the Council of contestable and fair markets in the digital sector.

¹⁸⁰ Ibid.

SECTION 2: THE USA LEGISLATION AND POLICIES

CHAPTER 5: HISTORICAL BACKGROUND

The United States of America is a federation of 50 states, therefore juridically different from the European Union. This section will survey the United States legislation and policies using the same parameters previously employed in the EU section so as to give the same pieces of information about the two, to then fulfil the comparison which will be examined in the third section.

The constitution of the USA displays in which way its government works. There are 3 branches and every one of them has its own power and can, through the system of check and balance, reverse the actions of another branch so as to stop a branch from becoming dominant in respect of the others. ¹⁸¹

The power is divided into legislative executive and juridical and every branch has its figures of reference. The legislative branch, which is in charge of creating law, comprises the congress divided into two chambers the Senate and the House of Representatives;¹⁸² the executive, which enacts laws, involves the president the cabinet and the vice president;¹⁸³ whereas the juridical branch is responsible for the interpretation of the laws, and it includes the supreme court and other courts.¹⁸⁴

Nevertheless, it is fundamental for the scope of this section to explain that the constitution clearly states that the countries forming the USA have specific powers; as a matter of fact, each of them has its constitution, judiciary, governmental structure and legal codes. ¹⁸⁵ However, federal legislation and policies have a primacy when laws are enacted. This means that a federal policy will always overthrow a state one.

The distinction just illustrated will, in the next chapters, hold a significant role with respect to the legislative framework analysis considering that laws are implemented not only at the federal level but also at the state one.

¹⁸¹ USAgov, Branches of the U.S. Government, available at:< https://www.usa.gov/branches-of-government>

¹⁸² U.S. Const. Art. I

¹⁸³ U.S. Const. Art. II

¹⁸⁴ U.S. Const. Art. III

¹⁸⁵ Federal Judicial Center, The U.S. Legal System: A Short Description.

To what concern advertising, starting from the 18th century an open market in the USA was established and since then the growth and technological advancement brought an increase in production and advertising. This last became a matter of concern for consumers and advertising companies which did not know if they could rely or not on the advertisement of a specific product.¹⁸⁶

Therefore, in the 20th century, a movement took the lead in this matter: the Truth in Advertising Movement; its purpose was to seek a professionalization of the advertising field which afterwards resulted in the enactment of the "Printer ink statute" related to advertising, that was then adopted for the first time in Ohio.¹⁸⁷

After that, and after the continuous growth in advertising expenditure the foundation of an independent regulatory agency was crucial: the Federal Trade Commission whose scope was to forbid and define unfair practice in the USA ultimately became an authoritative figure in the advertising field. ¹⁸⁸

Advertisements which by then and afterwards became increasingly complex and elaborated required a regulation that would shift from the original goal, which was to defend legitimate competition, to a more consumer protection-oriented regulation. 189

The technological advancement, as mentioned, had a great impact on the USA advertising field. The historical development of the advertising industry resulted firstly in the creation of a statute which was adopted by the majority of the state and then in the foundation of the FTC. The first issue which caused concern both to advertising companies and consumers was the reliability of advertisements which resulted in the implementation of policies that prohibited the use of misleading advertisements.

Having briefly described the initial development of the advertising industry this chapter will follow the historical narration by introducing and analyzing two important agencies related to the topic of this work: the Federal Trade Commission and the Digital Advertising Alliance.

¹⁸⁸ Ibid.

¹⁸⁶ D.P. ROSS, *The historic development of modern US advertising regulation*, Department of Accounting and Law, Babson College, Babson Park, MA, USA, 2015.

¹⁸⁷ Ibid.

¹⁸⁹ Ibid.

5.1 THE FEDERAL TRADE COMMISSION AND THE FEDERAL TRADE COMMISSION ACT

The primacy of the government bodies with respect to state ones gives the former the right to institute agencies which can regularize specific topics at the federal level.

This paragraph will survey the most important agencies in the USA related to the subject of the dissertation, the Federal Trade Commission. Starting with a general overview of the commission, its duties, its bureau and its offices, the analysis of the Federal Commission Act will be displayed thereby giving the first insight into the regulation of online advertising in the United States of America.

The Federal Trade Commission, instituted in 1914 with the Federal Trade Commission Act signed by President Woodrow Wilson, was founded on the necessity to regularize the competition due to the development of commercial intercourses among states.¹⁹⁰

The FTC's scope, indeed, is to protect consumers and implement the prevention of unfair and deceptive practices at the hands of businesses. In order to do so, it provides educational programs for companies and consumers; it implements policies, and it undertakes measures to effectively enforce laws related to unfair, anti-competitive and deceptive practices.¹⁹¹

The Commission is composed of 5 commissioners (no more than 3 can come from the same state) whose mandate last seven years. Both the commissioner and the chairman are appointed by the president prior to consultation with the Senate.¹⁹²

The FTC is composed of twelve offices and three Bureau: the Bureau of Competition, the Bureau of Economics and the Bureau of Consumer Protection.

The first one is involved in the prevention of anti-competitive practices; in order to do so, it enforces antitrust policies such as the Clayton Act.¹⁹³ Whereas, the second one by providing

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¹⁹⁰ A E. MACINTYRE, J. J. VOLHARD, *The Federal Trade Commission*, 11 B.C. L. Rev. 723, 1970, Available at: https://lawdigitalcommons.bc.edu/bclr/vol11/iss4/6>

¹⁹¹ FEDERAL TRADE COMMISSION, *About US: Mission*. Available at: https://www.ftc.gov/about-ftc/mission> ¹⁹² Federal Trade Commission Act, 15 U.S.C. § 41.

¹⁹³ The Clayton Act's purpose is to prevent anti-competition practices

economic analysis and assisting consumer protection and antitrust investigations, seek to portray to the commission the economic impact of its actions. The last one' role, instead, is to defend consumer from misleading practices by enforcing congress laws and commission regulations on the matter.¹⁹⁴

The Bureau of consumer protection is of utmost importance for this work since it incorporates, among other divisions, the division of advertising practices and the division of privacy and Identity Protection. The former operates in the enforcement of the laws related to the "truth-in-advertising", which seek advertising businesses to be reliable and, in every kind of mean necessary to safeguard consumer rights against misleading advertising, whereas the latter deal with issues related to the consumer's privacy and the enforcement of such laws.¹⁹⁵

The Federal Trade commission Act, as just displayed, is the founding act of the FTC, it was last amended after the entry into force of law 109-455 (22/12/2006), and it is the act that gives power and responsibility to this agency. Thus, the FTCA gives the FTC the power to investigate in any practice considered unfair that could damage the consumer or the competitor company itself.

The Federal Trade Commission Act will not be portrayed extensively; however, section five of such Act is important to be addressed because of its relationship with the thesis's enquiry question.

Indeed, the FTCA invested FTC with the power to decree the unlawfulness of practice considered unfair or misleading. Practices are considered such, under section 5 of the act, if they can cause damage or are related to the material conduct within the United States. The section, as a matter of facts, states that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

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¹⁹⁴ FEDERAL TRADE COMMISSION, *About US: Bureaus&Officies*, Available at: https://www.ftc.gov/about-ftc/bureaus-offices

¹⁹⁵ Ibid.

¹⁹⁶ Federal Trade Commission act, Sec.5 15 U.S.C. § 45

¹⁹⁷ Federal Trade Commission act, Sec.5 15 U.S.C. § 45 (1)

Section 5, while defining the scope of the FTC and the meaning of unfair practice makes understandable the fact that the online advertising practices are under its jurisdiction.

In addition to that, there are other sections which are directedly involved with the advertisement industry, thereby related to the online advertising world.

Section twelve, in this regard, address false advertisement¹⁹⁸ (the one who induct consumer to buy services, food for instance) as unfair and deceptive practices.¹⁹⁹ Section thirteen and fourteen (directly relate to false advertisement) respectively illustrate the power of commission of imposing injunction and restraining orders and the possibility for the commission to apply penalties.²⁰⁰²⁰¹

The Federal Trade commission is an important agency for the regulation of online advertising nonetheless the American advertising industry also relies on self-regulatory bodies. The next paragraph as a matter of facts will briefly describe the DAA so as to provide all the general information related to the organizations that regulate and implement online advertising policies.

THE DIGITAL ADVERTISING ALLIANCE

The development of the digital world has created for the USA the necessity to keep at pace with the new ways with which advertising companies implement their economic revenues.

¹⁹⁸ False advertisement is defined and described in Sec. 15 15 U.S.C. § 55 as: "(1) means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug. (2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine."

¹⁹⁹ Federal Trade Commission act, Sec.12 15 U.S.C. § 52

²⁰⁰ Federal Trade Commission act, Sec.13 15 U.S.C. § 53

²⁰¹ Federal Trade Commission act, Sec.14 15 U.S.C. § 54

The FTC, in this regard although operating in the regulation of advertisings (among other themes), is not the only agency that deals with the digital advertising world.

In order to provide guidance to companies the Digital Advertising Alliance was created. The alliance (also known as DAA) is a non-governmental organization that, through the use of principles, enforces privacy practices in the online advertising field. Hence, it is led by the most prominent marketing and advertising associations namely the American Advertising Federation, the Interactive Advertising Bureau, the BBB National Program, the Network Advertising Initiative, the A4 and the Association of National Advertisers.²⁰²

The goal of this association is to promote transparency for consumer and self-regulatory practices, among which the Online Behavioral Advertising principle (which will be displayed in the next section). It also implements first-party and third-party guidelines on Mobile-app and Websites and Mobile web in order to acknowledge companies in their responsibilities when using these devices to advertise.²⁰³

This little paragraph was meant to give an insight into the Alliance which developed the Self-regulatory principle of Online behavioral advertising. With this last parenthesis, the historical background of this section is fully delineated and was meant to introduce the USA context. First of all, by explaining the regulatory framework of this country and in the second instance highlighting the organisation and agency which deal with the online advertising field.

The next chapter will survey the issue of privacy giving altogether information about the federal and state-level laws and focusing afterwards on the regulation of privacy when it concerns the protection of personal data.

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²⁰² Digital Advertising Alliance, About the Digital Advertising Alliance, Available at:

https://digitaladvertisingalliance.org/about

²⁰³ Ibid.

CHAPTER 6: THE REGULATION OF ONLINE ADVERTISING AND THE ISSUE OF PRIVACY

The USA political framework as displayed in the historical background is divided into three branches, nevertheless being a federation of states implies that this division not only applies to the federal level institution but also to the state level one.

Therefore, the regulation of online advertising and the privacy issue annexed to it not only can be regulated at the federal level, with the use of acts and agencies affixed to it but also at the state level. This, as a matter of fact, renders the level of protection and regulation very different from state to state.

This chapter, given these premises, will briefly display the privacy laws implemented at the federal level, and afterwards, the state-level policies related to privacy in online advertising will be examined (highlighting the differences among state laws). Moreover, the OBA self-regulatory principles will be analyzed thereby closing the discussion about the privacy issue.

6.1 THE LACK OF A UNITARIAN FEDERAL LEVEL DATA PROTECTION REGULATION

The inexistence of a unitarian data protection law in the USA resulted in a netting of privacy laws in distinct sectors. Nevertheless, the privacy regulation does not only exist at the federal level, as a matter of fact, but there are also state-level laws related to the subject that in some cases can result stricter than the federal ones.

This paragraph is meant to introduce the federal level privacy laws and to display whether or not such laws can be invoked to defend personal data in Online Advertising.

At a first glimpse, the laws which will be examined seem to have little in common with online advertising, however, for the scope of the paragraph, a law summary will be given in an attempt to determine whether or not these laws have anything in common with online advertising.

Indeed, the privacy policies which will be briefly surveyed are: the Fair Trade Reporting Act which safeguard the data that consumer reporting agencies collect by imposing obligations

to such agencies in the transmission and investigations related to credit reports; ²⁰⁴ the Health Insurance Portability and Accountability Act which protect individuals form the disclosure of health information related to them; ²⁰⁵ The family Education Right and Privacy Act that covers the student education field; ²⁰⁶ the Video Privacy Protection Act, which regulate personal data on videotape rental and sale records; ²⁰⁷ the Electronic Communication Privacy Act which deal with the communication sector and more precisely with the diffusion of communications (it actually protect such communication from being collected and used illegally); ²⁰⁸ the Gramm-Leach-Bliley Act deals with companies in the financial sector and require them to not only safeguard data but also to explain to consumer how their data are shared. ²⁰⁹

Provided that the laws just mentioned do not have any correlation with the online advertising world there are two more laws that are important to display when talking about the US privacy regulation

First of all, the Federal Trade Commission Act that was analyzed in the historical chapter have, as previously stated, a significant amount of point in common with the online advertising; these are related the prohibition of unfair practice and the requirement for companies to be transparent when advertising. Nevertheless, this act is the founding act of the Commission itself which means that it refers mostly to the responsibilities and duty that this agency has at the federal level. To what concern privacy, through its privacy and identity protection division, it enforces laws in the matter, which imply that the regulation of the online advertising by the FTC is also subjected to the privacy law enforcement (an example of such enforcement is the Children's Online Privacy Protection Rule adopted after the entry into force of the Children's Online Privacy Protection Act).²¹⁰

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²⁰⁴ Fair Trade Reporting Act, 15 U.S.C. § 1681 et seq.

²⁰⁵ Health Insurance Portability and Accountability Act, Pub. L. 104-191, 1996.

²⁰⁶ Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.

²⁰⁷ Video Privacy Protection Act, 18 U.S. Code § 2710.

²⁰⁸ Electronic Communication Privacy Act, 18 U.S.C. §§ 2510 et seq.

²⁰⁹ Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.

²¹⁰ Children's Online Privacy Protection Act, 5 U.S.C. §§ 6501–6506

The Children's Online Privacy Protection Act²¹¹ (COPPA)defines the rules that operators need to follow in order to process children's personal information. According to the act, the term "child" refers to people that are under 13 years old.²¹² This age identification is an important matter of the dissertation enquiry given that a great number of under 13 years old people use social media and the internet in the everyday life. Therefore, how does this age limitation affect the online advertising world? Before answering this question, a general overview of the COPPA will be shortly presented.

The Act imposes a set of requirements that the operator has to fulfil in order to lawfully process a child's personal data; this includes the request of an opt-in consent to parents if an online service or a website, which is collecting personal information, is: child-oriented or, a portion of it is child-oriented or if the operator of such website is aware of the age of the child.

This opt-in consent is named in the act as "verifiable parental consent" which means:

"any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child."²¹³

Furthermore, the operator of the website not only needs to disclose a notice with the information related to the categories of data collected, and the purpose of such collection to the parent, but also, he/she has to implement procedures concerning the confidentiality of the personal data involved.²¹⁴

Notwithstanding, the act provides some derogation to the request of consent, as a matter of fact, for instance, if the child's personal data are collected only once to respond to a direct demand of the child and then those data are not used to recontract such child, the operator can process such information without the verifiable parental consent.²¹⁵

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²¹¹ Children's Online Privacy Protection Act, 5 U.S.C. §§ 6501–6506.

²¹² 5 U.S.C. § 6501(1).

²¹³ 5 U.S.C. § 6501 (9).

²¹⁴ 5 U.S.C. § 6502.

²¹⁵ 5 U.S.C. § 6502.

This insight of the COPPA act portrays that the children's privacy protection in the online world is a matter of concern in the US; moreover, the enforcement of such act is as previously said an FTC duty. This agency in fact, in 2013 adopted the "Children Protection Privacy rule"²¹⁶ which among other provisions updated the definition of personal information which now refers to:

"individually identifiable information about an individual collected online, including: (1) A first and last name; (2) A home or other physical address including street name and name of a city or town; (3) Online contact information as defined in this section; (4) A screen or user name where it functions in the same manner as online contact information, as defined in this section; (5) A telephone number; (6) A Social Security number; (7) A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier; (8) A photograph, video, or audio file where such file contains a child's image or voice; (9) Geolocation information sufficient to identify street name and name of a city or town; or (10) Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition."²¹⁷

This definition enlightens some of the operation used by advertisers while collecting data, such data as a matter of fact as the definition suggests can also be related to persistent cookies which can track a given user across multiple sites. Therefore, given the purpose of the act before tracking, the operator need to ask for opt-in consent, causing thereby a problem for the collection of personal data. The opt-in consent can have a great impact in the storing of data, and it can constitute a limitation to the scope of profit of advertising businesses

Nonetheless, important is to mention that the Rule further specifies that action as behavioural advertising or profiling is prohibited which means that the important source of revenue given by this practice can no longer be used by advertising companies.

This paragraph, while surveying the branching of privacy rules in different sectors has displayed that the correlation between online advertising and privacy is inexistent in most of the act showed. However, the protection of privacy when taking into account children is a matter of concern for the federal government that, to overcome the threat that the World Wide Web can pose, has implemented a policy that can be directly related to online advertising.

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²¹⁶ Children Protection Privacy rule, 16 CFR § 312 et seq.

²¹⁷ 16 CFR § 312.2

Thereby constituting the first US law examined to impose an obligation on online companies in matters of privacy.

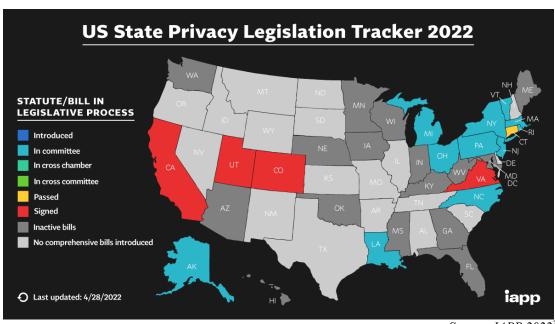
The next chapter will analyze the policy related to privacy at the US state level, therefore giving further insight related to the relationship between online advertising and the issue of privacy in different USA states.

6.2 STATE-LEVEL PRIVACY LAWS

The constitution besides conferring powers to the federal bodies, as already displayed, gives the same amount of power to states rendering them free to implement and enforce policies. It is important to remember that such policies are hierarchically subjected at the federal level; however, this does not stop state governments from instituting new sets of acts which need to be respected by local citizens.

To what concerns the issue of privacy, not every government has implemented other laws related to the subject other than the one mentioned above this means that to the extent of online advertising, not every state imposes obligations that need to be fulfilled other than the one related to the deceptive and misleading practice imposed by the FTC and the online child's data protection act.

The marginal implementation of national law in the privacy field can be summarized by this picture:



Source: IAPP 2022²¹⁸

As this picture shows only four out of 50 countries has signed state-level privacy policies which means that in those state the processing of data is strictly connected to the compliance on the state level acts.

Given these premises, and the numerous policies related to privacy(namely the California Consumer Privacy Act²¹⁹ and its amended version the California Privacy Right Act,²²⁰ the Colorado Privacy Act,²²¹ the Virginia Consumer Data Protection Act²²² and the Utah Consumer Privacy Act²²³), this paragraph will briefly survey the four state laws highlighting the correlation between privacy and online advertising, thereby following the purpose of the dissertation.

Nonetheless, before starting the analysis of the policies, it is important to note that up till 2022 there is only one law in force which is California's one, the others including the amended version of the California laws are just signed and will be enacted in 2023.

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²¹⁸ IAPP, *US State Privacy Legislation Tracker*, 2022, Available at: < https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>

²¹⁹ California Consumer Privacy Act of 2018 ("CCPA"), Cal. Civ. Code §1798.100 et seq.

²²⁰ California Privacy Right Act (CPRA), Prop. 24 CIV. CODE § 1798.100, et seq.

²²¹ Colorado Privacy Act, Colo. Rev. Stat. §6-1-1301, et seq.

²²² Virginia Consumer Data Protection Act, VA Code § 59.1-578 (2020)

²²³ Utah Consumer Privacy Act, Utah Code § 13-11-2

The California Consumer Privacy Act (CCPA) was enacted in 2018 and was the first level state law in the US concerning consumers' privacy. After a brief overview of the law the focus will shift to the relationship that this has with the online advertising word; can the policy refer to online advertising? How do such policies affect it?

Before entering the analysis is important to mention that the CCPA is already amended, and the provision here displayed will last till 2023 when the Consumer Right Protection Act will enter into force.

The CCPA not only involve rights for consumers but also imposes requirements to businesses which have certain criteria. These criteria include the status of profit company which have businesses in the state of California and have or a gross revenue higher than 250000\$, or it collects, shares, acquires and sells the personal information of 50000 or more consumer for a commercial purpose; or the incomes, from the selling of personal information, is equal to or greater than the 50% of the total incomes.²²⁴

Consumers who can dispose of the rights assigned from the CCPA are only resident of the California state, which means that people who only reside there for holidays cannot exercise such rights.²²⁵ The right includes: the right to request information related to the processing of personal data;²²⁶ the right to opt-out from the selling of personal information;²²⁷ the right to ask for the deletion of the data collected and the right to be aware of the categories of data collect and the purpose of such collection.²²⁸ Moreover the CCPA introduced an prohibition of selling of personal data without consent for children under 16 years.²²⁹

On the other hand, the act imposes on companies, upon "verifiable consumer request" 230, the obligation to disclose the information, which is collected and the purpose of such collection,

²²⁴ California Consumer Privacy Act of 2018 ("CCPA"), Cal. Civ. Code § 1798.140(c)

²²⁵ Cal. Civ. Code § 1798.140(g)

²²⁶ Cal. Civ. Code § 1798.100(a)

²²⁷ Cal. Civ. Code § 1798.120

²²⁸ Cal. Civ. Code § 1798.105 – 1798-110

²²⁹ Cal. Civ. Code § 1798.120(c)

²³⁰ The directive under Cal. Civ. Cod § 1798-140(ak) define "verifiable consumer request" as: a request that is made by a consumer, by a consumer on behalf of the consumer's minor child, by a natural person or a person registered with the Secretary of State, authorized by the consumer to act on the consumer's behalf, or by a person who has power of attorney or is acting as a conservator for the consumer, and that the business can verify, using commercially reasonable methods, pursuant to regulations adopted by the Attorney General

in not more than 12 months.²³¹ Moreover, businesses have to provide a notice on their websites on which is exposed the personal information collected, the purpose of such collection and the privacy policy implemented. ²³² In addition to this companies need to provide a "Do Not Sell My Personal Information" button which allowed the consumer to optout to the selling of such data; ²³³ they also have the obligation to provide an opt-in consent option for the parent of under 16 years old consumer.²³⁴ Nonetheless is important to mention that a breach of one of the obligations just mentioned can result in penalties for the company involved.²³⁵

Having briefly described the consumer rights and company's obligations and, before detailing the relationship with online advertising, is important to mention that an amended version (California Privacy Right Act) of the law analyzed will enter into force in 2023 with some changes. As a matter of fact, these changes are related first of all to the definition of business, which starting from 2023 will regulate the operations of the company with 100000 consumers. Furthermore, the amended version includes for the consumer: the right to correct the personal information already collected by a company;²³⁶ the right to put limitations on the processing of sensitive personal information.²³⁷

To what concern businesses the amended version imposes the obligation to limit the time length of the storage of information;²³⁸ and to limit the purpose of the collection to a specific

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pursuant to paragraph (7) of subdivision (a) of Section 1798.185 to be the consumer about whom the business has collected personal information. A business is not obligated to provide information to the consumer pursuant to Sections 1798.110 and 1798.115, to delete personal information pursuant to Section 1798.105, or to correct inaccurate personal information pursuant to Section 1798.106, if the business cannot verify, pursuant to this subdivision and regulations adopted by the Attorney General pursuant to paragraph (7) of subdivision (a) of Section 1798.185, that the consumer making the request is the consumer about whom the business has collected information or is a person authorized by the consumer to act on such consumer's behalf.

²³¹ Cal. Civ. Code § 1798-130

²³² Cal. Civ. Code §1798.100

²³³ Cal. Civ. Code §1798-135

²³⁴ Cal. Civ. Code §1798-120

²³⁵ Cal. Civ. Code §1798-155

²³⁶ California Privacy Right Act (CPRA), Prop. 24 Civ. Code § 1798-106

²³⁷ Prop. 24 Civ. Code §1798-121

²³⁸ Prop. 24 Civ. Code §1798-100

and legitimate purpose that the company has disclosed at the moment of the processing.²³⁹ Furthermore it imposes the company to implement a reasonable level of security to safeguard the collection of data.²⁴⁰

Resuming the enquiry question is important to note that the term "personal information" given by the act refers to:

"information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is reasonably capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household: (A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, internet protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers. (B) Any categories of personal information described in subdivision (e) of Section 1798.80. (C) Characteristics of protected classifications under California or federal law. (D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies. (E) Biometric information. (F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an internet website, application, or advertisement. (G) Geolocation data. (H) Audio, electronic, visual, thermal, olfactory, or similar information.(I) Professional or employment-related information."241

The inclusion of browser history and the internet activity, which are useful data for the purpose of online behavioural advertising can be consider a first answer to the correlation between the California Consumer Privacy Act and the online advertising field; thus, as previously stated websites companies which collect information need to provide notice of the collection of data, and considering that advertising company rely on those information provided from their contractors, the notice requirement and the possibility to opt-out from the collection poses a great issue for the fulfilment of their duty, which can severely impact their final revenues.

Another important matter related to the advertising field is the fact that the major companies which rely on the selling of ads space are situated in the California ground. Facebook, Google and Microsoft which by selling advertising space earn a great source of revenue by

²³⁹ Prop. 24 Civ. Code §1798-100

²⁴⁰ Prop. 24 Civ. Code § 1798.100

²⁴¹ Prop. 24 Civ. Code § 1798-140(v)

complying with the CCPA can somehow be affected by the possible reduction of personal data that can be collected.

Nevertheless, the most appealing issue is the possibility of opting out from the collection of data which are sold. About the opting-out option, it is important to clarify that the amended version of the CCPA, the CPRA either then the current option of an opt-out from the selling of personal information provides the consumer with the same option in relation to the sharing of such information. ²⁴² Thereby, in which way does the amended version define sharing? The definition of sharing under CPRA is:

"means sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for cross-context behavioral advertising, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged"²⁴³

The meaning of sharing includes "cross-context behavioral advertising" which under the act means:

"the targeting of advertising to a consumer based on the consumer's personal information obtained from the consumer's activity across businesses, distinctly-branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer intentionally interacts." ²⁴⁴

Therefore, while CCPA which is into force can indirectly provide a set of rules for online advertising, the amended version directly refers to advertising in its text rendering noticeable the requirements that advertising companies as towards consumers and the consumer's right to opt-out from such service.

The shifting from federal level law which protects children with respect to the privacy, and as a consequence with respect to online advertising, to a state law which imposes certain requirements on consumers when processing personal data not only for under-16 people but also for all the California residents can be considered from the one hand a major improvement

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²⁴² Prop. 24 Civ. Code §1978-120

²⁴³ Prop. 24 Civ. Code §1978-140(ah)

²⁴⁴ Prop. 24 Civ. Code §1978-140(k)

of the protection of personal data but from the other a possible threat to businesses which rely on that information to target and create advertising ad hoc.

Thus, the amended version of the directive will enter into force in 2023; to some extent such amendment can be considered stricter than the CCPA however the resonation of this new act cannot be estimated before its enactment.

Given the analyzation of the California Consumer Privacy Act, it is important to stress that the other legislation which will be displayed have plenty of point in common with this law. Hence, the realization of the Virginia Consumer Data Protection Act, the Colorado Privacy Act and the Utah Consumer Privacy Act is subsequent to the signature of the CCPA which imply that, to a certain extent the provision taken by the other acts can have similarities with the first state-law on this subject.

It is not the purpose of the dissertation to highlight the differences between this legislation and, given the amount of common point, the analyzation of those acts will not be as detailed as the CCPA so as to not only avoid repetition but also to centre the focus in the enquiry question which is the online advertising field.²⁴⁵

The act which will be surveyed are not already in force, indeed they will be effective from the 2023, therefore the analysis will relate theoretically what will happen after the acts become effective, since that time is important to notice that the provision which will be displayed are not into force consequently the online advertising companies has little to comply with, at the time this dissertation is written.

Starting from the Virginia Consumer Data Protection Act (VCDPA), despite the brief definition of personal data, which is broaden than the CCPA one, and does not provide any information that could be directly involved in the online advertising field, the VCDPA provide the definition of "targeted advertising" as:

"displaying advertisements to a consumer where the advertisement is selected based on personal data obtained from that consumer's activities over time and across nonaffiliated websites or online applications to predict such consumer's preferences or interests. "Targeted advertising" does not include: 1. Advertisements based on activities within a controller's own websites or online

²⁴⁵ For detailed information about the comparison of CCPA, the CPRA, the VCPDA and CPA see: C. COSGROVE, S. RIPPY, *Comparison on Comprehensive Data Privacy Law in Virginia, California and Colorado*, IAPP, 2021.

applications; 2. Advertisements based on the context of a consumer's current search query, visit to a website, or online application; 3. Advertisements directed to a consumer in response to the consumer's request for information or feedback; or 4. Processing personal data processed solely for measuring or reporting advertising performance, reach, or frequency."246

Provided this definition, in the text of the VCDPA is explicitly written that: consumers have the right to opt-out to behavioural advertising and company are required to "clearly and conspicuously disclose such processing"²⁴⁷ which means that if before the starting of 2023 companies are free to collect data for the purpose of behavioural advertising without fearing the chance that consumer opt-out from such practice, after that date behavioural advertising practices need to be disclosed in order to render the owner of the personal data collected aware of such exercise thereby possibly causing damages to companies which till that moment could process data without having to display a notice.

Nonetheless, the act also provides companies with the requirement in case of processing of personal data for targeted advertising to implement a data protection assessment.²⁴⁸

As it can be seen by the three laws already examined, while the previous version of CCPA not directedly involve the term behavioural advertising in its definition, and the online advertising regulation is traceable from other definitions, the two laws that will enter into force in 2023 explicitly relate behavioural advertising to privacy; thereby providing rules related to that field.

To what concern the Colorado Privacy Act and the lastly signed Utah Consumer Privacy Act it can be said that both these laws, with some changes, are particularly similar to those already examined. Moreover, to the extent of the enquiry question, both these acts provide the definition of target advertising and the right for the consumer to have the information about such practice disclosure and the right to opt-out from such processing.

To conclude it can be said, from what has been displayed in this paragraph, that the implementation of state-level acts related to privacy is still further away from achieving a preeminent role in every state. Despite this, the law implemented in the 4 states under enquiry

²⁴⁶ Virginia Consumer Data Protection Act, VA Code § 59.1-57

²⁴⁷ VA Code §59.1-574(D)

²⁴⁸ VA Code § 59.1-575

provides the regulation not only of privacy itself but also of behavioural advertising, a fundamental source of revenue for advertising companies. Notwithstanding, given that the majority of the laws displayed have not already been implemented it is difficult to conceive what, in tangible terms, these new restrictions may affect the online advertising industry. Having analyzed the state-level laws related to privacy before detailing the social network field and the rules that apply to it, it is important, after having extensively nominated the behavioural advertising throughout this whole paragraph, to comprehend how this is regulated other than from the state-level privacy laws. Hence, the next paragraph will survey the self-regulatory principles on online behavioural advertising provided by the FTC and DAA; thereby closing the investigation of the correlation between online advertising and the law implemented in the privacy field.

6.3 ONLINE BEHAVIOURAL ADVERTISING

The Federal Trade Commission, which was founded to protect consumers from misleading and unfair practices and to improve fair competition among businesses, had and has a preeminent role in the development of self-regulation in the online behavioural advertising field. Hence, as noted in the previous paragraph, the online behavioural advertising practice, developed after the creation of the World Wide Web, is a matter of concern for consumers who are bothered by the involvement of personal data in the information collected from the advertising companies.

The online behavioural advertising method, as a matter of fact, is part of the privacy level-state laws analyzed in the previous paragraph and, consequently a fundamental part of this investigation. Having already discussed the state laws and their connection with the online advertising, in order to have a wider and specific view of the correlation in the US between legislative procedure and the online advertising field it is clear that the analysis of the behavioural online advertising principles proposed by the FTC can somehow centre both the concerns and benefit that this milestone for the online advertising world has.

The survey will focus on the Principle displayed by the FTC in 2008 and then on the DAA one which has its basis on the former, afterwards the results of the implantation of these self-regulatory initiatives will be provided so as to clearly address the consequences that a self-regulatory framework has in the USA.

Prior to this analysis, it is relevant to highlight the steps which brought to the advancement of the implementation of self-regulation, which other than providing context will also display the possible benefit and concerns related to Online Behavioural Advertising (OBA), this identification will provide the general understanding that is required to comprehend why the principles instituted by the FTC and DAA are important in the online advertising field.

The 2000 report of the Federal Trade Commission to the Senate other than highlighting the definition of online profiling, report the benefit and concerns of consumers related to such practice. Being Online profiling the predecessor of what is now called Online behavioural advertising renders it relevant to out discussion.²⁴⁹ Consequently, the overview of this report will introduce the concept on online profiling and the concern and benefit of this practice which at the time of its submission were already considerable.

The term "online Profiling" is defined as the collection of information related to a consumer through cookies, web bugs and spyware, which follows the movement of such consumers and can with the data provided by their behaviour create a profile with the habits and preferences related to such consumer. The information collected by the advertising network²⁵⁰ is most of the time anonymous; however, if a consumer identified himself/herself on a website where advertising is in place or if the provider of such website sells or shares the personal information with advertising companies, the tracking of the consumer can result in the collection of personal data. Thus, the incorporation of personal data into this practice can in some cases constitute a concern for consumers, which generally are not aware of the profiling that is taking place. ²⁵¹

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²⁴⁹ FTC Staff Report:Self-Regulatory Principles For Online Behavioral Advertising, *Behavioral Advertising Tracking, Targeting, & Technology*, Federal Trade Commission, 2009, p.6.

²⁵⁰R.PITOFSKY, S.F. ANTHONY, M. W. THOMPSON, O. SWINDLE, T. B. LEARY, *Online Profiling: a Report to the Congress*, Federal Trade Commission 2000.
²⁵¹ Ibid.

Nevertheless, even though the browser is usually equipped with the means to reject cookies, the default settings of such browser are set to not reject them, which means that persistent cookies that track consumers along multiple websites are part of the advertising network, can in most of the cases act undisturbed and serve their purpose without having to deal with the consumer concern.²⁵²

The results of this practice are foreseeable, given the inclusion of personal information major concerns among consumers have raised over the year and the 2000 report display them accurately. The most prominent concern is related to the lack of knowledge of consumers both at the conceptual level and at the material one. Given that the consent to use cookies is not required the knowledge of their placement is generally inexistent (the only ways to have knowledge about this feature is by changing the default setting of the browser or being informed by the website about the profilation). In this regard, the Report displaying a survey made by the Commission says that, for instance, only 22% of the 57% who use third-party cookies, disclose the information that such cookies collect.²⁵³

Moreover, another matter of concern is the tracking on multiple and different websites, as a matter of fact, the report highlights that when pieces of information are processed in in more than one website the profilation of a distinct consumer can be more accurate, therefore becoming intrusive in consumer opinion.²⁵⁴

Notwithstanding, online profiling can have some benefit both for the consumer and the advertising company which use this method. Thus, the profiling permit company to show advertising related to the habits and interest of a given person, which means that a significant amount of money could be saved from being squandered by people not interested in the product advertised. From the consumer perspective instead, the profiling practice can allow them to not receive the same advertising several times, rendering it annoying; and moreover, can allow them to be constantly informed about services and products which, without the profiling tactic, would maybe never been known.²⁵⁵

²⁵² Ibid

²⁵³ R.Pitofsky, S.F. Anthony, M. W. Thompson, O. Swindle, T. B. Leary, *Online Profiling: a Report to the Congress*, op.cit.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

The threat that the online profiling can pose to privacy as portrayed by the consumer opinion in the report is a relevant issue that the commission at the time thought could be handled with self-regulatory principle instead of legislating on the matter.²⁵⁶

Having discuss the premises to the self-regulatory principle the focus will shift in the actual analysis of the principles which was implemented by the commission in 2008. While previously it was presented as online profiling this part will relate to the practice displayed with the definition of Online Behavioral Advertising; as just stated the online profiling is from the commission point of view the ancestor of OBA, therefore there is no more need of use the former term in this part.

The proposed principle about online behavioural advertising, released by the commission in 2007, was composed of four points that were implemented in an attempt to marginalize the privacy concern of the consumer.²⁵⁷

These principles included: first of all the business disclosure of the use of behavioral advertising was required and the opportunity for consumers to express their willingness to be subjected at this practice; secondly, the data collected needed to be processed within a limited period of time and companies needed to take security measures in order to safeguard the data processed; thirdly, in the circumstance in which a given company were to necessitate other data beyond the one which was notified to be processed, the consumer was required to give is consent prior the collection of the new data; and finally if the process of data is related to sensitive one the consumer was requested to give his/her explicit consent.²⁵⁸

The proposed self-regulation principle however was only meant to give an incentive to the creation of more relevant self-regulation on behavioural advertising given the fact that those already existing were not providing the necessary level of consumer protection.²⁵⁹

Nonetheless, despite the intent to implement this self-regulatory principle, some commentators illustrated some issues that the principle could not manage to solve. Thus,

²⁵⁶ Ibid.

²⁵⁷ FTC Staff Report:Self-Regulatory Principles For Online Behavioral Advertising, *Behavioral Advertising Tracking, Targeting, & Technology*, op.cit.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

while some comments expose the rightfulness to include in the self-regulation no-personally identifiable information(non-PII) (which among other information includes the IP address); others explained that given that non-PII were not referred to personal data they did not constitute a threat to privacy and thereby a regulation of such data could only lead to the expenditure of money for businesses.²⁶⁰

Furthermore, other problems concerning the principles were argued, lastly resulting in the creation of a revised self-regulatory principle which would try to satisfy the concern of consumers on privacy.²⁶¹

The revised version of the self-regulatory principle provided a new updated version of the four principles previously displayed. This version taking into account the comments on the issues related to it provided: firstly, the definition of behavioural advertising as "the tracking of a consumer's online activities over time – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer's interests", 262 and afterwards describe in detail the principle of the self-regulation.

The first principle discusses the fact that websites need to provide a notice which is userfriendly with the identification of the processing data practice and an easy way for consumers to express their willingness to let the data be collected. Hence, it also added the necessity for a notice, when the data are collected outside the website context, provided by the website where it is explicated how and where the pieces of information are collected. ²⁶³

The second principle concerns the security of the information involved in the behavioural advertising practice; as a matter of fact, the self-regulation requires the company to implement measures based on the sensitivity of the data involved and impose a limit in the

²⁶¹ Other issues included: the application of contextual-advertising and first-party behavioral advertising and the processing of data, for mor information see FTC Staff Report:Self-Regulatory Principles For Online Behavioral Advertising, Behavioral Advertising Tracking, Targeting, & Technology, op.cit.

²⁶² FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising, Behavioral Advertising Tracking, Targeting, & Technology, op.cit. ²⁶³ Ibid.

length of time to process data which is limited to the achievement of the legitimate purpose of the company.²⁶⁴

To what concerns the third and the fourth principles, they respectively display that a company which undergoes some changes in the way data are collected necessitate, before processing the information already disclose, the affirmative consent by the owner of such data; and such consent is also required for the processing of data considered sensitive.²⁶⁵

The revised principles proposed by the FTC are the first step to the implementation of a self-regulatory framework on online behavioural advertising which tries to accommodate the necessity to meet both the concerns of consumers and the demand of the companies that profit from such practice.

A new self-regulatory principle on OBA was afterwards implemented, in 2009, by the Digital Advertising Alliance which expanded the principles from four to seven. The incorporation of three more principles further enhances the level of protection of consumer data.

The principles enacted by the DAA include in the first instance the education of consumers and companies involved with behavioural advertising. The necessity to be aware of how data are collected and how to express the preference for the processing and the actors involved encouraged the DAA to include an educational principle in its self-regulation.²⁶⁶

Furthermore, the concise notice principle dictated by the FTC was implemented with the name of transparency by DAA which besides a clear, recognizable and visible notice of the use of OBA on a certain website, requires the inclusion of a link which redirects to information about third parties to which information is disclosed and the statement of the compliance with the DAA principles. Notwithstanding, third parties are also obliged to display, themselves or through industry-developed web sites in which the company is participating, the notice about the processing of consumer data for OBA purposes.²⁶⁷

Moreover, while the third principle displays the ability to exercise consent for the collection of data and the withdrawal of such consent, the fourth one requires companies related to OBA

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²⁶⁴ Ibid.

²⁶⁶ Digital Advertising Alliance (DAA), Self-regulatory principles for online behavioral Advertising, 2009 lbid.

to enhance the level of security of the data processed and the limitation to the collection at the amount of time necessary to fulfil the processing purpose. Nonetheless, the latter also requests companies to provide the data with anonymisation and randomization so as to not be able to reconstruct the data at the original level in order to render the implement the security of such data.²⁶⁸

Consent is also required, as principle 5 dictates, when there are changes in the processing of the data already collected and, furthermore when sensitive data are processed. The sixth principle, in this context, individuates two types of sensitive data: the children one which is regulated under COPPA and the health and finance ones. Those data prior the collection need to be consented to, for what concerns the former by parents and the latter by the owner of such sensitive data.²⁶⁹

Finally, the last principle which is related to accountability is introduced to further enhance the principles related to the OBA. Indeed, it institutes monitoring programs on websites on the compliance of the principles; reports on transparency and the compliance with those principles.²⁷⁰

The accurate enhancement of the self-regulatory principle provided by the DAA is not the only solution that the alliance implemented in order to address consumer concerns about privacy. Indeed, in 2010 the DAA introduced the YourADchoices icon which was meant to improve transparency by charging this icon with knowledge about the relevant information collected and the purpose of such collection which is advertising.²⁷¹

The Online Behavioural Advertising self-regulatory principle introduced by DAA is surely an advancement in the self-regulation of the subject, however, does this self-regulation and the FTC one really improves the regulation of such practice?

²⁶⁹ Ibid.

²⁶⁸ Ibid.

²⁷⁰ DAA, Self-regulatory principles for online behavioral advertising, op.cit.

²⁷¹ Digital Advertising Alliance, *Put the YourAdChoices Icon to Work for You*, Available at:

https://youradchoices.com/learn

The answer for this question can be provided by the article "Self-Regulation for Online Behavioral Advertising (OBA): Analysis of OBA Notices", 272 which by surveying the contents in various websites about OBA(199 companies were involved), both in 2013 and 2015, discovered that the 74.5% in 2013 and 62.9% in 2019 of the companies involved did not provide any explanation of the Online Behavioural Advertising, a focal point of the principles discussed.²⁷³

Furthermore, the article highlights that only a small amount of the companies involved (38.6% in 2013 and 41.3%) in the survey provided consumers with a user-friendly method to opt-out of the processing.²⁷⁴

Even though the survey displayed concern only 199 companies that use OBA the fact that the majority of website neither explain what online behavioural advertising is nor give the option to opt-out at all from such practice(or the method to opt-out is difficult). This suggest that, even if the self-regulatory principles provided by the FTC and the DAA were a step forward to the regulation of online behavioural advertising and a plausible means to enhance the protection of data, the self-regulatory principles themselves are not a sufficient method to protect consumer from the practice of behavioural advertising.

The issue of privacy as displayed throughout this chapter is an important matter of enquiry for the FTC and the DAA, however the lack of comprehensive legislation on privacy at the federal level and the subsequent fragmentation of law on the subject do not incentive the enhancement of privacy in the topic of this dissertation. While the implementation of a federal level self-regulatory framework from OBA is being implemented this does not give in practice the level of protection that consumers expressed in the FTC 2000 report.

The analyzation of the privacy in online advertising in the USA displayed both new initiatives and lack of unity, however, this statement will be discussed further in the comparison section. Moving forward with the policy analysation next chapter will survey the influencer

²⁷⁴ Ibid.

²⁷² S. An, H. Kang, S.J. Hyun, Self-Regulation for Online Behavioral Advertising (OBA): Analysis of OBA Notices, Journal of Promotion Management, 2018,24:2, 270-291.

²⁷³ Ibid.

marketing in the USA thereby concluding the survey on the policies that are implemented in the USA till this moment.

CHAPTER 7: ONLINE ADVERTISING AND INFLUENCER MARKETING

The influencer marketing, which implies the combination of the use of a person well known among the public and the advertising of a product, is nowadays a preeminent solution adopted by companies which want to obtain the maximum revenue possible without employing amounts of money in advertising spots.

In the USA the adoption of influencer marketing for commercial purposes increased from 55,4% in 2019 to 72,5% in 2022.²⁷⁵ These numbers show how companies are further and further involved in the social media world to advertise their services and products.

The impact that influencer marketing has is notably high, given the level of expenditure of advertising companies in this new mean. However, a relatively new method of advertising can on the one hand constitutes a benefit both for consumers, which can be always updated on new products and new trends, and companies, which can expand their revenues, and from the other pose new threats related consumer protection.

In this regard, this chapter will analyze the policies implemented by the FTC for the regulation of the influencer marketing, but before doing that the enforcement of deceptive practices related to online advertising will be displayed so as to have a panoramic of regulations which can be related to the influencer marketing field.

7.1 UNFAIR AND DECEPTIVE PRACTICES

The Federal Trade Commission Act, as displayed in the historical background, is the law in charge of the regulation of unfair and deceptive practices, thereby this paragraph will further analyze which practices can be considered unfair and deceptive from the FTC perspective so as to introduce the next chapter which as previously said will highlight the regulation of the influencer marketing.

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²⁷⁵ Statista Research Department, *Influencer marketing penetration rate in the U.S. 2019-2022*, 2022, Available at:

The digital era which brought about the introduction of online advertising displayed by the FTC as "native advertising" and "sponsor content" has enlarged the variety of misleading and deceptive practices recognized by the commission. As a matter of fact, the commission in the "Policy statement on deception" ²⁷⁶ highlights that practice or omission can be deceptive if it can somehow mislead a consumer who is acting according to the situation, such advertising therefore can be considered deceptive if the commercial purpose is not exposed. ²⁷⁷ The non-disclosure of the practice while misleading the consumer can also influence his/her interaction with the content which means that the unawareness can lead the consumer in purchasing or interacting with content that is meant to incentive his/her choice to buy a product or a service.

The online world and the implementation of social media, therefore, had rendered possible the misleading practice of including advertising, in a website or in a post, in such a way as to be almost unrecognizable from the consumer who, while surfing the internet, explores that specific website.²⁷⁸ Nevertheless, the disclosure of the advertising intent or promotional message of content has been addressed by the commission and through the guide ".com How to Make Effective Disclosures in Digital Advertising",²⁷⁹ which had given knowledge and ways in how effectively disclosing the advertising practice. Such information relates the position of the disclosure of the advertisement in a certain place and certain time so as to make it identifiable in respect of the content of a webpage, for instance.²⁸⁰

Native Advertising is defined by the commission as:

"broad range of advertising and promotional messages that match the design, style, and behavior of the digital media in which it is disseminated. The ads can appear in a wide variety of forms, including written narratives, videos, infographics, images, animations, in-game modules, and playlists on streaming services."²⁸¹

And it adjunct also that native advertising constitutes a deceptive practice even if the information about the product is reliable.²⁸²

²⁷⁶ FTC Statement on Deception, 103 F.T.C., 1984

²⁷⁷ Ibid

²⁷⁸ FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements.

²⁷⁹ Federal Trade Commission, ".com How to Make Effective Disclosures in Digital Advertising, 2013

²⁸⁰ Ibid.

²⁸¹ FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements, op.cit.

²⁸² Ibid.

To address a format as misleading the commission not only look at the statement included in the advertising, but it applied the "net impression standard" which focuses both on the statement or images of an ad and also on the message that it can give. Thereby an FTC analysis will both comprehend the survey of an advertisement from a reasonable consumer standpoint, ²⁸³ and the analysis of the entire practice (and not only the message as previously said).

The native advertising can pose a great threat to consumer rights, as a matter of fact, while the disclosure of the practice of advertising is required, and need to be visible, clear and appear at the right time; this practice blurred the advertising inside a context. For instance, a website talking about a given sport also displays equipment related to the given sport. The purpose of showing equipment not always can be directly identifiable by a person as a commercial practice. Therefore, the non-identification can be configurated as a deceptive practice which is prohibited by section 5 of the Federal Trade Commission Act.²⁸⁴

The FTCA in section 5 mentions, besides deceptive practice, unfair practice; an unfair practice is considered as such if it causes damage to the consumer (which could refer to monetary damage) that cannot be avoided, and such damage is not reversed or compensated with advantages for the consumer. This mean that an unfair practice does not involve discounts not any practice which included an avoidable damage by the consumer.

The brief definition of unfair practice was required to understand the upcoming chapter and to have an overall overview of the FTCA in advertising field.²⁸⁵

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²⁸³ It is not necessary that the majority of reasonable consumers depict a practice as deceptive it could also be a limited circle as the case *Heinz W. Kirchner*, 63F.C.T, 1282, 1963 displays. In this case the advertising was related to a product that make people unsinkable however even if the majority of consumer found that the product respect the claim advertised, a circle of consumer found out that it made them sink. Thereby the advertisement was claimed as deceptive.

²⁸⁴ Federal Trade Commission act, Sec.5 15 U.S.C. § 45, op.cit.

²⁸⁵ Consumer Compliance Handbook, Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices, 2004; see also: FDIC Consumer Compliance Examination Manual, Unfair and Deceptive Practices—Federal Trade Commission Act, 2018

The Federal Trade Commission which among this duty surveys the compliance with the section 5 is in charge of providing notice and taking into judgment companies which do not comply with the prohibition of unfair and deceptive practice.

The scope of this paragraph was to identify misleading practices related to the online advertising environment that could also be related to influencer marketing. Indeed, influencer marketing can exploit the unawareness of a consumer and mislead him/her to buy a product nominated by a person that he/she follows and admires. This practice could be both innocuous, in the sense that an influencer just wanted to talk about a product that he/she finds perfect, or it can be addressed as deceptive if the influencer under question is involved in a contract and has revenue for talking about that product without mentioning the commercial purpose of his/her statements.

This duality is the reason why the influencer market is being taken into account in this dissertation. The social media platforms that day by day count new subscribers can pose a threat to consumers who not always are aware of what these platforms reserve. Altogether the advertising on social media can be easily portrayed as deceptive and its regulation is necessary in order to protect not only consumer rights in general but also the children's rights, which represent a great portion of the users of social networks. As a matter of facts, a survey from "statista" showed for instance that the 65% of people from 13 to 14 years old use is Instagram and the percentage increase till arriving at 77% for people who have from15 to 17 years old.²⁸⁶ Whereas another survey made by the "common sense" highlighted that 38% of children from 8 to 12 years old have used in 2021 social media.²⁸⁷ This panoramic specifies how regulation of the advertising on social media is of utmost importance not only to consumers in general but also to youngster which on daily basis use these platforms.

²⁸⁶ Statista Research Department, *U.S. teens who have ever used selected social media 2018, by age group,* 2022, Available at:https://www.statista.com/statistics/945367/percentage-teenagers-who-ever-used-social-media-platforms-usa/

²⁸⁷ V. RIDEOUT, A. PEEBLES, S. MANN, M. B. ROBB, *The Common Sense Census: Media Use by Tweens and Teens*, Common Sense, 2021

7.2 THE GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING AND THE DISCLOSURE 101 FOR SOCIAL MEDIA INFLUENCERS.

The influencer marketing is an important source of revenue for companies. Indeed, the capacity of social media to make possible interaction among people and share content renders them a useful tool for companies that, on the one a hand wants to advertise their product to a certain category of consumer and, on the other wants, through the use of influencer wants to advertise their product as reliable.

Influencers, as a matter of fact, have both the characteristic of being known by a huge amount of people and being followed for being credible and reliable. These two advantages which companies nowadays found appealing, when deciding which way to advertise, can make the difference in the selling of a product.

The law that applies to normal advertising, which in the USA is the FTCA section 5, applies also to influencer marketing however, in 1980 and afterwards, in 2009 the Federal Trade Commission enacted a guideline for the use of endorsement and testimonial advertising. Indeed, such a guide was meant to acknowledge advertising companies and endorsers on how to conduct an advertisement without risking being deceptive. ²⁸⁸ However important is to mention that even though the guidance offers to the parties involved an explanation on how to comply with section 5 of the FTCA not every possible kind of category of endorsement and testimonial advertising is displayed. Thus, to address a deceptive practice the commission will survey advertising on a case-to-case basis. ²⁸⁹

First of all, this paragraph will define the world endorsement and the guideline related to it, afterwards, the analysis will enter the specific topic of the advertising marketing surveying the disclosure 101 for social media influencers. Being influencer marketing a relatively new means of advertising it is clear that the deceptive practices that it can encompass are various, for this reason, the Federal Trade Commission had implemented a disclosure particularly related to influencers in order to address the possible problem that this practice can include.

²⁸⁸ B. D. Rose, H. Siegel, M. Tomkiel, FTC Guides concerning the use of endorsement and testimonial advertising, Prior Cashman LLP, 2009

²⁸⁹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 et seq.

The "Guides Concerning the Use of Endorsements and Testimonials in Advertising"²⁹⁰ implemented by the commission give an extensive definition of the term Endorsement and it refers to it as:

"any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution."²⁹¹

Therefore, it is possible to recognise the typical feature of the influencer marketing in this category of advertising. Indeed, the guideline when referring to an endorser can, in the case of this paragraph, refer to an influencer.

The guide require endorsement to portray the honest opinion of the endorser and at the same time required to the latter, while advertising, to be in "bona-fide" which means that the information given in a specific advertisement need to be truthful thereby if the advertisement depict a notorious person while using the product and displaying its benefits the endorser which did such advertisement have to have proven such product.²⁹²

Nonetheless, if the requirement mentioned above is not fulfilled either the advertisers or the endorser can be charged with false claim which is actually a prohibit practise because deceptive, under FTCA.²⁹³

There are different types of endorsement, as a matter of fact, an advertisement can include a consumer endorsement which are the advertisement that depict the affirmative experience with a given service or product, of one or more consumer and it is likely to be interpreted as the advertising of an effective product in relation with the purpose of the advertisement. Thus, the experience of the endorser is the central point in this kind of advertisement which means

²⁹² 16 C.F.R. § 255.0(c)

²⁹⁰ 16 C.F.R. § 255.0 et seq op.cit

²⁹¹ 16 C.F.R. § 255.0(b)

²⁹³ 16 C.F.R. § 255.0 (d)

that, if the advertisement claims that a consumer was effectively involved in experiencing the product, such claim must be truthful.²⁹⁴

Furthermore, other types of advertising can be on the one hand, the expert endorsement which features the figure of an expert inside the advertisement; the expert must be a person whose field of expertise is the one of the product or service advertise so as to not mislead a consumer; and on the other hand, endorsement by the organisation, this last type of endorsement must rely a certain advertisement on its consistency with the collective judgement of the organisation itself.²⁹⁵

After having described the type of endorsement, the Federal Trade Commission emphasises that the disclosure of the material connection is a fundamental cornerstone of the endorsement in advertising. Thus, the relationship between the endorser and the seller of the product advertised is required to be displayed so as to not mislead consumers when advertising a given product.²⁹⁶

The missed disclosure of a practice as advertisement was addressed by the Federal Trade Commission in the "Enforcement Policy Statement" which, when taking into account the infomercial,²⁹⁷ expresses the requirement of the statement "paid advertisement" so as not to fall in the prohibited practices.²⁹⁸

The guide on the use of the endorsement in advertising is not the only method that the commission used to inform advertiser and endorser in how to advertise without deceive. As a matter of fact, when talking about influencer marketing is important to state that the Federal Trade Commission has sent 90 letters noticing, famous influencers and advertising companies, about the necessity to disclose an advertisement as such.²⁹⁹

²⁹⁴ 16 C.F.R. § 255.2

²⁹⁵ 16 C.F.R. § 255.3 – 255.4

²⁹⁶ 16 C.F.R. § 255.5

²⁹⁷ The term informercial refers to the practice of advertising with the scope to inform a consumer on the characteristics of a product which is the main topic of the advertisement. This type of advertisement usually last more than a typical advertising.

²⁹⁸ FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements, op.cit.

²⁹⁸ Ibid

²⁹⁹ FTC Press Release, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, 2017, Available at:https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship

Thus, in those letters the FTC reported an important aspect of the endorsement guideline which refers to the "material connection" between the endorser and the advertiser which is addressed as:

"[...] a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement. Material connections could consist of a business or family relationship, monetary payment, or the provision of free products to the endorser" 300

The letters sent by the commission not only address the missed disclosure but inform endorsers that such disclosure should have been put above the "more" button, which appears in the mobile version of applications such as Instagram.

Nonetheless, this was not the only note that the commission addressed in the letters, as a matter of fact, some letters also specified that hashtags were not sufficiently accurate in describing the relationship between the endorser and the seller, and other letters implied that the incorporation in a single post of plenty tags or hashtags did not conspicuously explain the purpose of the post.³⁰¹

The statement that these letters represent is that the influencer marketing is still a practice which needs more guidance, given that the level of disclosure is still lacking.

Therefore, the commission in 2019 opted for a more social media-oriented disclosure which addresses influencer marketing as such: "Disclosure 101 for social media influencer". The concepts that this guide gives are nothing new in respect of what was already mentioned; thus the existence of such a document explains both the level of concern of the commission in addressing deceptive practice and why this dissertation is taking into account the influencer marketing.

By using a colloquial language, the disclosure is not a legal document it is only a clarification with respect to what influencers should do when advertising; given that the information included in this disclosure refers to how to comply with section 5 of the FTCA the features of this document will be displayed shortly so as to centre the analyzation concerning the behavior that an influencer needs to adopt to respect the law.

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³⁰⁰ FTC Press Release, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, op.cit.

³⁰¹ Ibid

³⁰² FTC, Disclosures 101 for social media influencers, 2019

The disclosure advises influencers on how to uphold the law and gives specific pieces of information, such as the necessity to have a clear and simple statement for disclosing a collaboration. Others include the fact that such disclosure needs to be put only when there is a real relationship between the seller and the influencer, and such relationships can be a paid partnership or a free gift. However, despite the differences, it is of utmost importance that the statement is clear and visible.³⁰³

The influencer marketing is still a new world which needs more regulation so as to help both endorsers and consumers not to stumble into deceptive practices which on the one hand can cost the credibility of the influencer and on the other could injure the consumer which was biased by his/her idol words.

This last part concludes the section concerning the USA legislative framework, this section has shown how federal and state laws can affect the advertising world. Nonetheless, after having examined the policies related to online advertising both in the EU and in the USA the comparison section can display the differences between the two.

The next section, after briefly introducing the differences between the EU and USA at the legislative level will discuss, taking into account the laws already mentioned, the differences between the two actors.

³⁰³ FTC, Disclosures 101 for social media influencers, op.cit.

SECTION 3: CRITICAL COMPARISON

CHAPTER 8: EU VS USA

The United States of America and the European Union are two different actors in lots of fields. Notwithstanding there are some points which tied together these two actors, therefore, permitting a reliable comparison between the two.

This chapter is meant to compare the policies which were examined before to give an overall perspective on how the EU and the USA implemented policies in the regulation of a relatively new field. The comparison will highlight firstly, the difference in regulation and secondly, the differences in enforcement; as a matter of fact, while the first part will revise the policies already mentioned in the previous sections comparing the two actors' regulations, the second part will, through practical examples and through the social media platform, compare how influencer marketing and online advertising, in general, is regulated and enforced in the EU and the USA.

Before doing so is important to highlight the differences between these two actors so as to have an overall view of why some policies in one region are stringiest than the one on the other and vice versa.

Despite the great differences from the juridical perspective which will be displayed in the next paragraph is important to mention the economic bond that these two superpower shares. The diplomatic relation between the EU and USA dates back to the 1953 period in which the United States help the post-war countries of the EU in their reconstruction. ³⁰⁴

This relationship counts not only on shared values such as Human rights, democracy and freedom but also on the interdependency that tide up the two superpowers.³⁰⁵ Thus, their relationship is one of the most important bilateral relations in the world.

Nonetheless, this does not mean that there are not any tensions between the two actors as a matter of fact, in a meeting, after the election of President Biden the European Commission director Mr Schlegelmilch stated that:

"Although disputes are to be expected in light of the significance of the economic integration, trade tensions with Washington have reached peak levels over the last four years. One of the

³⁰⁴ European Parliament Liaison Office in Washington DC, *EU-US Relations*, Available at: < https://www.europarl.europa.eu/unitedstates/en/eu-us-relations>

³⁰⁵ European Parliament Liaison Office in Washington DC, *Shared Values*, Available at: https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/shared-values>

hallmarks of the current administration has been an unprecedented use of unilateral trade sanctions, under the guise of protecting U.S. national security ("Section 232") and fighting against unfair trade practices ("Section 301")." ³⁰⁶

Notwithstanding, the European Commission President also stated that the new US presidency addressed the willingness to reinvigorate the traditional bond between the two actors and the existing multilateral system.³⁰⁷³⁰⁸

The great economic and military power that the EU and the US have in the international arena render these two superpowers suitable subjects for a legislative comparison. The online advertising world which developed after the creation of the World Wide Web is still a matter of concern for both the actors under enquire. Thus, the further and further innovation of the online platform and social media, despite the great benefits, creates threats that countries are supposed to deal with.

The convergency of multiple actors involved in the advertising field renders the regulation more complicated given that control on the compliance with the regulations is to be fulfilled in relation to the actors included in the advertising chain: starting from the seller of a product passing through the ad company, the provider of a website, the influencer in the social network just to arrive at the consumer which rights need to be defended and enforced.

Differently from the traditional advertising method, the online advertising not only is a matter of concern for consumers' rights but also for the protection of data; has the analysis of the policies, previously displayed, shows online advertising through the use of cookies and web bugs (etc.) can create a profile used for behavioural advertising which implies advertising based on preferences of a given person that most of the time is unaware that his/her data are collected for this scope.

The next paragraph will detail the differences between the legislative framework of the EU and the US and also compare the differences in the incorporation of online advertising policies at the national level for what concerns the EU and state level to what concerns the

³⁰⁶ CIVIL SOCIETY DIALOGUE, Meeting on EU-US trade relation after the US elections, 2020.

³⁰⁷ Ibid

³⁰⁸ The "multilateral system" is a system implemented to promote connectivity, security, trade, economics and technology between the major international actor.

USA. The comparison will not give an overview of every single state in the EU and the US only some states will be briefly analysed so as to comprehend how the incorporation works.

8.1 DIFFERENCES IN LAWS INCORPORATION AT THE STATE LEVEL

The European Union and the United States are two different actors who exercise their legislative power within their respective borders being the former a political and economic union of 27 countries and the latter a federation composed by 50 states. This section will firstly highlight the legislative frameworks, to permit afterwards to explain, with a practical example, how laws are incorporated at the national level,

The US division in branches can be individuated among the European Union too as a matter of fact there are different institutions which address a different power each. The legislative branch of the US is composed of the House of Representatives and the Senate; the former approves and oversees trade agreements; has the power to propose, amend or adopt laws and, in relation to the US budget, it is in charge of drafting and adopting it. The latter share the same competencies as the former with the exception of trade agreements, indeed the senate is in charge of the international section agreements, even related to trade. The EU legislative branch is composed of the Council of the European Union whose tasks are: amending and adopting the EU budget and legislation and starting negotiations, however, it cannot start legislation but can coordinate the plan of legislation with the other actor of the legislative branch, the European Parliament. It shares the same competencies as the Council with the exception of the negotiation part, as a matter of fact, in its place it has the competency to approve the international agreement.³⁰⁹

Furthermore, there is the executive branch which for what concerns the US is composed by the president who other than being the commander-in-chief of the army is the head of the state and have the power to implement and enforce policy written by the legislative branch; the vice president who its ready to assume the presidency in cases in which the president no longer can; and the cabinet which duty is to enforce and administer on a daily basis the federal

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³⁰⁹ European Parliament Liaison Office in Washington DC, *US and EU Branches of Government: Legislative branches*, Available at: < https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/legislative-branches>

laws.³¹⁰ To what concern the European Union, the institution in charge for the executive branch is the European Commission which other than initiating legislation, allocates fund (control how money are used for instance), and together with the judicial branch enforce EU laws.³¹¹

Lastly, the Judicial branch which is represented by the Supreme Court in the USA and by the European Court of Justice in the EU; both are entitled to interpret legislation and rule over them. One of the most salient differences is that, while the ECJ judges are appointed every 6 years, the judges of the Supreme Court serve for life.³¹²

Having portrait the roles of the three branches in both region and knowing that while the US is a federation of state in which states can adopt and enforce state legislation and the EU is an international organization, to which member state have delegated their sovereignty in some field in order to adopt common policies, so as to serve the EU scope which is to promote integration and cooperation; it is now time to comprehend how the policies already mentioned are incorporated at national level. The analysis will not display every policy mentioned and every state of the EU and USA, but it is just meant to give an example of the differences in incorporating procedure.

Starting from the USA a salient point which can be found in the article VI the commonly known "supremacy clause" give an answer to what concern the "incorporation" of federal law in a US state. The constitution of the USA, as a matter of fact, does not include an incorporation at the state level of acts enacted at the federal one. Indeed, article six provide an accurate explanation on how the pyramid of US legislation works:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

³¹¹ European Union, *EU institutions: the European Commission*, Available at: < https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission en>

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³¹⁰ The White House, *The Executive Branch: From the President, to the Vice President, to the Cabinet, learn more about the Executive Branch of the government of the United States, Available at:*

https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/

³¹² European Parliament Liaison Office in Washington DC, *US and EU Branches of Government: Judicial Brances*, Available at: < https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/judicial-branches>

the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³¹³

In detail, this means that the laws implemented at the state level are subordinate to the laws at the federal level, thereby local courts, when ruling, have to uphold firstly the federal legislation and if the federal legislation does not provide regulation of a given topic the state laws are taken into account.

Therefore, for instance, provided that a local court is called to rule in a case of a consumers data violation, in reference to behavioural advertising practice, and given that there is no US federal law related to the subject,³¹⁴ and assuming that the case took place in California ground at the cost of a California resident; the law that the local judge can enforce is the California Consumer Data Protection which regulate the collecting, sharing and selling of consumer data. Altogether this practical example explains that the supremacy clause imposes local courts to uphold in first instance the Federal law and afterwards the state level one.

The European Union, in contrast, being an organization meant to promote integration, when enacting policies, these are meant to be transposed at national level. As it was already mention there are two types of policies that European Union can enforce: on the one hand, regulation and decision as the GDPR) which are binding for member states at the date of the entry into force; on the other hand, directives which are meant to be incorporated with the legislation of a member state within the time presented in the directive.³¹⁵

The incorporation of a directive varies from member state to member state, for instance directive 2005/29/EC incorporation in Romania, as the article of Ilie-Cătălin Ungureanu stated was implemented *ad litteram*, meaning that the directive was transposed as it was in the Romanian legislative framework given that there was no regulation on the specific subject of unfair commercial practices.³¹⁶

³¹³ U.S. Const. Art. VI

³¹⁴ T. KLOSOWSKI, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, Wirecutter, 2021, Available at: < https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/>

³¹⁵ European Commission, *Applying EU law*, Available at:< https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en>.

³¹⁶ I-C. UNGUREANU, *Implementation of Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market*, International Journal of academic research in business and Social Science, 8(7), 2018.

Nonetheless, not in every member state, such a method of incorporation was possible; as a matter of fact, Italy which had a preexisting policy integrated into the Italian Consumer Code had to revise such code so as to implement the directive. As Francesco Bosco explains in its paper, the directive entailed the enactment of three distinct policies: the d. lgs. 145/07³¹⁷ which led to the abrogation of d. lgs. 206/2005³¹⁸ in the discipline of misleading advertising and to the limitation of its scope which then included only relationships between professionals; the d. lsg. 146/07³¹⁹ imposed important changes in chapters from 18 to 27 (d.lsg. n 206/2005) of Title III of the Consumer Code (among these changes the directive 2005/29/EC term "unfair" was incorporated not as "sleali" but as "scorrette"); finally, the last further implementation was the d.lsg. 221/07³²⁰ which incorporated the exercise of commercial practices under the principles of loyalty fairness and good faith.³²¹On the other hand, the incorporation of directive at national level can result in a failed implementation, when such circumstances occur the commission can address a formal infringement procedure that if not solved will result in the involvement of the European Court of Justice.³²²

The comparison in the incorporation of law at national level highlighted that, given the different legislative framework of the two actors under examination, while the USA legislation can be related as pyramid with at the top the constitution and the federal laws and under the state laws; the EU considering the two types of policies which can implement can, on the one hand bind to a certain regulation member state or, on the other imposed them to incorporate a directive with national laws. Such difference is given also by the fact that the

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³¹⁷ Decreto Legislativo 2 agosto 2007, n. 145 Attuazione dell'articolo 14 della direttiva 2005/29/CE che modificala direttiva 84/450/CEE sulla pubblicita' ingannevole.

³¹⁸ Decreto Legislativo 6 settembre 2005, n. 206 Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229.

³¹⁹ Decreto Legislativo 2 agosto 2007, n. 146 "Attuazione della direttiva 2005/29/CE relativa alle pratiche commerciali sleali tra imprese e consumatori nel mercato interno e che modifica le direttive 84/450/CEE, 97/7/CE, 98/27/CE, 2002/65/CE, e il Regolamento (CE) n. 2006/2004", Gazzetta Ufficiale n. 207 del 6 settembre 2007.

³²⁰ Decreto Legislativo 23 ottobre 2007, n. 221 Disposizioni correttive ed integrative del decreto legislativo 6 settembre 2005, n. 206, recante Codice del consumo, a norma dell'articolo 7, della legge 29 luglio 2003, n. 229

³²¹ A. Bosco, *Pratiche commerciali scorrette e potenziali sanzionatori: la corte di Giustizia dell'Unione Europea sceglie l'antitrust, 2021.*

³²² European Commission, *Applying EU law*, op.cit.

US can legislate in more fields than the EU, which was created thanks to the fact that the Member States delegated sovereignty in some areas.

Having discussed the differences between the EU and USA from the juridical standpoint, the next chapter will compare the policies related to privacy and online advertising of both actors so as to give a normative comparison to then comprehend the final chapter of this dissertation which will display their different enforcement procedures.

8.2 PRIVACY POLICIES COMPARISON

The analysis of the policies, that the previous sections portrayed, explains how the EU and the USA implement policies to protect both the rights of consumers and the right to privacy. Therefore, some part of the previous analysis will be used so as to compare how the actor involved implemented policies in the online field.

The comparison will not take into account neither Data Protection Directive given that it was abrogated with the General Data Protection Regulation, nor every data protection state act displayed in the USA section. Thereby the comparison will highlight the differences between the GDPR and the CCPA (given that is the only State Act related to consumer privacy into force in this particular moment).

The comparison will serve as a guide in relation to privacy for afterwards comprehending how social media platform, namely YouTube, Facebook/Instagram and TikTok, implemented the policies mentioned in the EU and the USA so has to give, other than a description of the differences, a factual comparison with the example of how the actor sanctioned the platforms for not complying with the legislature.

The comparison will not survey the directive on unfair commercial practice and its counterpart. However, it is important to mention the most salient difference which is related to the fact that: on the one hand the Directive on Unfair Commercial Practice is an independent policy which features what are the prohibited practice and the way in which implement lawful practices; while, on the other hand its counterpart although addressing relatively the same issues, is also the founding act of the agency which is required to enforce

the mandate conferred by the act itself which comprehend unfair commercial practice at section 5.

To what concern privacy, the GDPR and CCPA have both significant common points and differences. The first difference which stand out is the fact that the GDPR regulation applies to a wider audience. Indeed, while the California Consumer Privacy Act apply only to California residents³²³ the GDPR applies to every person located in the European Union.

Furthermore, going into detail in the comparison of the GDPR and CCPA in relation of online advertising, the former request an opt-in consent for the processing of personal data, collected by cookies for behavioural advertising, this must be expressed freely and unambiguously, and the processor of the data must prove that the consent was given;³²⁴ whereas the CCPA does not require opt-in consent for all California Resident with the exception of children under 13 years old. Indeed, the processing of data under 16 is legitimate only if parents have expressed their consent.³²⁵

To what concern children the GDPR address the necessity of parental consent for all children under 16 years old,³²⁶ on the other hand, the parental consent in the CCPA is addressed only to parent of children under 13 years old, the latter as a matter of facts address under 16 only when talking about the selling of those data without the consent of the 16 years old owner.³²⁷ Basically the parental opt-in consent is the result of the COPPA which for the first time required such rule.³²⁸ Therefore, the GDPR require parental consent in whatever activity concern processing of personal data whereas the CCPA address the parental consent only when those data are sold.

Moreover, connected to the consent is the definition of personal data, to what concern the Eu regulation with the term personal data refers to whatever information that could directedly or indirectly lead to the identification of a person,³²⁹ which includes among other even the IP

³²³ Cal. Civ. Code § 1798.140(g)

³²⁴ Article 4(11), Article 7, Regulation 2016/679

³²⁵ Cal. Civ. Code §1798-120

³²⁶ Article 8, Regulation 2016/679

³²⁷ Cal. Civ. Code § 1798.120(c)-(d)

³²⁸ 5 U.S.C. § 6501(1).

³²⁹ Article 4(1), Regulation 2019/679

address as recital 30 explain.³³⁰ Whereas, the CCPA give an extensive definition of which data are to be considered personal, as a matter of fact in this case the IP address does not fall in this definition.³³¹ Therefore, when talking about personal data while the California's law specific which data are to be included the GDPR links the definition to every data that could identify a person.

The processing must be disclosure in both the GDPR and the CCPA, the former requires controllers to give specific information about what data are processed, information about the possible sharing with third parties and limited the time of processing at the adequate time to fulfill the purpose of the process.³³²The latter, ask companies to provide a notice about the data that are collected and intended use, and an additional notice if other categories of data are collected in second instance or if they are processes for other purposes different from the one exposed.³³³

In relation to the level of security, companies under CCPA are not required to implement security measures to safeguard the data collected whereas the GDPR imposes to both the processor and the controllers to implement specific measures to guarantee an adequate level of security for the data involved.³³⁴ Despite the penalties (that indirectly refer to the necessity of security) resulting from some security breaches addressed in the CCPA, for companies that did not apply "reasonable security measures", ³³⁵ there is no explicit obligation for companies to implement such measures, being security one of the most important feature of the regulation of the collection of data such lack could cause great damages to the consumer. Lastly, the possibility of opting out of the processing of data is addressed directly by the CCPA which imposes companies both to opt out and to put a "do not sell my personal information" button.³³⁶ Whereas the GDPR while directly addressing the opting-out option only for marketing procedures, permits consumer to withdrawal their consent.³³⁷ The

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³³⁰ Recital 30, Regulation 2016/679

³³¹ Cal. Civ. Code §1798-140(o)

³³² Article 12, Regulation 2016/679

³³³ Cal. Civ. Code §§ 1798.100(a)- (b), 1798.105(b), 1798.110, 1798.115.

³³⁴ Cal. Civ. Code § 1798.150

³³⁵ Article 24(1), Regulation 2016/679

³³⁶ Cal. Civ. Code §§ 1798.120, 1798.135(a)-(b)

³³⁷ Article 7, Article 2, Regulation 2016/679

differences in this case is more related to the form that to the meaning, as a matter of fact, the GDPR by allowing to withdrawal the consent indirectly address the practice of opting out.

The comparison of the GDPR and CCPA in relation how online advertising while having some point in common, as for instance the notice with the information collected, have a lto of differences which reflect in the degree of protection of the personal data. Indeed, it can be seen by this comparison that the statement proposes in section 1 chapter 2.3 which addressed the GDPR as the stringiest data protection regulation worldwide can be considered true in the light of the comparison of the EU and California law.³³⁸ The comparison highlighted only the differences that could relate privacy with the online advertising, as a matter of fact, there are other differences which could be portrayed but they fall out of the dissertation purpose.³³⁹

³³⁸ GDPR.EU, What is GDPR, the EU's new data protection law, op.cit.

³³⁹ To visualize the entire comparison of the GDPR and CCPA see: L. JEHL, A. FRIEL, CCPA and GDPR Comparison Chart, Practical Law. or a cookie-oriented comparison see also: O. PANTELIC, K. JOVIC, S. KRSTOVIC, Cookies Implementation Analysis and the Impact on User Privacy Regarding GDPR and CCPA Regulations, Sustainability, 2022.

CHAPTER 9: ADVERTISING IN SOCIAL MEDIA

Social Media platforms, which are increasingly involving, in their world, new users can obtain revenues both by the so-called influencer marketing and by the advertising in general which are disposed of, in the case of YouTube, within video content. Such a source of revenue, however, is derived from a practice which, if not regulated, can cause damage to consumer and personal data. As a matter of fact, and as previous chapters displayed, the employment of behavioural targeting in social media platform to confer ad-doc advertising, which suits the preferences of the consumer, on the one hand, can benefit both consumer that visualizes advertising tailored to him/her, and companies that can save money by addressing product and services only to people interested; on the other hand, though, the employment of personal data can cause damage for the person involved in the processing.

Notwithstanding online behavioural advertising are not the only threat that consumers can stumble into as a matter of fact with the newly born influencer marketing new problems with unfair commercial practice arose. Despite the laws enforced by both the USA and the EU, such practices are still a matter of concern for both countries that by filling lawsuit and guidelines are trying to impose standards to the influencer which advertise products on those social media platforms.

The market size of influencer marketing in the EU is estimated to be 14 billion US dollars in 2022, whereas in the USA it represented 13.8 billion U.S. dollars in 2021 of the market size. 340341 This data has more than doubled from 2019 which means that more and more businesses are relying on influence marketing to advertise their product.

This chapter which will conclude the analysis of the policies related to online advertising will attempt to transpose into facts the descriptive analysis which was displayed throughout the dissertation. The choice to analyze three platforms is dictated by the fact that Facebook/Instagram, YouTube and TikTok are among the most used platform in these years (as Statista displays in January 2022, Facebook was the first platform for a number of

Statista Research Department, *Influencer marketing in the U.S. - statistics & facts*, 2021, Available at : https://www.statista.com/topics/8371/influencer-marketing-in-the-us/#dossierKeyfigures

³⁴⁰ Statista Research Department, *Influencer marketing in Europe - statistics & facts*, 2022, Available at: < https://www.statista.com/topics/3304/influencers-in-europe/#dossierKeyfigures>

subscribers followed by YouTube, WhatsApp, Instagram, We chat and TikTok, which is the most recent one). 342 This survey will firstly explain how the platform implemented the policies related to online advertising and afterwards will provide some ruling on the matter so as to comprehend how the enforcement of policies of both the actor under examination are fulfilled. Needless to say, that the privacy policy that will be surveyed in the USA is the California one.

9.1 META: FACEBOOK AND INSTAGRAM

Facebook founded in 2004 and Instagram in 2010 at the beginning were two different social networks but after the acquisition of Instagram by the founder of Facebook they were incorporated, firstly under the name of Facebook inc. and, afterwards under the name of Meta. Meta comprehends the first application for number of subscriber (Facebook) and the first application for the use of influencer marketing (Instagram) which mean that a great amount of people is subject to the advertising that these two platforms use. Therefore, how Meta complies with the GDPR on the one hand and how it complies with the CCPA? After briefly describe the meta terms in relation with privacy, there will be displayed some cases in which the social network and the influencers using those social had breach the law. Meta, as a matter of fact, can be fined in relation with the privacy policies and the advertising which it displays but not for the influencer who is using its account to advertise.

Meta, to showcase the compliance with the GDPR, introduce an ad-hoc page in which it explains the important feature that the privacy regulation implies; this page other than explaining that the group comply with the GDPR display some of the most salient points which the normative require. Indeed, it explains when Facebook(Instagram) is acting as a "service provider" and when instead it is acting as a "processor", the former case is related to the fact that Facebook is responsible for the collection of data while using the platform itself; the latter scenario instead is when Facebook is processing information on behalf of

³⁴² Statista Research Department, *Most popular social networks worldwide as of January 2022, ranked by number of monthly active users,* 2022, Available at:< https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>

third party for instance advertiser who has to "have an appropriate legal basis for Facebook to process this data".³⁴³

Furthermore, it displays the necessity for consent and the possibility to withdraw it as the regulation requires, it also explains that the processing of the data is incorporated in the contract and has a defined scope, and lastly it explicates the terms of the transferring of data outside the European Economic Area(EAA). Indeed, Facebook Inc. adhere at the "privacy shield" which is an agreement between the EU and the USA that imposes to the USA the stringiest form of surveillance of data related to EAA people allowing EEA to benefit from more transparency and security from the processing of their data in the US ground.³⁴⁴

Altogether, the information related to the GDPR provided by Facebook substantially coincides with the EU requirements for the protection of privacy; despite the formal compliance enlightened by Facebook are there any cases in which such platform failed to comply with the GDPR?

The Irish supervisory authority in this respect, can give an answer, in the press released of March 2022, the Irish SA admitted having fine Facebook for 17M€ for the breaches of article 5(2) and 24(1) GDPR. The decision which followed the notification of 12 data breaches at the hands of Facebook and, the inability for Meta to provide that there were effective security measures for the protection of data, cause the company to be fined. ³⁴⁵ This example demonstrate how Meta (therefore Facebook and Instagram) compliance with the GDPR is still a work in process given that the platform failed to provide the adequate means to conspicuously comply with the General Data Protection Regulation.

To what concern the fulfilment with the California Consumer Data Protection, Meta (Facebook – Instagram) provide another ad-hoc page for the explanation of what the CCPA implies for the Californian Facebook Inc. Community. Indeed, it addresses in the specific

344 Garante della Protezione dei Dati Personali, *Privacy Shield*, Available at :

³⁴³ Meta, What is the General Data Protection Regulation (GDPR)?, Available at: < https://www.facebook.com/business/gdpr>

https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/5306161

³⁴⁵ Data Protection Commission, *Data Protection Commission announces decision in Meta (Facebook) inquiry*, 2022, Available at: < https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-meta-facebook-inquiry>

state terms the "limited data use" which displays when Facebook acting as a service provider and shares personal information about people.³⁴⁶ Therefore, it explains its obligations which include the notification when sharing data and the prohibition to share personal data of people which opted out. Afterwards, it lists the obligation for advertisers which include the requirement of noticing people when sharing personal information with Facebook and other obligations which are the same as the one of Facebook when acting as a service provider.³⁴⁷ Provided the information that Facebook display to comply with the CCPA; there is no case which relates the platform breaching CCPA policies. However, the Federal Trade Commission filed a complaint against the platform for deceptive practice in relation to the non-disclosure of the sharing of personal data from Facebook to third parties (which may include advertising companies); not in relation with the user but with the "friends list" of a given person. As a matter of fact, while users where provided of a ticking box to express consent to specific fields of user's personal data, among them the "friend List", 348 it did not disclose the practice to the "friends" which were part of the list.³⁴⁹ Provided that the nondisclosure is by law (the FTCA) a deceptive practice, the allegation which refers to events of 2012, resulted in a monetary settlement of 5 Billion\$ and, in restrictions which include the Facebook privacy approach reconstruction and dispositions on Facebook executives in order to hold them accountable for privacy decisions.³⁵⁰

Having portrayed the law incorporation on Meta of both GDPR and CCPA it can be said that the information provided by Facebook totally related to the policies of both the USA and the EU. Despite the formal compliance, as shown by the case displayed Meta platforms is required to improve its privacy policies so as to comply in the substance with the EU and the

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³⁴⁶ Facebook, *State-Specific Terms*, Available at: < https://www.facebook.com/legal/terms/state-specific/update>

³⁴⁷ Ibid.

³⁴⁸ It tis the list of friends that a person has in its Facebook account, which is usually composed. Y name and surnames of people.

³⁴⁹ United States Court for the District of Columbia, Case No. 19-cv-2184, Complaint for Civil Penalties Injunction and other relief.

³⁵⁰ FTC, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook FTC settlement imposes historic penalty, and significant requirements to boost accountability and transparency, 2019, Available at:https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook

US laws. The amount of money of compensation that Facebook need to pay to both the EU and the US is an indication of the how these two actors incentive the application of the laws and address threats related to the privacy of the consumer.

Instagram, which, as mentioned, is the first social for the use of influencer marketing, while having the same regulation in advertising as Facebook does(given that is part of Meta planforms), is not taken accountable for the deceptive practice fulfilled by influencers when posting content to advertise.

In this respect the FTC, as mentioned before, after addressing 90 letters to influencers in order to request an alignment of their conduct with the section 5 requirement for disclosure in April 2017, it further sent other 21 letters to the influencer, involved in the previous investigation, with "follow-up warning" a few months later. These letters include not only the request to comply with the policy related to disclosure but also the requirement for influencers to express by the end of September their relationship with the companies' products that they were allegedly advertising. This shows how the FTC take seriously the enforcement of section 5 of the FTCA in relation to advertising and, in this case influencer marketing. The influencer market practice, thus, as the FTC shows, can if not regulated and enforced become a threat to consumers which place their trust in their "role model".

On the other hand, similar cases happened in the EU, most precisely in Germany, the German Federal Court of Justice was called to rule on some influencers' appeals after being convicted by the district courts. The plaintiff was related to the fact that the three influencers involved while posting, advertisement content only included "tap tags" of the companies which

³⁵¹ FTC, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers Owners must disclose material connections in future posts; FTC staff also sends 21 warning letters to prominent social media influencers, 2017 Available at: < https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers>

supplied the products; this conduct was addressed by the court as: "inadmissible surreptitious advertising and claims the defendants for injunctive relief." ³⁵²

For instance, one of those influencers, who received compensation from a company to include a raspberry jam in her contents, was found guilty of not displaying the commercial purpose of the content related to the jam; in this sense, the German court deliberated that:

"the contribution to the "Raspberry Jam" violates § 3a UWG in conjunction with § 6 para. 1 No. 1 TMG and § 58 para. 1 sentence 1 RStV or § 22 para. 1 sentence 1 MStV, because the commercial communication or Advertising is not clearly recognizable as such."

This ruling invoked the German law Act against Unfair Competition³⁵³ which was enacted to implement the Directive on Unfair Commercial Practices. This case practically explains how in the EU such practice is enforced in the influencer marketing field.

This paragraph has attempted to explain, on the one hand how meta complies both with the GDPR and the CCPA and, on the other hand provided practical examples of law enforcement in the online advertising field, firstly related to privacy and secondly to unfair commercial practices. The next chapter will, following the steps of the analysis just displayed; survey how YouTube enforce US and EU privacy law and expose if any, cases related both to privacy and to unfair commercial practices in relation to the dissertation topic.

9.2 GOOGLE: YOUTUBE

YouTube was founded in 2005 and from the 2006 is parts of Google; this implies that the terms of conditions of both google and YouTube coincide. This paragraph, will follow the steps of the precedent one with the exemption of portraying the transposition of the GDPR and the CCPA in the YouTube policy terms, given that google substantially integrate both directive in a similar way as Meta, so in order to not repeat the same patterns this part will

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³⁵² Federal Court of Justice on the obligation of influencers to mark their Instagram posts as advertising, No. 170/2021. Available at:

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021170.html https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021170.html

only illustrate specific cases which involved the video sharing platform with the EU and USA laws.³⁵⁴³⁵⁵

In 2019 YouTube, which is a video-sharing platform, was fined by the Federal Trade Commission for violating the Children Online Privacy Protection Act Rule. This rule is affiliated with the COPPA and was implemented by the FTC itself so as to further enhance the act which concerns the protection of children online.

Before discussing further, the plaintiff is important to acknowledge that YouTube permits its users to share content and to monetize from those content by letting the platform introduce advertisements that are personalized for every user. The practice of behavioral advertising used by YouTube concern the collection of personal data which can, as this case, be processed unlawfully.

The complaint made by the FTC, after investigating the possible presence of child-oriented content in the video sharing platform, ³⁵⁶ and having detected that YouTube has many channels that address children (for instance the "Masha and the Bear" Channel), and provided that the Google's subsidiary, thanks to research or exchanging of information, is aware of the presence of minor in its platform, charged YouTube with failing to provide clear notice of the collection of data, failing to inform parents of children under 13 and failing to obtain the parental consent of these kids. ³⁵⁷³⁵⁸ This charges resulted afterward in a settlement which imposed google to pay a 170M\$ fine and to implement systems to obtain information about

³⁵⁴ For further information about the implementation of the GDPR see: What is the General Data Protection Regulation (GDPR)?, Available at: https://support.google.com/google-ads/answer/7687725?hl=en&ref_topic=3119071>

³⁵⁵ For further information about the implementation of the CCPA see:< Helping advertisers comply with CCPA in Google Ads, Available at: < https://support.google.com/google-ads/answer/9614122?hl=en&ref topic=3119071>

³⁵⁶ The COPPA Rule defines child-oriented website in section 312.2 as: "Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience."

³⁵⁷ 6 C.F.R. §§ 312.4(b)-(c)-(d), 312.5.

³⁵⁸ United States Court for the District of Columbia, Case No.: 1:19-cv-2642, , Complaint for Civil Penalties Injunction and other relief.

the presence of children and to acknowledge companies, that operates as advertiser in the planform, that Google therefore YouTube comply with the COPPA rule.³⁵⁹

In the EU, the French "Commission Nationale de l'informatique et des Libertés" in 2020 fined Google for 100M€, the CNIL in its sentence charged google with the three different violations. The investigation that supported the sanction detected that among these violations there was the practice protracted by google to insert third party cookies in users' devices without prior consent, these cookies that were mostly used for advertising purposes, as a matter of fact, did not configurate as essential ones, therefore explicit information and explicit consent were required. The other two breaches were related to the lack of information about the cookies used by google and the difficulty of opting out from the cookies already store in the user' device. The sentence not only imposed sanction for the breach of the article 82 of the French Data protection law, which implemented Directive 2002/58/EC, but also a periodical injunction which impose google to implement the opting out policies for google users residing in France.

The sentences displayed show how both the EU and the USA in different field enforce the law to the failure of the Google company to comply with the law which indirectly regulate online advertising. As the two policies displayed the online advertising world can threat both children in targeted advertising and users for the storage of cookies for advertising purposes. Next chapter will survey the last founded TikTok app with other two cases, one in relation with the USA and one in relation with the EU.

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³⁵⁹ United States Court for the District of Columbia, Case No.: 1:19-cv-02642, Stipulated Order for Permanent Injunction and Civil Penalties Judgement.

³⁶⁰ Commission Nationale de l'informatique et des Libertés, Deliberation of the Restricted Committee n° SAN-2020-012 of 7 December 2020 concerning GOOGLE LLC and GOOGLE IRELAND LIMITED.

³⁶¹ Loi n° 78-17 du 6 janvier 1978 relative à l'in formatique, aux fichiers et aux libertés

³⁶² CNIL, Deliberation of the Restricted Committee n° SAN-2020-012, op.cit.

9.3 TIKTOK

TikTok is the last founded platform which this dissertation will survey, it was founded in 2016 with the name of Musical.ly and it can be distinguished by the other platform for the fact that is not an American social network, it is a Chinese one. As YoutTube, TikTok is a video sharing platform mostly used for short videos of different kind. It is famous among the youngest and this fact is what concern both the EU and the FTC cases which will be displayed afterwards.

Starting from the EU the BEUC in 2021 filed a series of complaints against TikTok, that given its predisposition to be a teenager/children-oriented oriented platform, has failed to safeguard the right of these categories of users.

Before detailing the complaints is important to say that the European Consumer Organization published a report of the paltform displaying that the "terms of service" and the "virtually Item policy" hide some unclear, unfair, and ambiguous points in relation to contractual information and unfair terms.³⁶³ This failure to implement clear terms of service forced the BEUC to file complaints against the platform.

The complaints not only addressed the term of service and the "virtually Item Policy" but also the hidden advertising practice portray by the platform. As a matter of fact, the BEUC exposed that TikTok by encouraging, for instance, branded hashtag challenges, spread contents related to the product advertised, which involve both influencers and companies in hidden marketing practice that can potentially deceive consumers.³⁶⁴ Given that the majority of users is composed by the youngest such unlawful practice is to be considered even more dangerous.

The BEUC by addressing those problems addresses authorities to start an investigation against this misleading and deceptive practice that TikTok is perpetrating.³⁶⁵

³⁶⁵ Ibid.

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³⁶³ The European Consumer Organization, *TikTok without filters*, 2021

³⁶⁴ Th European Consumer Organization, *BEUC files complaint against TikTok for multiple EU consumer law breaches*, 2021, Available at:< https://www.beuc.eu/publications/beuc-files-complaint-against-tiktok-multiple-eu-consumer-law-breaches/html>

To what concern the USA, the FTC sanctioned TikTok in 2019 to have engaged with practices that go against the Children Online Privacy Protection Act. As the plaintiff portrays, after having demonstrated that the platform can be configured as a child-oriented one, that it was aware of processing children's personal data and that such platform received numerous complaints from parents; it was charged with failing in providing notice to parents about the targeting of their children, failing to obtain parental consent, holding personal information for more than required and failing to delete personal information.³⁶⁶

The charges resulted in the obligation for the platform to take offline every content created by under 13 people, to comply with the COPPA rule and to pay, after the settlement, 5,7M\$.

TikTok has portrayed while being one of the most used platforms, especially for underage people, is engaged both in the USA and EU in unlawful practices that could potentially harm children and consumers in general. The lack of compliance, with the policies of the EU and USA have, as seen resulted in complaints that became a case in the US.

This last chapter by portraying cases for every platform mentioned described how the practice of online advertising can, if misused threaten the rights of consumers' and the right to privacy, especially among the youngest. The chapter which portrayed cases related to both the actors analyzed showed how plaintiffs, where issued and sanctioned, were imposed for the breaches of either data protection laws or unfair commercial practice. The practical comparison which displayed firstly theoretically and afterwards practically how the EU and the USA enforce laws end the third section of this dissertation

³⁶⁶ United States Court for the District of Columbia, Case No. 2:19-cv-1439, Complaint for Civil Penalties Injunction and other relief.

³⁶⁷ FTC, Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law, FTC obtains largest monetary settlement in a COPPA case, Available at :< https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy>

CONCLUSION

The digital era has brought plenty of changes in ordinary daily life. The internet, as a matter of fact, while being an important source of communication and interaction for people, is also the engine for the creation of new policies.

The advertising industry which benefited from the creation of the webspace by introducing new advertising methods is paraxially being regularized by more policies than the ones which regulated the "traditional" advertising practice.

The newly instituted online advertising, by using among other tools cookies, is trying to create more and more ad-hoc advertisements which can comply with the necessity and preferences of consumers. This kind of practice as mentioned throughout the dissertation is called online behavioral advertising.

The dissertation while trying to expose the policies which could directedly and indirectly regulate online advertising, displayed that the behavioral advertising practice, to fulfil its purpose, uses personal information, thereby triggering the addressing of the issue of privacy.

This work which attempted to carry out a critical legislative analysis by portraying both the EU and the USA policies in relation to online advertising displayed how the two actors involved, which are economic partners, and the most powerful economies around the world, have tried to deal with the threats that online advertising poses to consumer and data. The comparison that afterwards was displayed gave a significant point of reflection mostly related to the privacy policies implemented by both entities

By firstly portraying the organization involved in the regulation of online advertising, namely EASA for the EU and the FTC and the DDA for the USA, the dissertation illustrated how self-regulatory principles implemented till this moment were not sufficiently adequate to impose compliance among advertising companies, influencers and providers.

Nonetheless, if the self-regulation did not display any differences in enforcement among the actors, the implementation of privacy policies resulted really different in the EU and the USA. Indeed, while the USA have sectorial privacy laws at the federal level and none of those neither directedly nor indirectly address online advertising with the exception of the

Children's Online Privacy Protection Act (which addresses under 13 years old kind) and the only state law related to privacy currently in force California's CCPA; the EU implemented the stringiest regulation around the world: the GDPR. The comparison which was fulfilled between the CCPA and GDPR highlighted that the former, even though being considered an important step forward to the USA's enhancement of consumer data protection, cannot be compared with the latter in the degree of strictness. The imposition of opt-in consent and the possibility of withdrawing it, compose some of the requirements that GDPR requests for processing data. Important is to mention, in this regard, that the behavioral advertising practice is carried out using the processing of personal data to create "profiles" of people to then place advertisements that are more in line with their preferences.

The law analysis included also policies oriented to unfair commercial practices in which both the EU and USA have similar enforcement procedures, the only substantial differences are the fact that the law which regularizes the unfair commercial practices in the USA is the constitutional act of the agency which enforce such law, whereas the directive 2005/29/EC is just a directive which imposes obligation and restriction; and the fact that FTCA does not include Comparative advertising in its text while the EU does.

To what concern the influencer market, the obligation to disclose the advertising purpose with adequate terminology as the FTC guide and EASA best practice highlighted do not have significant differences between the two actors' regulation.

The theoretical analysis of the EU and USA legislature in relation to the regulation of only advertising afterwards was translated into practice with the consideration of cases which took place on the most used social media platforms: Facebook/Instagram, YouTube and TikTok. The cases portrait, while exposing how in the EU and in the USA, policies are enforced, that in both actor's territories, even if there are actual laws that prohibited some practices such as hiding advertising, or processing data for advertising purposes without parental consent, platforms and influencers failed to comply with such requirement thereby creating liabilities and threats to the consumer.

The analysis and subsequent comparison of the policies related to online advertising on the one hand displayed every policy related to the online advertising, and on the other portrayed

how both the USA and the EU need to further implement such policies so as to, in the first instance safeguard consumers' and children's personal data, and in the second instance to prevent the unfair commercial practice from happening.

The attempt of the dissertation was to further expand the literature related to online advertising regulation by exposing the two majors' economies' policies and then comparing them. This resulted in the requirement for both parties to implement and keep policies up to date so as to keep at pace with technological advancement and the new tools which online advertising can develop in the future.

The digital world which reserved plenty of benefits can if misused create threats which will affect mostly the younger generations which are the ones that use the internet platform the most. The EU and USA in this regard and, considering that both are important parties in the global arena, need to enforce and implement stringent policies which have to result in the enhancement of consumer rights, data protection improvement so as to benefit consumers influencers and companies.

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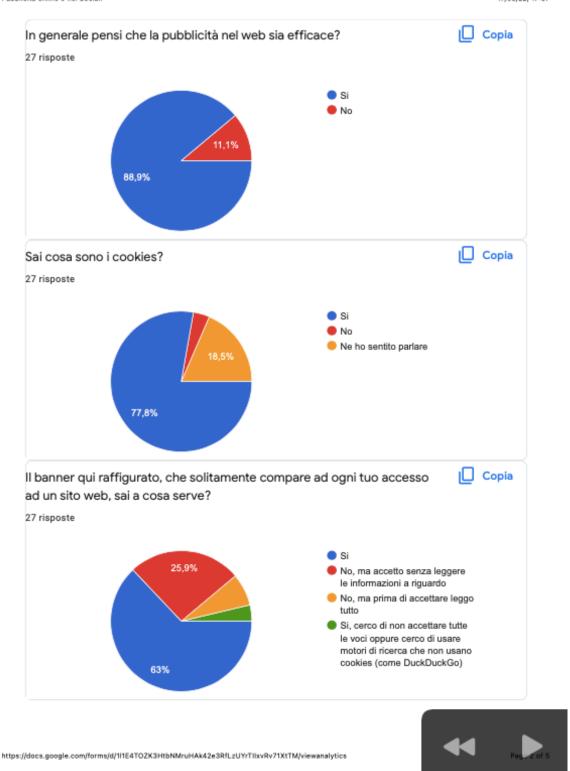
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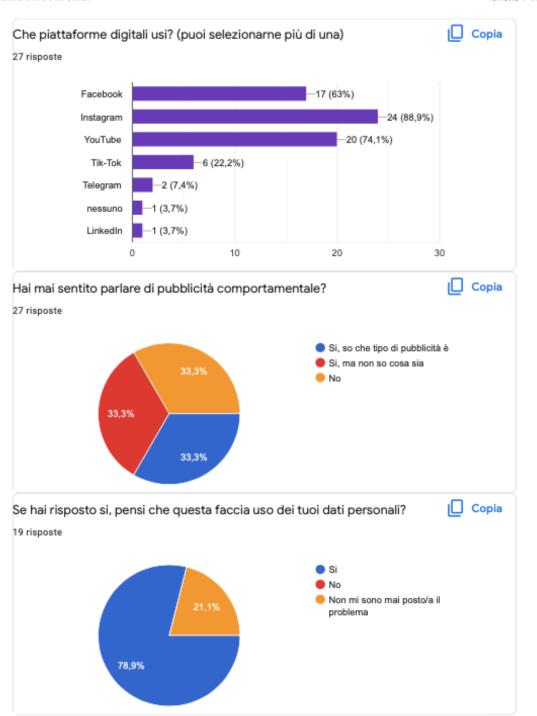
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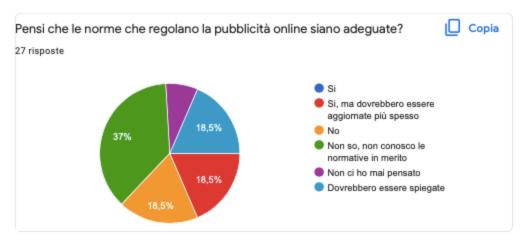


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