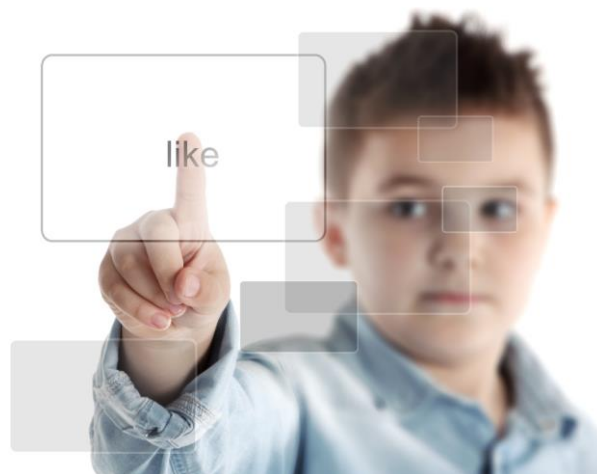

Mapping and analysis of the current legal framework of commercial communication aimed at minors

A research report in the framework of the AdLit SBO project



This document forms part of the 'AdLit' (Advertising Literacy) research project. AdLit is a four-year interdisciplinary research project on advertising literacy, which is funded by IWT (Agency for Innovation through Science and Technology). The main goal of the AdLit project is to investigate how we can empower children and youth to cope with advertising, so that they can grow up to be critical, informed consumers who make their own conscious choices in today's new media environment.

The AdLit consortium comprises of the following partners:

University of Ghent: Research group CEPEC, Department Education and Research Group CJS

University of Antwerp: Research group MIOS and Department Marketing

KU Leuven: Research group Centre for IT and IP Law (CiTiP)

Free University Brussels: Research group CEMESO

For more information in relation to the project, visit our website (www.AdLit.be) or visit us on Facebook (www.facebook.com/reclamewijs) or Twitter (@AdLitSBO).

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In cooperation with the AdLit consortium

Please cite the following:

Valerie Verdoodt, Eva Lievens and Liesbeth Hellemans (2015). Mapping and analysis of the current legal framework of advertising aimed at minors. A report in the framework of the AdLit research project. Document accessible at www.AdLit.be.

EXECUTIVE SUMMARY

Aim: From a legal perspective, one could assume that children are entitled to stricter regulation than adults in relation to advertising. Indeed, with regard to advertising aimed at minors in particular, a patchwork of various rules exists across different law domains and sectors. In order to determine the actual level of protection of minors, a structured overview of these rules is needed. As such, this report aims to provide an overview of different categories of laws regarding (new) advertising (formats) aimed at minors.

Method: The report covers a broad spectrum of regulatory initiatives that deal with commercial communication aimed at minors. First, an exploratory mapping of the relevant law domains narrowed the scope of the report down to five main subsections. Each of these subsections examines the relevant legislation (including the preparatory works), as well as certain case law from the Court of Justice of the EU or the European Court on Human Rights and reference is made to their interpretations where relevant for the research. The report also provides a comparative analysis of international, European and national legislation where relevant, in order to illustrate certain current practices.

Main findings: This report offers a mapping of the relevant provisions concerning commercial communication aimed at children. From the analysis conducted in this report, it can be concluded that at the moment there is extensive and detailed regulation on commercial communications reaching children, especially at the EU level. However, the framework is fragmented into a myriad of provisions which may result in overlaps, making it quite difficult to comprehend how all these provisions interrelate in practice. More in particular, the mapping exercise resulted into the following subsections:

CHILDREN'S HUMAN RIGHTS. On a daily basis, children are confronted with commercial communications targeted at and tailored for them. Modern advertising techniques often blend the commercial message with the non-commercial content (e.g. advergames, advertising on social media) and as a result can be misleading or even aggressive. Such practices may affect children's human rights, including the right to access to good-quality media or the right to freedom of expression. Furthermore, the collection of children's data for purposes of targeted advertising needs to respect the child's right to privacy.

MEDIA LAW. At the European level, the Audiovisual Media Services Directive is a key legal instrument containing general provisions on audiovisual commercial communication as well as laying down specific rules in relation to the protection of minors. However, the AVMSD only foresees in partial (i.e. minimum) harmonisation and Member States were allowed to decide whether or not to implement stricter rules. Furthermore, the AVMS Directive does not cover all aspects of audiovisual commercial communication (for instance unfair commercial practices).

CONSUMER PROTECTION LAW. Nowadays, children face many consumer risks whenever they go online. In these situations, the provisions of the general consumer protection framework could be applicable. The framework is applicable to commercial communication, regardless of the format of the

advertising. In particular, the Directive on Misleading and Comparative Advertising, the Unfair Commercial Practices Directive and the E-Commerce Directive are discussed in this report.

DATA PROTECTION LAW. In Europe, the Data Protection Directive was designed to give substance to the principles of the right to privacy. However, in the EU, currently, no specific laws are in place that deal with the processing of children's personal data. The EU's approach can be compared with the US approach, where there is a specific Federal law dealing with this topic (i.e. the Children's Online Privacy Protection Act of 1998, "COPPA").

PRODUCT-SPECIFIC LEGISLATION. In addition, this report found several other relevant provisions which did not fit under the first four subsections per se. More specifically, this section includes an overview of certain product-specific provisions regulating advertising on food, tobacco, alcohol, medication, etc.

BELGIAN COUNTRY REPORT. Finally, this report contains an overview of relevant Belgian legislation dealing with advertising aimed at minors, following the same structure and subcategories of law as described above. In addition, the country report touches upon certain Belgian criminal law provisions that are relevant in the context of advertising.

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LIST OF ABBREVIATIONS

ACC	Audiovisual Commercial Communication
AVMSD	Audiovisual Media Services Directive
BCEL	Belgian Code of Economic Law
CJEU	Court of Justice of the European Union
CSA	Conseil Supérieur de L'Audiovisuel
COPPA	Children's Online Privacy Protection Act
DPA	Data Protection Authority
DPIA	Data Protection Impact Assessment
EC	European Commission
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GDPR	General Data Protection Regulation
HFFS	High fat, salt and sugar
JEP	Jury for Ethical Practice in Advertising
TWFD	Television without Frontiers Directive
TEU	Treaty on the European Union
UCPD	Unfair Commercial Practices Directive
UNCRC	United Nations Convention on the Rights of the Child
VRM	Flemish Regulator for the Media (Vlaamse Regulator voor de Media)

PREFACE

RELEVANCE FOR ADLIT

The wide array of rules that address commercial communication aimed at minors, sometimes specifically, sometimes in a more general manner, currently cause a high degree of uncertainty, which not only hampers advertisers' compliance, but also threatens to disempower consumers. This report provides a comprehensive overview of rules that currently govern commercial communication aimed at minors. It is a necessary first step in the analysis of the type of regulation that is most appropriate, of the safeguards that need to be adopted, and the type of oversight and enforcement that is necessary to achieve the goal of protecting and empowering minors.

CHAPTER 1 - CONTEXT OF THE REPORT

1. Background

NEW ADVERTISING FORMATS. Although commercial communication is of all ages¹, the methods to distribute commercial messages to consumers as well as the incentives behind advertising have changed drastically over the last decade, due to the ubiquity and increased use of the digital communications technologies. Traditionally, advertisers spread their commercial messages - addressed to both adults and children - through traditional, mostly national media platforms, such as radio, television, print media and outdoor billboards². Nowadays, commercial content is increasingly distributed through a variety of emerging digital platforms, networks and devices, such as PCs, MP3 players, e-readers, game consoles, mobile phones, smartphones³ and connected television, often with both a national and cross-border reach. Product placement, programme sponsoring and digital TV overlays are complemented by brand-new, highly sophisticated advertising formats, ranging from clickable banners over pop-ups, personal branded fan pages, in-game advertising, advergames and brand presence on social media.

PERSONALISED CONTENT. Furthermore, where traditional marketers were predominantly focused on an immediate increase in sales, nowadays, advertisers are increasingly interested in obtaining personal information through advertising formats. It enables them to profile their customers and offer them personalised commercial messages. Building a strong and lasting personal interaction and connection with the young consumer is a key component in modern-day marketing strategies.⁴ While these new advertising strategies target both adults and children, studies have shown that distributing commercial messages through digital platforms is particularly appealing to children. Research has shown that children enter the digital world at a very young age, with 70% of the 3-4 year-olds already being active

¹ Early examples of sales pits were found in ruins of Pompeii. M. Tungate (2007). *Adland: A global history of advertising*. London: Kogan Page, 9-22.

² B. Glaser (2013). How has advertising changed in the last 10 years? <http://www.allvoices.com/article/15570378> accessed 20.11.2014.

³ V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren], 2-42.

S. Livingstone and L. Haddon (2009). EU Kids Online: Final Report. EU kids Online, 5-7;

G. Stald, L. Green, M. Barbovski, L. Haddon, G. Mascheroni, B. Savgari, B. Scifo and L. Tsaliki, (2014). Online on the mobile: Internet use on smartphones and associated risks among youth in Europe. EU Kids Online, 4.

⁴ For example by forwarding commercial messages by e-mail or sharing them on social media platforms. Research has found that up to 79 % of websites addressed to children collect their personal data and even up to 87% of the websites to youngsters. In particular name, address, e-mail address, phone, mobile phone and even data of third parties are requested; V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren], 54. In addition, the collection of children's personal data is a key-feature in the majority of children-oriented apps; Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 1 and 10, footnote 38, http://www.ftc.gov/sites/default/files/documents/reports/mobile-apps-kids-current-privacy-disclosures-are-disappointing/120216mobile_apps_kids.pdf accessed 14.10.2014.

online.⁵ Their favourite activities include playing games and watching videos online. This explains the increasingly successful 'advergAMES', i.e. short, fun and interactive games fully integrating the product or brand to be advertised, offering children an enjoyable experience and connection with the brand.⁶ Furthermore, social media platforms such as virtual worlds (i.e. Second Life or Habbo Hotel), brand communities⁷, instant messaging (MSN, IM), weblogs, video channels (YouTube, Vimeo), blogs, social network apps⁸ and social network sites (e.g., Facebook) are popular with youngsters.⁹

ADVERTISING REGULATION AND THE PROTECTION OF MINORS. In Europe, the internal market in which goods, persons and services can move freely among the Member States, is one of the fundamental aspects of the European integration. However, real market integration calls for consumers who are sufficiently informed and aware of the types of goods and services that are available to them.¹⁰ This is where advertising plays an important role, and where the freedom of commercial expression allows commercial operators to encourage consumers to engage in cross-border transactions. Nevertheless, free movement has its limits and there are certain non-commercial interests which require adequate protection and legislation and particularly the protection of children. Accordingly, several regulatory initiatives have been launched in the past that deal with commercial communication aimed at minors, including consumer protection laws, laws regulating media, data protection legislation, etc.

LEGAL CHALLENGES. The attractiveness of new advertising formats to and the active involvement of children raise particular legal challenges. First, these new forms of commercial communication span across a variety of sectors at different levels (i.e., international, European, national and regional). As such, various conflicting, regulatory and self-regulatory instruments may apply, embedding potentially specific, children-oriented elements. Second, data protection plays a significant role. It is recognised that children have little or no understanding of and knowledge about the extent and sensitivity of the data to which advertisers may gain access, or the extent of data sharing with third parties for advertising purposes,¹¹ which is of particular relevance for mobile apps.¹² The increase of children's

⁵ B. Zarouali et al. (2015). Media possession and use of minors [Mediabezit en –gebruik bij minderjarigen]. AdLit Project. www.AdLit.be accessed 28.09.2015.

⁶ A. Nairn and H. Haiming (2012). AdvergAMES: it's not child's play', a review of research. Family and Parenting Institute, 5-6. http://www.agnesnairn.co.uk/policy_reports/advergAMES-its-not-childs-play.pdf accessed 20.11.2014.

S. Grossman (2005). Grand Theft Oreo: the Constitutionality of Advergame Regulation. The Yale Law Journal, 227-230; F. Gagnerot (2010). The regulation of advergAMES in the European Union. University of Exeter, 13; Studies show that 90 % of the food featured advergAMES targeting children contain advertising for low nutritious food. Since new digital media advertising subconsciously influences children, children's food choices are significantly influenced⁶ leading to long term questions around for example obesity;

J. Chester and K. Montgomery K. (2007). Interactive Food & beverage marketing. Targeting Children and Youth in the Digital Age. Berkeley Media Studies Group, 65; J.L. Harris et al. (2012). US Food Company Branded AdvergAMES on the Internet: Children's exposure and effects on snack consumption. Journal of Children and Media, 51-68; K. Weber, M. Story and L. Harnack (2006). Internet food marketing strategies aimed at children and adolescents: A content analysis of food and beverage brand web sites. Journal of the American Dietetic Association, 1463.

⁷ Examples are Ford, Twix, Mega Mindy, which offer free games and reductions.

⁸ V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren] 56.

⁹ R. Heyman, J. Pierson and I. Picone (2011). User Empowerment in Social Media Culture. Mapping of the process to commodify Personal Identifiable Information in social media. EMSOC Project. www.emsoc.be accessed 28.09.2015; For instance 9 out of 10 Flemish youngsters has at least one social network account, see B. Zarouali et al. (2015). Media possession and use of minors [Mediabezit en –gebruik bij minderjarigen]. AdLit Project. www.AdLit.be accessed 28.09.2015.

¹⁰ A. Garde (2011). Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators? International Journal of Children's Rights 19, 523.

¹¹ Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 10, 26.

¹² They can, even when children, of whatever age, do not explicitly type personal details into the device, by means of sophisticated technologies, such as cookies or other tracking mechanisms, capture a broad range of user information

personal data collection and further processing by means of advanced technologies thus raises a fundamental question with regard to the protection of children's right to privacy in a broad sense and the protection of their personal data, in a more narrow sense. Third, the new advertising formats might put existing legislation to a test. Most new advertising formats have the specific feature to embed the advertising content (i.e. the persuasive, commercial message) into the non-promotional media content (i.e. entertainment, information) in a more or less *integrated* manner. As a result, the distinction between advertising, information and media content becomes increasingly blurry.¹³ Consumers, and in particular children, may experience greater difficulties in recognising the commercial or persuasive message. In other words, it undermines consumers' ability to process the commercial message in a critical manner,¹⁴ which seems to be contrary to certain specific legal requirements set forth in European and national regulatory instruments, i.e. that '*audiovisual commercial communications shall be readily recognisable as such*' (infra Chapter 2, Section 2).¹⁵

2. Aim and scope

AIM. From a legal perspective, one could assume that children are entitled to stricter regulation than adults in relation to advertising. Indeed, with regard to advertising aimed at minors in particular, a patchwork of various rules exists across different law domains and sectors. In order to determine the actual level of protection of minors, a structured overview of these rules is needed. As such, this report aims to provide an overview of different categories of laws regarding (new) advertising (formats) aimed at minors.

GENERAL SCOPE. This report will take into account different legal frameworks containing rules on advertising that reaches minors. Given the myriad of potentially applicable laws, the report maps on the one hand more general rules that protect certain individuals (i.e. children, consumers and data subjects) as well as rules governing advertising on specific types of media (i.e. audiovisual media). Furthermore, it takes a look at the legislation vis-à-vis the actual product being advertised (i.e. food, alcohol, tobacco, medication and toys).

TERRITORIAL SCOPE. Geographically, the report will focus on Belgian (including, federal, Flemish and French Community) and European legislation and where relevant, this report will consider other non-

automatically stored on the device, such as the user's precise geolocation, phone number, enhancing further use and/or sharing by advertisers, without even alerting the user. Additionally, information on the data collected, purpose and sharing practices at the moment of the data collection is often lacking, unclear or incorrect, as revealed by an extensive study performed in 2011 by the Federal Trade Commission in the United States; Federal Trade Commission (FTC), "Mobile Apps for kids", 1, 2 and 10-17. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Strategy for a Better Internet for Children, COM (2012), 196 final, 5, <http://ec.europa.eu/digital-agenda/en/news/communication-european-strategy-make-internet-better-place-kids> accessed 14.10.2014.

¹³ S.L. Calvert (2008). Children as consumers: Advertising and marketing. The Future of Children, 205-234;

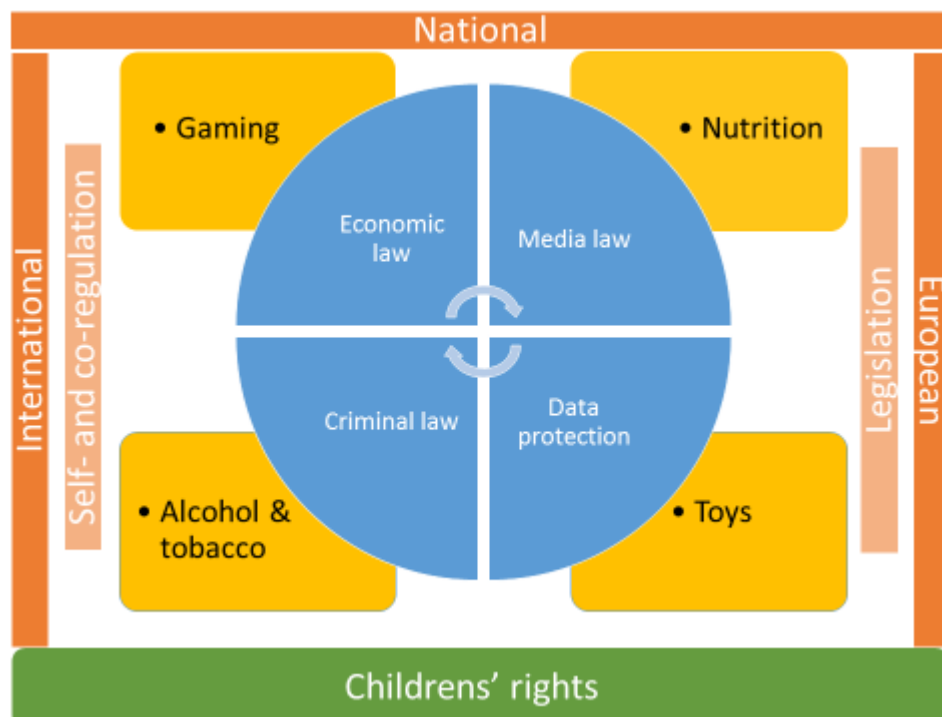
V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren] 109-111; E.S. Moore (2004). Children and the changing world of advertising. Journal of Business Ethics, 163-164.

¹⁴ V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren] 7-9;

E. Rozendaal et al. (2011). Reconsidering advertising literacy as a defense against advertising effects. Media Psychology, 338-344.

¹⁵ Article 9 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013> (hereinafter cited as the AVMSD).

EU countries to illustrate current practices, or new developments that are not yet integrated in the EU framework.



FUTURE REPORTS. Aside from the legislative initiatives, an important framework which interrelates with the regulation in the field of advertising is self- and co-regulation. The self- and co-regulation framework, however, remains outside the scope of this report, as these initiatives will be mapped and their implementation and complementarity with the legal framework will be assessed in a second report (“Mapping and Analysis of Alternative Regulatory Instruments”). It is also significant to note that a third report will assess the applicability of the current legal framework to new advertising formats such as brand placement, split-screen advertising, in-game advertising, advergames, etc. (“Assessment of the applicability of the current regulatory framework to new advertising formats”). This assessment will include a discussion on the varying competences of the legislators (both material and territorial) and it will focus in particular on the efficiency of enforcement of regulation in the online environment. Based on the findings, the main challenges and gaps in the current framework will be identified. Finally, a fourth report will develop a blue print for a future-proof regulatory framework for commercial communication aimed at minors, with an important emphasis on empowerment (“Toward future-proof regulation of commercial communication aimed at minors”). The research results of this task will be translated into policy guidelines and recommendations.

3. Methodology

METHODOLOGY. The report covers a broad spectrum of regulatory initiatives that deal with commercial communication aimed at minors. First, an exploratory mapping of the relevant law domains narrowed the scope of the report down to five main subsections. Each of these subsections examines the relevant legislation (including the preparatory works), as well as certain case law from the Court of Justice of the EU (“CJEU”) or the European Court on Human Rights and reference is made to their interpretations

where relevant for the research. The report also provides a comparative analysis of international, European and national legislation where relevant, in order to illustrate current practices.

STRUCTURE OF THE REPORT. First of all, the analysis is divided into two chapters, Chapter 2 dealing with the legal framework at the international, European and sometimes national level and Chapter 3 focusing specifically on Belgian legislation. Furthermore, certain main sections can be distinguished, addressing the major domains of law in which legislative rules concerning advertising and minors can be found, i.e. (1) Children's human rights, (2) Media law, (3) Consumer protection law, (4) Data protection law, (5) E-commerce law, (6) Criminal law, (7) Product-specific legislation. The descriptive analysis is preceded by a definition section, setting forth some basic notions for the remainder of the study, and ends with a final conclusion.

4. Definitions

4.1 Minor, child, youngster

NO UNIFORM LEGAL DEFINITION. When researching a topic that relates to 'minors', one finds very quickly that different notions are used to indicate the targeted persons, with 'minors', 'children', 'adolescents', 'youth', 'youngsters' and 'young persons' as some of the terms that are most frequently used.¹⁶ These terms can be found in turn across different legislative and policy documents. First of all, the United Nations Convention on the Rights of the Child has opted for the notion 'child', which it defines as

"every human being below the age of eighteen years of age unless under the law applicable to the child, majority is attained earlier".¹⁷

The Council of Europe Cybercrime Convention, on the other hand, talks about 'minors', by which is meant *"all persons under 18 years of age"* (unless a Party requires a lower age limit not less than 16 years of age).¹⁸ Other policy documents like the 2006 Recommendation on the protection of minors and human dignity in audiovisual and online information services,¹⁹ use the words child²⁰ and minor²¹ alternately, without providing any clarification or definition. Aside from this, certain scholars have advanced their own interpretation of the different concepts.²² ETZIONI, for instance, clarifies the distinction between children, teenagers and minors as follows:

¹⁶ E. Lievens (2010). *Protecting children in the digital era the use of alternative regulatory instruments*. Boston: Martinus Nijhoff.

¹⁷ Article 1 United Nations Convention of the Rights of the Child, 20.11.1989, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 22.06.2015.

¹⁸ Article 9, para. 3 Council of Europe, Convention on Cybercrime, ETS No. 185, 23.11.2001, Budapest, <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> accessed 22.06.2015.

¹⁹ European Parliament and Council Recommendation 2006/952/EC of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, *OJ* 27.12.2007, L 378, 72.

²⁰ Defined as *"a young person especially between infancy and youth"* in Merriam Webster's Online Dictionary, Child, <http://www.m-w.com/dictionary/child> accessed 22.06.2015.

²¹ Defined as *"a person who has not attained majority"* in Merriam Webster's Online Dictionary, Minor, retrieved from <http://www.m-w.com/dictionary/minor> accessed 22.06.2015.

²² Another scholar argues that any definition of childhood is inevitably artificial, and that the notion 'minor' is somewhat discriminatory, since it is *"imbued with the notion that children are lesser or incomplete beings because they are not always able to determine and in their own best interests, something arguably which they share with many adults"*. See G. Van Bueren, (1995). *The international law on the rights of the child*. Dordrecht: M. Nijhoff, 32.

“Children refers to those twelve and under, and teenagers refers to those between the ages of thirteen and eighteen. Minors is used to refer to both groups together”.²³

Taking a closer look at the two most frequently used notions, ‘child’ and ‘minor’, one could argue that whereas child is a more general term, used in different contexts, the notion ‘minor’ is linked to the age of majority, and more often used in a ‘legal’ context.

DISTINCTION ACCORDING TO AGE – Even though different notions are used, it is clear that the decisive criterion for labelling a person a ‘child’ or a ‘minor’ is age.²⁴ Most policy documents set eighteen years as the ‘age of majority’. This age of majority is laid down in most countries’ national legislation. In addition, countries also set age limits for the acquisition of other rights, such as the age of sexual consent, or the age required to marry.²⁵ HODGKIN and NOWELL note that

“setting an age for the acquisition of certain rights or for the loss of certain protections is a complex matter”, which “balances the concept of the child as a subject of rights whose evolving capacities must be respected with the concept of the State’s obligation to provide special protection”.²⁶

In addition, certain policy documents in the area of media law make a further distinction between ‘child’ and ‘youth’, according to various age limits.²⁷

SOCIAL SCIENCE RESEARCH – Another area of research in which ‘childhood’ is a subject of interest is social science research. The interpretation of this concept is, however, far from straightforward and may vary in different cultures.²⁸ Nevertheless, social scientists do agree on the fact that age is an important factor for the evaluation of the effect of advertising on children. In particular, research has shown that children’s advertising literacy develops over the years together with their cognitive capacities.²⁹ In general, younger children *“attend to and interpret information in different ways than do their older counterparts”*.³⁰ Social science research uses specific categories linked to stages of advertising literacy,

²³ A. Etzioni (2004). On protecting children from speech (Symposium Do children have the same First Amendment rights as adults?). *Chicago-Kent Law Review* 2004 Vol. 79 No. 1, 43.

²⁴ On interpretations of the beginning and ending of childhood, A. Bainham (2005). *Children – the modern law*. Bristol, Family Law, 86 *et seq.*

²⁵ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York. Unicef, 5. Not only is the age of majority laid down in national legislation. For instance in Belgium, the age of minority in civil law is set at 18 years old (see Article 388 of the Belgian Civil Code, 21 March 1804, published 3 September 1807 (hereinafter ‘the Belgian Civil Code’), whereas criminal law has set the age limit at 16 (Articles 372 and 373 of the Belgian Criminal Law of 8 June 1867, published on 9 June 1867 (hereafter ‘the Belgian Criminal Code’) and labor law even at 15 years.

²⁶ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York. Unicef, 1.

²⁷ For instance, The Flemish Community Media Decree Media Decree defines a ‘child’ as a person under the age of 12 years²⁷ and makes a distinction with ‘youth’ being a person aged between 12 and 16 years (Article 2, 15° and 18° of the Belgian Decree of 27 March 2009 of the Flemish Community on radio and television, BS., 30 April 2009 (hereinafter ‘the Flemish Community Media Decree’)). The Ofcom Broadcasting Code on the other hand speaks of children when under 15 years (Section 1: Protecting the Under-Eighteens, Ofcom Broadcasting Code).

²⁸ I. Hutchby and J. Moran-Ellis (2001). Introduction: relating children, technology and culture in I. Hutchby and J. Moran-Ellis (eds), *Children, technology and culture: The impacts of technologies in children’s everyday lives*. Oxford: Routledge, 1: *“Thus across different cultures, children are looked after in periods of dependency in a variety of social arrangements, are cultural participants in varying degrees of inter- and intragenerational segregation and integration, and occupy the status of ‘child’ for varying lengths of time”*. For an overview of the approach of childhood throughout history cf.: E. Verhellen (2000). *Convention on the Rights of the Child: Background, motivation, strategies, main themes* (3rd, rev. ed.). Leuven: Garant, 11 *et seq.*; A. Bainham (2005). *Children, the modern law* (3rd ed.). Bristol: Family Law/Jordan Pub., 85.

²⁹ V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren] 106.

³⁰ V. Strasburger and B. Wilson (2002). *Children, adolescents, and the media*. Thousand Oaks Calif.: Sage Publications, 12.

such as 0-5 years, 8-12 years 12-15 years and 16-18 years of age.³¹ However, it is significant to note that capacities and skills of children of the same age can vary widely, for instance due to personality differences or gender characteristics.³²

USE OF NOTIONS – For the purpose of this report, the notions ‘child’, ‘minor’ and ‘youngster’ will be used interchangeably. Where the age is of particular importance to the topic that is discussed this will be emphasised and explained.

4.2 (Audiovisual) commercial communication and advertising

EVOLUTIONARY CONCEPT. The European directives regulating promotional messages use different terms to refer to such messages. For instance, the Unfair Commercial Practices Directive of 2005 (infra Chapter 2 section 3) uses the term advertising, whereas the Audiovisual Media Services Directive of 2007 (infra Chapter 2 section 2) refers to “audiovisual commercial communication”. The legislator’s idea at the time of drafting the latter was to establish a common set of rules applicable to all different forms of promotional activities. Indeed, according to CASTENDYK

“the introduction of the general concept of “audiovisual commercial communication” was necessary in order to cover advertising in a larger context of audiovisual media services.”³³

More specifically, this new concept was to cover audiovisual commercial communications of all kinds, including advertising, sponsorship, teleshopping, split screens, interactive advertising and product placement.

USE OF NOTIONS – For the purpose of this report, the notions ‘(audiovisual) commercial communication’ and ‘advertising’ will be used in conformity with the legislative instruments that are discussed.

³¹V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren] 102.

³² V. Strasburger and B. Wilson (2002). *Children, adolescents, and the media*. Thousand Oaks Calif.: Sage Publications, 13.

³³ R. Chavannes and O. Castendyk (2008). “Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 1 AVMSD” in O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 2008, 810.

CHAPTER 2 – THE LEGAL FRAMEWORK

1. Children’s Human Rights Law

CHILDREN’S RIGHTS AND COMMERCIAL COMMUNICATION. The belief that children are individuals worthy of respect slowly gained prominence in the 20th century.³⁴ Nowadays, it is generally recognised that the human rights framework is not only applicable to adults but also to children. In particular, children are considered to be active subjects of rights (i.e. children’s rights).³⁵ As recipients of information, they may be exposed to all kinds of advertising formats which may present commercial risks (e.g. misleading or aggressive advertising). Therefore, it is important to empower children and youth to cope with advertising, so that they can grow up to be critical, informed consumers who make their own conscious choices in today’s new media environment. In this regard, the children’s rights framework provides certain key principles that need to be taken into account.

ROADMAP. This section of the report analyses the provisions of the children’s human rights framework, which may be relevant when dealing with commercial communication aimed at children. First, the international framework consisting of the United Nations Convention on the Rights of the Child is analysed. More specifically, the general principles and the enforcement mechanism are further explained. Secondly, this section focuses on the human rights tradition of the Council of Europe and the European Union. Particular attention will be given to children’s freedom of expression and their right to privacy. Finally, this section will touch briefly upon children’s rights and business principles.

1.1 International - *United Nations Convention on the Rights of the Child*

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD. The legal document providing the international legal framework for children’s rights is the United Nations Convention on the Rights of the Child (UNCRC),³⁶ adopted by the UN General Assembly on 20 November 1989.³⁷ So far, the Convention has been ratified by 193 countries and is in fact the most widely accepted instrument of international law.³⁸

³⁴ E. Lievens (2010). *Protecting children in the digital era the use of alternative regulatory instruments*. Boston: Martinus Nijhoff, 264-265.

³⁵ S. Ruxton (2005). *Children’s rights in the European Union: What about us? : Next steps*. Brussels: The European Children’s Network, 105.

³⁶ United Nations, Convention on the Rights of the Child, 20 November 1989, retrieved from <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [hereinafter: UNCRC].

³⁷ Previous international documents on children’s rights were: “Declaration on the Rights of Child”, adopted by the League of Nations in 1924, and the 1959 “UN Declaration on the Rights of Child”, which was adopted unanimously by the General Assembly of the United Nations on 20 November 1959, retrieved from <http://www.unhcr.ch/html/menu3/b/25.htm> (on 22 July 2015). For a detailed overview see G. Bueren (1995). *The international law on the rights of the child*. Dordrecht: M. Nijhoff, 6-12.

³⁸ Interesting to note is that although the US is signatory to the Convention, up until now it has not ratified it. See Status Of Ratification Interactive Dashboard, <http://indicators.ohchr.org/> (Last Updated: 13 July 2015).

The UNCRC entered into force in 1990 and its provisions are legally binding³⁹ for the signatories⁴⁰, but the actual implementation of the provisions is left up to the discretion of the national legislators.⁴¹ Nevertheless, the principles of the UNCRC are considered the key guidelines for establishing children's rights policies.⁴² It functions as a comprehensive framework against which legislative or policy proposals should be evaluated.⁴³ Furthermore, the Court of Justice of the European Union has repeatedly stressed that it takes the UNCRC into account when applying the general principles of Community law.⁴⁴

CHILD AS RIGHTSHOLDER. According to Article 1 UNCRC, it is applicable to *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*.⁴⁵ Traditionally, vulnerability and incapacity have been the bedrock of the Western legal conception of children.⁴⁶ Children needed an adult representative to initiate legal proceedings on their behalf and their vulnerability was often invoked to justify this difference in treatment.⁴⁷ On the other hand, one of the essential elements of the UNCRC is the belief that children should not be regarded merely as vulnerable victims, but also as social actors who need support while growing up.⁴⁸ As per RUXTON, the Convention emphasises the capacities and strengths of children as rights holders.⁴⁹ This legal transformation is also reflected in the Third Optional Protocol to the CRC (OP3 CRC), providing a means through which children's legal rights and access to remedies can be strengthened (infra section

³⁹ ECJ, *Parliament v. Council*, C-540/03, 27 June 2006, para. 37: *"The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law [...]. That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States"*. See also: E. Verhellen (2006). *Convention on the Rights of the Child: background, motivation, strategies, main themes*. Antwerpen: Garant, 84 and 147; S. Meuwese, M. Blaak, and M. Kaandorp (eds) (2005). *Handboek Internationaal Jeugdrecht [International Youth Law Handbook]*. Nijmegen: Ars Aequi Libri, 3 [NL].

⁴⁰ There is, however, no consensus on the direct effect of the UNCRC. Cf. for instance: E. Verhellen (2006). *Convention on the Rights of the Child: background, motivation, strategies, main themes*. Antwerpen: Garant, 84-86; S. Meuwese, M. Blaak and M. Kaandorp (eds) (2005). *Handboek Internationaal Jeugdrecht [International Youth Law Handbook]*. Nijmegen: Ars Aequi Libri, 4 [NL].

⁴¹ The Committee on the Rights of the Child, however, does emphasise that it *"welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention – that children alongside adults are holders of human rights"*: United Nations Committee on the Rights of the Child (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), General comment No. 5. http://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html accessed 17.07.2015.

⁴² Commission of the European Communities, Commission Staff working document accompanying the Communication from the Commission Towards an EU strategy on the rights of the child, Impact assessment, COM (2006) 367 final, SEC (2006) 888, 6 <http://register.consilium.europa.eu/pdf/en/06/st12/st12107-ad01.en06.pdf> accessed 22.07.2015.

⁴³ S. Ruxton (2005). *Children's rights in the European Union: What about us? : Next steps*. Brussels: The European Children's Network, 28.

⁴⁴ ECJ, *Dynamic Medien v. Avides Media AG*, C-244/06, 14 February 2008, para. 39; ECJ, *Parliament v. Council*, C-540/03, 27 June 2006, para. 37.

⁴⁵ Article 1 UNCRC. Cf. *supra*: Part 1, Chapter 1.

⁴⁶ S. Clark (2015). Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability. *Nordic Journal of International Law*, 183-220.

⁴⁷ *Ibid.*

⁴⁸ S. Ruxton (2005). *Children's rights in the European Union: What about us? : Next steps*. Brussels: The European Children's Network, 17. For instance, the formal phrasing *"the exercise by the child of the rights recognized in the present Convention"* in article 5, expresses the fact that children are active subjects of rights. See R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*, New York. Unicef, 85.

⁴⁹ S. Ruxton (2005). *Children's rights in the European Union: What about us? : Next steps*. Brussels: The European Children's Network, 28.

1.1.3).⁵⁰ As per CLARK, “their legal status as children is not in itself an obstacle to legal capacity to sue for violations of their human rights”.

CHILDREN’S RIGHTS IN THE MEDIA ENVIRONMENT. Since the creation of the UNCRC, there has been general agreement concerning children’s entitlement to fundamental rights that are of importance in the media environment (e.g. the right to freedom of expression in Article 13 UNCRC and the right to privacy in Article 16 UNCRC).⁵¹ On the other hand, children also need to be protected against harmful content such as aggressive or misleading advertising (e.g. advertising which encourages overspending and the purchase of virtual goods or credits with their mobile phones).⁵²

1.1.1 General principles and categories of rights

FOUR BASIC PRINCIPLES. In the context of the UNCRC, the role of states lies in fulfilling clear obligations to each and every child. To achieve an effective implementation of the Convention, states should develop a children’s rights perspective throughout their government, parliament and judiciary.⁵³ According to the Committee on the Rights of the Child⁵⁴, such a perspective should take into account the four key principles of the UNCRC, which form the basis for interpreting the other provisions.⁵⁵ The table below provides an overview of the four basic principles of the UNCRC:

PRINCIPLE	ARTICLE	COMMENT
Non-discrimination	2	The principle entails the protection of children against all forms of discrimination.
Best interest of the child⁵⁶	3	The interpretation of the best interests of the child cannot undermine or override any of the other rights ensured by other UNCRC provisions. ⁵⁷

⁵⁰ S. Clark (2015). Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability. *Nordic Journal of International Law*, 216-217.

⁵¹ E. Lievens (2014). A children’s rights perspective on the responsibility of social network site providers. 25th European Regional Conference of the International Telecommunications Society (ITS). Brussels, Belgium, 3-4.

⁵² European Parliament (Committee on Culture and Education) (2012). Report on protecting children in the digital world. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0353+0+DOC+XML+V0//EN> accessed 22.07.2015.

⁵³ Committee on the Rights of the Child (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) - General comment No. 5, 4. [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/\\$FILE/G0345514.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/$FILE/G0345514.pdf) accessed 22.07.2015.

⁵⁴ The Committee on the Rights of the Child is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties (see *infra* enforcement). For more information see <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

⁵⁵ Committee on the Rights of the Child (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) - General comment No. 5, 4.

⁵⁶ More specifically, taking the child’s best interests into account as a primary consideration, as the best interests of the child are not always the only factor to consider. Indeed, competing human rights interests, for instance, between children and adults can arise (R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 43). This is the case when dealing with the protection of minors against harmful media content such as misleading advertising (i.e. the interests of the child against the advertiser).

⁵⁷ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 39.

		<p>This general principle could be relevant to media regulation, as the article “<i>emphasizes that governments and public and private bodies must ascertain the impact on children of their actions, in order to ensure that the best interests of the child are a primary consideration, giving proper priority to children and building child-friendly societies</i>”.⁵⁸ Hence, the best interests of the child should be taken into account when developing media policy.</p> <p>Furthermore, it implies the creation of mechanisms to assess the impact of government actions on children, and to effectively take these results into account when shaping such policy.⁵⁹</p> <p>Finally, the principle requires states to ensure the necessary protection and care for the child (para. 2) when individual parents are unable or unwilling to protect the child.⁶⁰ As such, states should function as a safety net. In this regard, it could justify government involvement in protecting minors against harmful new media content such as manipulative advertising.</p>
The right to life, survival and development	6	This entails the right of children to have their lives protected from the moment of birth and their right to be able to survive, grow and develop appropriately.
The right to express an opinion and to have it taken into account	12	A child’s views need to be given due weight in any matter of procedure affecting the child.

Table 1: Basic principles of the UNCRC⁶¹

CATEGORIES OF RIGHTS. The UNCRC is a comprehensive instrument⁶² and groups rights specifically created for children, as well as child-specific versions of general fundamental rights. Traditionally, three categories of rights are distinguished: survival and development rights, participation rights and protection rights. Articles that are of particular interest to commercial communication aimed at children are articles 12 (the right to express an opinion and to have that opinion taken into account), 13 (the right to freedom of expression and to obtain and impart information), 14 (the right to freedom of conscience, thought and religion), 16 (the right to protection from interference with privacy, family, home and correspondence), 17 (access to information and material from a diversity of national and international sources), 19 (the right to protection from all forms of violence, injury, abuse, neglect or exploitation), 31 (the right to participate in leisure, cultural and artistic activities), and 36 (the right to protection from all other harmful forms of exploitation). The table below provides an overview of the different categories of rights and their corresponding articles:

⁵⁸ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 39.

⁵⁹ *Ibid*, 43.

⁶⁰ *Ibid*, 47.

⁶¹ E. Lievens (2010). *Protecting children in the digital era the use of alternative regulatory instruments*. Boston: Martinus Nijhoff, 269-270.

⁶² U. Kilkelly (2001). The best of both worlds for children’s rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child. *Human Rights Quarterly* Vol. 23, 311.

CATEGORIES OF RIGHTS	ARTICLE	COMMENT
Survival & development rights	5, 6, 7, 8, 9, 10, 14, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 40	The right to life and to have the most basic needs met (e.g., an adequate standard of living, shelter, nutrition, medical treatment), and the rights that enable children to reach their fullest potential (e.g., education, play and leisure, cultural activities, access to information and freedom of thought, conscience and religion)
Participation rights	12, 13, 14, 15, 16, 17	Rights that allow children to take an active role in their communities (e.g., the freedom to express opinions; to have a say in matters affecting their own lives; to join associations)
Protection rights	11, 19, 20, 21, 22, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41	Rights that are essential for safeguarding children and adolescents from all forms of abuse, neglect and exploitation (e.g., special care for refugee children; protection against involvement in armed conflict, child labour, sexual exploitation, torture and drug abuse)

Table 2: Categories of rights in the UNCRC⁶³

1.1.2 Provisions of particular interest to commercial communication

CHILDREN'S PARTICIPATION. According to Article 12 of the UNCRC, children should be able to actively participate in the promotion, protection and monitoring of their rights.⁶⁴ In particular, states should ensure that children who are capable of forming their own views can express those views freely in all matters affecting the child.⁶⁵ In addition, these views need to be given due weight in accordance with the age and the maturity of the child.⁶⁶ To achieve children's participation, RUXTON argues that "*child friendly and accessible spaces for children to express themselves should be developed, for example using technology such as (mobile) telephones and the internet*".⁶⁷ In this regard, it should be noted that new media environments such as social network platforms (e.g. Facebook, Snapchat, Instagram) and blogs have lowered the threshold for sharing and self-expression significantly.⁶⁸

⁶³ See http://www.unicef.org/crc/index_30177.html and <http://www.hrea.org/learn/guides/children.html> as cited by E. Lievens (2010). *Protecting children in the digital era the use of alternative regulatory instruments*. Boston: Martinus Nijhoff, 270.

⁶⁴ This principle applies to all measures adopted by Governments to implement the Convention: S. Ruxton (2005). *What about us? Children's rights in the European Union? Next Steps*. Brussels: The European Children's Network, 129.

⁶⁵ Article 12 para 1 UNCRC.

⁶⁶ Article 12 para 2 UNCRC.

⁶⁷ S. Ruxton (2005). *Children's rights in the European Union: What about us? : Next steps*. Brussels: The European Children's Network, 33.

⁶⁸ E. Lievens (2010). *Protecting children in the digital era the use of alternative regulatory instruments*. Boston: Martinus Nijhoff, 271.

FREEDOM OF EXPRESSION. A second right which is relevant when it comes to commercial communication aimed at children is the child's right to freedom of expression.⁶⁹ More specifically, Article 13 UNCRC stipulates that this right *which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice*.⁷⁰ As the article has a broad scope of application, it extends to the Internet as well as any other (future) medium.⁷¹ Finally, it is significant to note that the right is not unlimited, but restrictions have to be provided by law and necessary *"for respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals"* (para. 2).⁷²

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION. Linked to the previous two rights is the child's right to freedom of thought, conscience and religion under Article 14 UNCRC.⁷³ In particular, children need access to information to form and formulate their opinions. Accordingly, the practical implementation of the freedom of thought is intertwined with the right to participation and the freedom of expression. This article is aimed at state parties, who have to ensure the specific right for children. Significant to note is that restrictions on the freedom of thought are not allowed, contrary to for instance the freedom of expression.⁷⁴

FREEDOM OF ASSOCIATION. Another important right for children is the right to freedom of association and peaceful assembly, as mentioned by Article 15.⁷⁵ Social network platforms can play an important role in the realisation of this right for children. However, as the business models of these online platforms

⁶⁹ Similar articles are article 19 Universal Declaration of Human Rights, article 19 International Covenant of Civil and Political Rights, and article 10 European Convention on Human Rights and Fundamental Freedoms (cf. *infra*). Belgium formulated the following reservation with respect to article 13 UNCRC: *"Articles 13 and 15 shall be applied by the Belgian Government within the context of the provisions and limitations set forth or authorized by said Convention in articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950"*. This entails that the restrictions on the freedom of expression are interpreted in a slightly wider manner.

⁷⁰ The United Nations Committee on the Rights of the Child has stressed that it is not sufficient to just include the 'general' right to freedom of expression applicable to everyone in a country's constitution. It is necessary, according to the Committee, to also expressly incorporate the child's right to freedom of expression in legislation. See for instance: United Nations Committee on the Rights of the Child (1996). General Guidelines for Periodic Reports, CRC/C/58 [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.En?Opendocument) accessed 3.08.2015: *"States parties are requested to provide information on the measures adopted to ensure that the civil rights and freedoms of children set forth in the Convention, in particular those covered by articles 7, 8, 13 to 17 and 37 (a), are recognized by law specifically in relation to children and implemented in practice, including by administrative and judicial bodies, at the national, regional and local levels, and where appropriate at the federal and provincial levels"*.

⁷¹ E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 272.

⁷² The grounds for restrictions are identical to the grounds listed in article 19 para. 3 of the International Covenant of Civil and Political Rights. For more information on possible restrictions on freedom of expression, cf. *infra*.

⁷³ This right can also be found in the following articles: article 18 of the Universal Declaration on Human Rights, article 18 of the International Covenant on Civil and Political Rights, and article 9 of the European Convention on Human Rights and Fundamental Freedoms.

⁷⁴ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 195. However, there is no consensus on this issue. For example, Meuwese, Blaak and Kaandorp argue that restrictions are allowed. According to these authors, the third paragraph – which contains possible grounds for exception – applies to the freedom of thought as well (although it is formulated as follows: *"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others"*): S. Meuwese, M. Blaak, Mirjam and M. Kaandord (eds) (2005). *Handboek Internationaal Jeugdrecht [International Youth Law Handbook]*. Nijmegen: Ars Aequi Libri, 131 [in Dutch].

⁷⁵ Equivalents in other human rights treaties are article 20 of the Universal Declaration on Human Rights, article 22 of the International Covenant on Civil and Political Rights, and article 11 of the European Convention on Human Rights and Fundamental Freedoms. The Belgian government made the same reservation as for article 13, cf. *supra*.

are based on the collection of user data and the provision of behavioural advertising, they may raise significant legal issues. Similar to the freedom of expression, the right to freedom of association is not absolute but restrictions should conform to the law and need to be necessary in a democratic society.⁷⁶

RIGHT TO PRIVACY. The child's right to privacy has gained increasing attention in recent years. According to Article 16: *"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation."* This entails both interferences by state authorities and private organisations.⁷⁷ Moreover, paragraph 2 stipulates that there should be legislation in place which protects children against such interferences. The right to privacy is crucial in a digital media environment, where advertisers collect ever more personal data of consumers, including children. Additionally, keeping track of a child's use of the Internet and other new media, for instance through software, could be seen as a violation of the child's right to privacy.⁷⁸ Finally, parents may not interfere with their child's correspondence (i.e. both paper and digital correspondence).⁷⁹

ACCESS TO GOOD-QUALITY MEDIA. Another important right in relation to commercial communication aimed at children is the child's right to access to good-quality media under Article 17 UNCRC. More specifically, this article requires states to ensure that children have access to *"information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health"*. The reasoning behind this provision is that for the exercise of other fundamental rights (like the freedom of expression), children need to have access to a wide diversity of information.⁸⁰ Children may regard marketing and advertising transmitted through the media as truthful and may use products which are harmful (e.g. unhealthy food). Moreover, advertising can seriously impact children's self-esteem, for instance when portraying unrealistic body images.⁸¹ Hence, States are encouraged to pursue a proactive policy that stimulates the cultural, educational and informational potential of media when it comes to children.⁸² In addition, the UNCRC encourages the development of guidelines to protect children from harmful content.⁸³ Such guidelines need to be compatible with Articles 13 (freedom of expression), 18

⁷⁶ And in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others (para. 2 Article 15 UNCRC).

⁷⁷ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 216.

⁷⁸ E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 271.

⁷⁹ *Ibid.*

⁸⁰ S. Meuwese, M. Blaak, Mirjam and M. Kaandord (eds) (2005). *Handboek Internationaal Jeugdrecht [International Youth Law Handbook]*. Nijmegen: Ars Aequi Libri, 144-145 [in Dutch].

⁸¹ UN Committee on the Rights of the Child (2013). General comment No. 16 on State obligations regarding the impact of the business sector on children's rights, 8-9.

⁸² D. Voorhoof (1994). Media(recht) en kinder(recht)en [*"Media(law) and children('s rights)"*] in: E. Verhellen, (ed.), *Kinderrechtengids (KIDS): Commentaren, regelgeving, rechtspraak en nuttige informatie over de maatschappelijke en juridische positie van het kind [Guide to children's rights: Comments, regulation, case law and useful information about the social and legal status of the child]*. Gent: Mys en Breesch, 30 [in Dutch].

⁸³ It has been argued that the word 'guidelines', used in article 17 UNCRC, indicates a preference for voluntary, rather than legislative constraints. See R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 236. However, it should be noted that the Committee on the Rights of the Child has recommended to *"enact special legislation to protect children from harmful information, in particular from television programmes and films containing brutal violence and pornography"*. United Nations Committee on the Rights of the Child (2000). Concluding observations of the Committee on the Rights of the Child: Cambodia, CRC/C/15/Add.128, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/30dce34798ef39f480256900003397ac?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/30dce34798ef39f480256900003397ac?Opendocument) accessed 3.08.2015, para. 36; United Nations Committee on the Rights of the Child (2000). Concluding observations of the Committee on the

(responsibility of parents)⁸⁴ of the UNCRC. In relation to the latter, Article 5 is also important, even though it is traditionally not mentioned in the context of exposure to harmful content.⁸⁵ More specifically, Article 5 entails the responsibilities, rights and obligations of parents (or legal guardians) to offer appropriate direction and guidance to children (in a manner consistent with the evolving capacities of the child) when exercising their rights.⁸⁶ This provision could be interpreted as implying that parents have a responsibility to (do their best to) support their children in their approach to new media.⁸⁷ Furthermore, according to article 18 para. 2, States must “*render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities*”. This ‘assistance’ could, for example, consist of States providing adequate information to parents, regarding the risks of certain media or advertising to which their children can be exposed.⁸⁸

RIGHT TO PARTICIPATE IN LEISURE, CULTURE AND ART. Linked to the right to access to good-quality media is Article 31 which requires States to “*recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts*”. In this regard, new media technologies like social networking and online games can play an important role by facilitating access to cultural and artistic activities.⁸⁹ However, many children and their families are exposed to an increased marketing and commercialisation of play. This is one of the concerns of the Committee on the Rights of the Child, as parents experience more and more pressure to purchase certain toys and games. The Committee also fears that global marketing can serve to weaken children’s participation in the traditional cultural and artistic life of their community.⁹⁰

VIOLENCE OR HARMFUL EXPLOITATION. Finally, it is significant to note that the Committee on the Rights of the child has pointed to the fact that as children are recipients of information, they may be exposed to

Rights of the Child: Marshall Islands, CRC/C/15/Add.139.

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e91ea24ff52b434ac125697a00339c0c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e91ea24ff52b434ac125697a00339c0c?Opendocument) accessed 3.08.2015, para. 34-35.

⁸⁴ Article 18 para. 1 UNCRC recalls the primary responsibility of parents for the upbringing and development of the child.

⁸⁵ However, Hodgkin and Newell do stress the link with articles 12 and 13: “*In fact, parents are particularly well placed to build the capacity of children to intervene in a growing manner in the different stages of decision, to prepare them for responsible life in a free society, informing them, giving the necessary guidance and direction, while assuring children the right to express views freely and to give those views due weight*” (R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 92).

⁸⁶ For more details on parental responsibility, see M. Couzens (2007). Autonomy rights versus parental autonomy, 419-439 in: A. Alen (eds). *The UN Children’s rights Convention: theory meets practice* (Proceedings of the International Interdisciplinary Conference on Children’s Rights, 18- Ghent, 19.05.2006, Belgium). Antwerpen: Intersentia, 658 p.

⁸⁷ The United Nations General Assembly has also touched upon the responsibilities of parents *et al.* in this respect: “19. *Encourage measures to protect children from violent or harmful web sites, computer programmes and games that negatively influence the psychological development of children, taking into account the responsibilities of the family, parents, legal guardians and caregivers*”: United Nations General Assembly (2002). Resolution - A world fit for children, A/RES/S-27/2, 11, 16, http://www.unicef.org/specialsession/docs_new/documents/A-RES-S27-2E.pdf accessed 3.08.2015, as cited by E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 277.

⁸⁸ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 236.

⁸⁹ R. Hodgkin and P. Newell (2002). *Implementation handbook for the Convention on the Rights of the Child*. New York: Unicef, 470; S. Meuwese, M. Blaak, Mirjam and M. Kaandord (eds) (2005). *Handboek Internationaal Jeugdrecht [International Youth Law Handbook]*. Nijmegen: Ars Aequi Libri, 260 [in Dutch] as cited by E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 278.

⁹⁰ Committee on the Rights of the Child (2013). General comment No.17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art.31), 15.

“actually or potentially harmful advertisements, spam, sponsorship, personal information and content which is aggressive, violent, hateful, biased, racist, pornographic, unwelcome and/or misleading.”⁹¹

In this regard, Article 19 UNCRC requires States to protect children from *“all forms of physical or mental violence, injury or abuse, neglect or negligent”*.

1.1.3 Enforcement

COMPLAINTS. Until recently, the UNCRC did not foresee in an actual mechanism for enforcement. Accordingly, children could not file complaints and there was no option for testing the Convention in specific cases by the courts.⁹² This changed with the adoption of the Optional Protocol on a Communications Procedure (“OP”) in 2011, as children gained the ability to file complaints regarding specific violations of their rights under the UNCRC.⁹³ This Protocol entered into force in April 2014 and has up until today been signed by 49 and ratified by 17 states.⁹⁴ The protocol establishes a quasi-judicial mechanism that allows children and their representatives to file complaints with the UN Committee in relation to specific infringements of their rights under the UNCRC.⁹⁵ Important to note is that complaints can only be made after exhausting domestic remedies.⁹⁶ Accordingly, a complainant needs to provide evidence of engaging with existing domestic complaints mechanisms. The decisions of the UN Committee are non-binding, however, signatory parties commit themselves to follow the decisions and provide redress to victims. In addition, Article 9 of the OP foresees in the possibility of friendly settlements.

MONITORING. Additionally, the UN Committee on the Rights of the Child monitors the implementation of the UNCRC in the different States and can issue critical remarks or recommendations.⁹⁷ In recent years, the Committee has recognised the importance of digital rights as an aspect of children’s rights. For instance in the context of commercial communication, a report of the Committee on the Rights of the Child on a general discussion on digital media and children’s rights suggested to align its position with the UN Special Rapporteur in the field of cultural rights. The latter had recommended State parties to adopt legislation which would *“prohibit all forms of advertising to children under 12 years of age, regardless of the medium, support or means used, with the possible extension of such prohibition to 16*

⁹¹ Committee on the Rights of the Child (2011). General comment No.13 on The right of the child to freedom from all forms of violence, .

⁹² E. Lievens (2014). A children's rights perspective on the responsibility of social network site providers (25th European Regional Conference of the International Telecommunications Society, Brussels, Belgium, 22-25 June 2014), 3.

⁹³ United Nations (2011). Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure, https://treaties.un.org/doc/source/signature/2012/ctc_4-11d.pdf accessed 6.08.2015.

⁹⁴ For a real time update see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en accessed 6.08.2015.

⁹⁵ Children’s Rights Alliance (2014). Briefing Note on the Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure, http://www.childrights.ie/sites/default/files/information_sheets/files/BriefingNoteUNCRC3rdOptProtocol170914.pdf accessed 6.08.2015.

⁹⁶ For instance, in Ireland, several legal and quasi-legal remedies are open to children and families who’s rights under the UNCRC have been violated (e.g. courts, the Equality Tribunal, the Ombudsman for Children’s office). See *ibid*.

⁹⁷ U. Kilkelly (2001). The best of both worlds for children’s rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child. *Human Rights Quarterly* 2001, Vol. 23, 309.

*years of age and to ban the practice of child brand ambassadors”.*⁹⁸ As it is up to the States to take the recommendations into account, the role of the Committee is “*advisory and non-adversarial in nature and its success relies on diplomacy rather than legal sanction*”.⁹⁹ To foster the implementation of the UNCRC in an adequate manner, the Committee has also issued a number of implementation guidelines for the States.¹⁰⁰

1.1.4 Children’s rights and business principles

SELF-REGULATION. Besides the UNCRC and the Optional Protocols, the UN has also issued certain guidelines for putting the protection of fundamental rights into practice. Specifically tailored to children’s rights is the framework for business to respect and support children’s rights, drafted by UN Global Compact, Unicef and Save the Children in 2013.¹⁰¹ This self-regulatory framework calls upon business to both prevent harm and actively safeguard children’s interests.¹⁰² This self-regulatory framework will be discussed in greater detail in the second deliverable “Mapping and Analysis of Alternative Regulatory Instruments”.

1.2 Europe - *Fundamental human rights*

TWO EU HUMAN RIGHTS PROTECTION TEXTS. Over the years, both the Council of Europe and the European Union have adopted frameworks for fundamental human rights. The Council of Europe¹⁰³ adopted the European Convention on Human Rights (hereafter ‘ECHR’)¹⁰⁴ in 1950, which is an international treaty for the protection of democracy and human rights. It creates an international obligation to comply for the Member states and has thus been incorporated by all of them in their national laws. Furthermore, the Convention established the European Court of Human Rights (hereafter ‘ECtHR’)¹⁰⁵ to ensure compliance of the contracting parties with their obligations under the Convention. Conversely, the

⁹⁸ Committee on the Rights of the Child (2014). Report of the 2014 day of general discussion on “digital media and children’s rights”, 16.

⁹⁹ U. Kilkelly (2001). The best of both worlds for children’s rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child. *Human Rights Quarterly* 2001, Vol. 23, 309.

¹⁰⁰ For more information see Committee on the Rights of the Child (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44 para. 6), General comment No. 5.

¹⁰¹ E. Lievens (2014). A children’s rights perspective on the responsibility of social network site providers (25th European Regional Conference of the International Telecommunications Society, Brussels, Belgium, 22-25 June 2014), 9.

¹⁰² United Nations (2013). General comment No. 16 on State obligations regarding the impact of the business sector on children’s rights.

¹⁰³ The Council of Europe is an international organisation in Strasbourg, counts 47 member states and was formed right after the Second World War to promote democracy and protect human rights in Europe. It should not be confused with the institution of the European Council (which consists of the heads of state or government from the member states, as well as the President of the European Commission) or with the European Union (which consists of 28 member states that have delegated a certain part of their sovereignty on specific matters of joint interests). Nonetheless, all the members of the European Union are also member of the Council of Europe. For more information see <http://www.coe.int/aboutcoe/index.asp?l=en&page=nepasconfondre>.

¹⁰⁴ Council of Europe (1950). European Convention on Human Rights. CETS No. 005.

¹⁰⁵ The European Court of Human Rights is composed by a judge of each of the parties to the Convention and can examine cases brought by nationals of Member states and non-Member states, nationals of non-member states, Council of Europe Member states against another Member state. See <http://www.coe.int/aboutcoe/index.asp?l=en&page=nepasconfondre>.

original treaties of the European Communities did not explicitly refer to human rights or their protection.¹⁰⁶ Cases concerning human rights violations in areas within the scope of EU law that came before the European Court of Justice were brought into the so-called general principles of European law. However, the EU recognised that its policies could have an impact on human rights and proclaimed the European Charter of Fundamental Rights of the European Union (Charter) in 2000, covering a whole range of civil, political, economical and social rights of EU citizens, while also synthesising the constitutional traditions and international obligations common to the different Member states.¹⁰⁷ With regard to the protection of children, the Charter states that Member states should foresee protection and care for children, which is necessary for their wellbeing.¹⁰⁸ Furthermore, children are granted a right to freedom of expression.¹⁰⁹ The Charter also explicitly recognises the child's best interest principle (see *supra* section 1.1.1).¹¹⁰ Although initially the Charter was merely a political instrument, it became legally binding as EU primary law (see Article 6 (1) of the Treaty on the European Union) with the entering into force of the Lisbon Treaty on 1 December 2009.

FUNDAMENTAL RIGHTS IN THE CONTEXT OF COMMERCIAL COMMUNICATION. With respect to commercial communication aimed at children, two (substantive) human rights are of utmost importance, i.e., the right to freedom of expression and the right to privacy. The right to privacy and more specifically data protection will also be discussed further in section 4 of this chapter. The importance attached to these two fundamental rights with respect to the issue of protecting children is apparent from the following statement by the European Commission:

*“Before considering what rules and enforcement measures are applicable to protection of minors and human dignity, it must be emphasised that they are all subject to two fundamental principles that are inherent in any democratic society – freedom of expression and respect for privacy”.*¹¹¹

1.2.1 The right to freedom of expression

A. Principle and sources

ARTICLE 10 ECHR. The freedom of expression is a fundamental right in any democratic society and is deemed *“one of the basic conditions for its progress and for the development of every man”*.¹¹² This

¹⁰⁶ European Union Agency for Fundamental Rights (FRA) and Council of Europe (2014). *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 20, http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf accessed 30.09.2015.

¹⁰⁷ European Union Agency for Fundamental Rights (FRA) and Council of Europe (2014). *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 20, http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf accessed 30.09.2015.

¹⁰⁸ Article 24 Charter of Fundamental Rights of the European Union, O.J. 18.12.2000, C364/1.

¹⁰⁹ “Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”

¹¹⁰ Para 2 Article 24 Charter of Fundamental Rights of the European Union.

¹¹¹ Commission of the European Communities (1996). Green Paper on the protection of minors and human dignity in audiovisual and information services, COM 483 final. Along the same lines see: recital 4 Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ 07.10.1998, L 270, 48.

¹¹² ECtHR, *Perna v. Italy*, 6 May 2003, para. 39.

fundamental right has been included into a wide variety of international,¹¹³ European and national¹¹⁴ legislative texts. At the European level, the core provision guaranteeing this right is [article 10 of the ECHR](#)¹¹⁵:

1. *Everyone has the right to freedom of expression. This right shall include **freedom to hold opinions and to receive and impart information** and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, **restrictions** or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Thus, the freedom of expression entails the freedom to hold opinions and to receive and impart information and ideas without interference by any public authority, and regardless of frontiers.¹¹⁶ More specifically, this fundamental right encompasses both the passive obligation for States to refrain from interfering with the freedom of expression of their citizens as well as the positive duty to ensure that this freedom is not too restricted by private persons or organisations.¹¹⁷ According to the European Court of Human Rights (“ECtHR”), States may be required to actively take measures to protect their citizens, “*even in the sphere of relations between individuals*”.¹¹⁸

SCOPE OF PROTECTION. Article 10 has a very broad scope of application. Indeed, it extends to “*to any expression regardless of its content, form (any word, picture, image or action to express an idea, etc.), its disseminator, or the type of medium used*”.¹¹⁹ As the scope of Article 10 extends to all means of information sharing, it will also be applicable to information shared via the Internet or any other communication technology. Additionally, it may provide protection for ideas that are offensive,

¹¹³ At the international level the most important ones are Article 19 of the 1948 Universal Declaration on Human Rights, 10 December 1948 and Article 19 of the 1966 UN International Covenant on Civil and Political Rights United Nations, 16 December 1966.

¹¹⁴ In Belgium, the relevant provisions are articles 19, 25 and 150 of the Constitution.

¹¹⁵ The ECHR is part of the legal framework of the European Union due to article 6 para. 2 of the Treaty on the European Union. As such, article 10 ECHR is also of the utmost importance in the EU legislative framework.

¹¹⁶ E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 303-305.

¹¹⁷ D. Voorhoof (2004). *Vrijheid van meningsuiting [Freedom of expression]*, in: J. Vande Lanotte and Y. Haecck *Handboek EVRM: Deel II: Artikelsgewijze commentaar (Volume I) [ECHR: Part II: Commentary on the articles]*. Antwerpen: Intersentia, 925 [in Dutch]. See for instance: ECtHR, *Özgür Gündem v. Turkey*, 16.03.2000, para. 42-43.

¹¹⁸ ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, para. 42-43.

¹¹⁹ M. Macovei (2004). *Freedom of expression – A guide to the implementation of Article 10 of the European Convention of Human Rights (Human rights handbooks, No. 2)*. Strasbourg: Council of Europe, 7.

shocking or even disturbing.¹²⁰ However, restrictions remain possible, for instance for the dissemination of racism.¹²¹

RESTRICTIONS UNDER CERTAIN REQUIREMENTS. As mentioned, the right to freedom of expression is not absolute. According to paragraph 2 of Article 10, restrictions can only be imposed if they fulfil three qualitative conditions. First of all, the restriction should be prescribed by law. In this regard, regulation should be adequately foreseeable so that individuals are able to anticipate the potential consequences of a given action.¹²² Furthermore, regulation¹²³ must ensure that any interference by public authorities cannot occur arbitrarily.¹²⁴ Secondly, the restriction must pursue a legitimate aim.¹²⁵ Finally, the restriction has to be “*necessary in a democratic society*”, which entails the existence of a “*pressing social need*”. The ECtHR will evaluate whether a specific measure was “*proportionate to the legitimate aims pursued*”,¹²⁶ and whether the justifications provided by the national authorities are “*relevant and sufficient*”.¹²⁷

ARTICLE 11 CHARTER FUNDAMENTAL RIGHTS OF THE EU. [Article 11 of the Charter](#) corresponds to Article 10 ECHR and guarantees:

*Everyone has the right to freedom of expression. This right shall include **freedom to hold opinions and to receive and impart information** and ideas without interference by public authority and regardless of frontiers.*

Furthermore, this Article requires respect for the freedom and pluralism of the media.¹²⁸ While the ECHR is responsible for safeguarding human rights in the continent, the Charter focuses more on the

¹²⁰ This doctrine was first put forward in the Handyside case. Such are, as the Court repeats regularly, the demands of pluralism, tolerance and broadmindedness, since without conflicting information and ideas there would be no ‘democratic society’ at all, see ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, para. 49; see also ECtHR, *Perna v. Italy*, 6 May 2003, para. 39.

¹²¹ ECtHR, *Garaudy v. France*, 24 June 2003: “Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity”; ECtHR, *Gündüz v. Turkey*, 4 December 2003: “That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued”; ECtHR, *Kühnen v. Germany*, 12 May 1988.

¹²² E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 308-310.

¹²³ The European Court of Human Rights considers whether rules satisfy this requirement in a rather flexible manner. Even rules issued by a non-state entity to which the state has delegated rule-making authority can be considered ‘law’ for the purposes of the ECHR. For instance see ECtHR, *Barthold v. Germany*, 25 March 1985, para. 46

¹²⁴ D. Voorhoof (2004). *Vrijheid van meningsuiting [Freedom of expression]*, in: J. Vande Lanotte and Y. Haeck *Handboek EVRM: Deel II: Artikelsgewijze commentaar (Volume I) [ECHR: Part II: Commentary on the articles]*. Antwerpen: Intersentia, 968 [in Dutch].

¹²⁵ The grounds for restrictions are enumerated exhaustively in article 10 para. 2, and are interpreted in a restrictive way by the European Court of Human Rights. For a number of examples, see C. Ovey, R. White, and F. Jacobs (2006). *Jacobs and White The European Convention on Human Rights*. Oxford: Oxford University Press, 317-334.

¹²⁶ Voorhoof argues that this implies a double test. To begin with, the concrete consequences of a restrictive government interference are of importance: the more comprehensive, far-reaching or preventive a measure is, the more difficult it will be to justify. On the other hand, the gravity or severity of a conviction will also be an important element in the proportionality test. See D. Voorhoof, op. cit. 1024.

¹²⁷ To this aim, the Court assesses interferences in the light of the case as a whole, including the content of statements that were made, the context, the consequences, the intentions, etc. The court interprets the three conditions in a strict manner, and the burden of proof lies with the state. M. Macovei (2004). *Freedom of expression – A guide to the implementation of Article 10 of the European Convention of Human Rights (Human rights handbooks, No. 2)*. Strasbourg: Council of Europe, 30.

¹²⁸ Article 11 Charter of the Fundamental Rights of the European Union, para 2.

economic integration among Member States and the free movement of goods and services.¹²⁹ As such, the Court of Justice of the European Union deals primarily with the commercial freedom of expression (infra section B).

CHILDREN'S RIGHT TO FREEDOM OF EXPRESSION. The specific children's right to freedom of expression of Article 13 UNCRC has been discussed supra (chapter 2, section 1.1). Similarly to the right under Article 10, this right is not absolute and restrictions remain possible under certain conditions. The difference here is that information that could shock, offend or disturb children might be problematic.¹³⁰ However, finding the right balance between the freedom of expression and the protection of minors can be problematic. Indeed, tackling certain content which is deemed harmful to minors could lead to unwanted side-effects to the freedom of expression of adults, as they should be able to access the content freely.¹³¹ In this regard, arbitrary bans on advertising in an attempt to protect children against harmful ads might be problematic. Therefore, the following section will further analyse the specific case of freedom of commercial speech.

B. Freedom of commercial speech

PROTECTION OF COMMERCIAL SPEECH. The European Court of Human Rights has introduced commercial communication into the domain of freedom of expression decades ago.¹³² Indeed, the Court recognises the protection of Article 10 for "information of a commercial nature". Accordingly, the balancing test of paragraph 2 Article 10 will be applicable to any restriction of or interference with the freedom of commercial speech. For instance, the Court has applied the balancing test for its decisions on the admissibility of national advertising bans.¹³³

BROAD DISCRETION TO NATIONAL POLICY. In principle, the Court deems national authorities to be in a better position to give their opinion on the necessity of content restrictions than the international judge. Thus, the Court recognises broad discretion for national policy on restrictions on the content of advertising.¹³⁴ This approach is reflected in the following cases:

Casado Coca v. Spain¹³⁵ - The ECtHR found that a Spanish Royal Decree prohibiting nearly all lawyer advertising did not constitute a violation of Article 10 ECHR. In this case, a Spanish

¹²⁹ The EU Network of Independent Experts on Fundamental Rights (2006). Commentary of the Charter of Fundamental Rights of the European Union, 118-119, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf accessed 30.09.2015.

¹³⁰ G. Van Bueren (1995). *The international law on the rights of the child*. Dordrecht: Martinus Nijhoff Publishers, 134. An example of such content is pornography.

¹³¹ E. Lievens (2010). *Protecting Children in the Digital Era – The Use of Alternative Regulatory Instruments*. International Studies in Human Rights. Leiden: Martin Nijhoff, 312-313.

¹³² In 1973 with the case concerning an advertising for the Scientology Church. See ECtHR, *X and Church of Scientology v. Sweden*, 5 May 1979, Appn. 7805/77.

¹³³ *Ibid*, 5.

¹³⁴ "Otherwise the Court would have to re-examine the facts and all circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate". See ECtHR, 20 November 1989, Appl. 10572/83 (*Markt Intern Verlag*). See also J. Kabel (1994). Swings on the Horizontal – The Search for Consistency in European Advertising Law. *Legal Observations of the European Audiovisual Observatory*, Issue 2003-8, 4. Cases that reflect this approach include: ECtHR, *Casado Coca v. Spain*, 24 January 1994, Series A., No. 285; ECtHR, *Markt Intern Verlag GmbH & Klaus Beermann v. Germany*, 20 November 1989, Series A., No.165; ECtHR, *Jacobowski v. Germany*, 23 June 1994, Series A., No. 219; ECtHR, *NOS v. the Netherlands*, *Hempfling v. Germany*, 13 October 1993, Appn. 16844/90, unpublished; ECtHR, *X and Church of Scientology v. Sweden*, 5 May 1979, Appn. 7805/77.

¹³⁵ ECtHR, *Casado Coca v. Spain*, 24 January 1994, Series A., No. 285.

lawyer had breached the advertising ban and was sanctioned by the Barcelona Bar council. The According to the ECtHR, the ban fulfilled the conditions of (1) an interference by a public authority (i.e.) the Barcelona Bar Council, (2) being prescribed by law and (3) having a legitimate goal (i.e. protecting the public and other members of the profession). Regarding the justification of the measure, the Court held that even “*objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions.*” In this case, the punishment had been limited to a written warning and the Court concluded that the action taken by the Barcelona Bar council was not unreasonable and disproportionate to the aim pursued.¹³⁶

However, there are always exceptions in which the Court does decide against the national court’s opinion:

Barthold v. Germany¹³⁷ – Contrary to the *Casado Coca* case, the ECtHR did find a violation in the *Barthold* case, which dealt with a veterinary surgeon who had criticised the lack of emergency veterinary services in Hamburg during night time, in an interview for a newspaper, while also incidentally mentioning his own name and profession. The local businessmen’s association then obtained an injunction against Dr. Barthold to not discuss the matter further with any other journalist. When applying the test of Article 10 (2), the Court held that the injunction fulfilled the following conditions: (1) public authority (i.e. Court of Appeal), (2) prescribed by law and (3) legitimate aim (i.e. preventing unfair competition). Nonetheless, the Court found that the measure was disproportionate, as the claims Dr. Barthold made were not primarily advertising by nature but rather informational and he was speaking the truth.¹³⁸

C. Concluding remarks

CONCLUSION. There is no doubt that the right to freedom of expression is an essential element in the evaluation of any policy which attempts to protect children against harmful media content. In the context of commercial advertising, it is of the utmost importance to take into consideration the balance between the freedom of commercial speech and children’s rights including the right to be protected against any potentially harmful content or the right to privacy.

1.2.2 The right to privacy

CHILDREN’S RIGHT TO PRIVACY. As mentioned supra, children’s right to privacy has been affirmed by Article 16 UNCRC. In today’s digital information and communications environment, children’s privacy is often at risk.¹³⁹ Advertisers are collecting and processing ever more children’s data in order to provide them

¹³⁶ See also J. S. Rich (1998). Commercial Speech in the Law of the European Union: Lessons for the United States? *Federal Communications Law Journal*, volume 51, issue 1, 7.

¹³⁷ ECtHR, *Barthold v. Germany*, 25 March 1985, Series A, No. 90.

¹³⁸ See also J. S. Rich (1998). Commercial Speech in the Law of the European Union: Lessons for the United States? *Federal Communications Law Journal*, volume 51, issue 1, 8.

¹³⁹ A Belgian study, for instance, analysed the privacy policies and privacy statements of websites aimed at children and adolescents and found that a majority of these websites collects personal data of the young visitors without respecting their right to privacy: M. Walrave (ed.) (2005). *Cyberkids’ e-Privacy – Minderjarigen, minder rechten?* (Privacy Paper Nr. 4) [*Kids’ and Teens’ e-Privacy at stake? An analysis of data processing and privacy statements on websites aimed at children*]

with tailored advertising. Children's right to data protection will be discussed more thoroughly in section 3 of this chapter and, therefore, the current section is limited to a brief overview of the core legal framework concerning children and privacy.

A. Principle and sources

EUROPEAN CONVENTION ON HUMAN RIGHTS. At the European level, one of the key provisions with respect to the fundamental right to privacy is article 8 ECHR. This article has the same status as the principle of freedom of expression, and is also considered inherent in any truly democratic society.¹⁴⁰

Article 8 ECHR reads as follows:

1. *Everyone has the right to **respect for his private and family life**, his home and his correspondence.*
2. *There shall be no **interference** by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Similar to the freedom of expression, the article not only protects an individual from interference by public authorities, but also entails a number of positive obligations for the State.¹⁴¹ Such positive obligations may “*involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves*”.¹⁴² Any restriction on the right to privacy has to be (1) in accordance with the law, (2) necessary in a democratic society and (3) have a legitimate interest. States are also granted a certain margin of appreciation when establishing restrictions.¹⁴³ As per KILKELLY, in areas such as the protection of children the margin of appreciation has been considered to be especially wide.¹⁴⁴

CHARTER OF FUNDAMENTAL RIGHTS OF THE EU. The Charter not only embraces the right to private and family life, but also explicitly establishes the right to data protection and thus raises the level of protection to that of a fundamental right. More specifically, **Article 7 of the Charter** determines that:

“everyone has the right to respect for his or her private and family life, home and communications”.

and adolescents] [in Dutch]. For a US study, cf. Pew Internet and American Life Project (2007). Teens, privacy and online social networks – How teens manage their online identities and personal information in the age of MySpace.

¹⁴⁰ The right to privacy is also included in articles 7 and 8 of the Charter of Fundamental Rights of the European Union. International equivalents are article 12 of the Universal Declaration of Human Rights and article 17 International Covenant on Civil and Political Rights.

¹⁴¹ U. Kil Kelly, *The right to respect for private and family life – A guide to the implementation of Article 8 of the European Convention on Human Rights (Human Rights Handbook, no. 1)*, Strasbourg, Council of Europe, 2001.

¹⁴² European Court of Human Rights, *X. and Y. v. the Netherlands*, 26 March 1985, para. 23.

¹⁴³ U. Kil Kelly, *The right to respect for private and family life – A guide to the implementation of Article 8 of the European Convention on Human Rights (Human Rights Handbook, no. 1)*, Strasbourg, Council of Europe, 2001, 6.

¹⁴⁴ *Ibid.* 7.

Additionally, [Article 8 of the Charter](#) determines that:

“everyone has the right to the protection of personal data concerning him or her. In addition, such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Article 8 also establishes that an independent authority shall control compliance with these obligations.

EU PRIVACY DIRECTIVES. In addition, other important rules on privacy and the protection of personal data are laid down in the EU Data Protection Directive¹⁴⁵ as well as the e-Privacy Directive.¹⁴⁶ Both of these directives are applicable to the Internet¹⁴⁷ and pertain to adults as well as children.¹⁴⁸ They will be further discussed under section 3 of this chapter.

B. Concluding remark

PROTECTION OF CHILDREN’S PRIVACY. This section briefly outlined the general human rights instruments, as well as specific legislation at the European and national level that protects children’s privacy. It is of utmost importance to take this legal framework into consideration when establishing mechanisms to protect children against aggressive profiling practices and targeted advertising in the digital media environment.

1.3 Conclusion

In the context of commercial communication aimed at children, children’s human rights may be affected. For instance, by offering misleading or aggressive commercial communication on social media platforms or via television, certain fundamental children’s rights may be infringed, such as the right to participation or the right to access to good-quality media. Furthermore, collecting children’s data for purposes of targeted advertising may be in violation with the child’s right to privacy. Accordingly, both in the offline and online world, companies advertising their products and services need to take this important legal framework into account. On the one hand, one could assume that children constitute a vulnerable group of society and that their right to development needs to be adequately protected (including the rights to access to good-quality media and participation in leisure,

¹⁴⁵ European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 23 November 1995, L 281, 31.

¹⁴⁶ European Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJ* 31 July 2002, L 201, 37.

¹⁴⁷ Article 29 Data Protection Working Party (2000). Working document WP 37 - Privacy on the Internet, an integrated EU approach to on-line data protection, 46. An ECJ case relating to the processing of data on a webpage is ECJ, *Bodil Lindqvist v. Sweden*, 6 November 2003, C-101/01.

¹⁴⁸ Article 29 Data Protection Working Party (2009). Opinion 2/2009 on the protection of children’s personal data (General guidelines and the special case of schools), 4 and 7. The Article 29 Data Protection Working Party clarifies that “[i]n cases of conflicting interests, a solution can be sought by interpreting the Directives in accordance with the general principles of the UN Convention on the Rights of the Child, namely, the best interest of the child, and also by reference to the other legal instruments already mentioned”: *Ibid*, 19.

culture and art).¹⁴⁹ On the other hand, although in the context of children a paternalistic approach (e.g. imposing child-friendly defaults) may seem to offer the most effective means of protecting the interest of the child, it also raises key issues in relation to empowerment, the child's right to self-determination and its evolving capacities as a 'consumer'. Therefore, a balancing act between the paternalistic and user empowerment approaches to protection is required.

¹⁴⁹ Article 17 and 31 UN Convention on the Rights of the Child.

2. Media law

MEDIA LAW AND ADVERTISING RULES. At the European level, there is extensive and detailed regulation on advertising. However, as the regulation is fragmented into several Directives, there may exist overlaps and as such the framework is rather complex. In relation to audiovisual media, the first steps towards an EU audiovisual policy date back to the early 1980s, triggered by the developments of satellite broadcasting.¹⁵⁰ As broadcast signals did not stop at the national border, the EU adopted certain minimum standards on audiovisual media in 1989 for all Member States in the Television without Frontiers Directive (“TWFD”)¹⁵¹. In relation to advertising, the TWFD regulates certain aspects which are largely typical for television advertising such as hidden ads, sponsorship, the separation of programmes and commercials and maximum hourly amounts. For other aspects of advertising, the TWFD takes a more horizontal approach by laying down specific rules for instance in relation to the protection of minors and restrictions for the protection of health.¹⁵² Due to the technological and market developments this framework was revised and amended in 1997 and 2007 and finally renamed Audiovisual Media Services Directive (“AVMSD”) and codified in 2010.¹⁵³ Significant to note is that two other horizontal European Directives contain rules on advertising i.e. the Directive on Misleading and Comparative Advertising¹⁵⁴ and the Unfair Commercial Practices Directive.¹⁵⁵ These two legislative instruments will be discussed under section 3 of this chapter ‘Consumer protection law’.

ROADMAP. This section of the deliverable provides an overview of the most important provisions of the AVMSD applicable to advertising. It also offers definitions of the main concepts under the AVMSD, to foster a better understanding of the provisions. This section focuses first on the general provisions of the AVMSD and then studies the provisions specifically aimed at the protection of minors. Finally, this section touches upon the United Kingdom’s framework.

2.1 Europe

MINIMUM HARMONISATION. Ever since the TWFD the objective of European broadcasting legislation has been minimum harmonisation.¹⁵⁶ The aim of the AVMSD is to promote the free movement of audiovisual media services within the EU. To ensure that free movement is acceptable in the different Member States, the AVMSD defines certain minimum requirements that audiovisual media services need to abide by. Accordingly, it was left up to the Member states to decide whether or not to enact

¹⁵⁰ History of the audiovisual regulatory framework, http://ec.europa.eu/archives/information_society/avpolicy/reg/history/index_en.htm accessed 30.09.2015.

¹⁵¹ E. Dommering (2008). General Introduction Towards a European Media Law. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 14.

¹⁵² History of TVwF - The Television without Frontiers Directive http://ec.europa.eu/archives/information_society/avpolicy/reg/history/historytvwf/index_en.htm accessed 30.09.2015.

¹⁵³ O. Castendyk and L. Woods (2008). Part 2 - European Media Law. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 273.

¹⁵⁴ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. *O.J. L* 376/21.

¹⁵⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’). *O.J. L* 149/22.

¹⁵⁶ V. Little (2008). Audiovisual Media Services Directive: Europe's Modernization of Broadcast Services Regulations. *Journal of Law, Technology & Policy*, issue 1, 223.

stricter regulations.¹⁵⁷ The Directive contains several vague concepts that need to be interpreted by the Member states in their national laws. For instance, the concept ‘audiovisual media service’ is defined by referring to several unclear sub-concepts (infra B) all which lack clarity in scope and substance.¹⁵⁸ In other words, once the Member states adopt diverging definitions of those concepts, the scope of the AVMSD will be different across the different states.

SCOPE. The AVMSD covers both linear and non-linear “television-like” audiovisual media services (e.g. scheduled programming delivered via Internet or mobile networks).¹⁵⁹ Furthermore, the Directive adopts a two-tier approach, which entails that certain basic rules apply to all audiovisual media services whereas the rules specific to broadcasters will only apply to linear audiovisual media services. The intention of the European Commission in its proposal was that the application of the rules would not be dependent upon the delivery platform used.¹⁶⁰ The scope of the Directive is further clarified by certain definitions, which are discussed in detail below.

2.1.1 Definitions

A. Media service provider and editorial responsibility

MEDIA SERVICE PROVIDER. A media service provider is the natural or legal person with editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.¹⁶¹

EDITORIAL RESPONSIBILITY.¹⁶² One of the cumulative requirements for the definition of an audiovisual media service (infra) is editorial responsibility. This entails the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule (television broadcasts) or in a catalogue (on-demand audiovisual media services). Even though the concept of ‘effective control’ is vague and not conclusive, CHAVANNES and CASTENDYK seem to interpret the exercise of effective control in terms of the ability to

“authorise the broadcasting or making available of the programme. In other words, the possession of the broadcasting rights determine an entity’s possession of effective control, even if the actual technical transmission is performed by another entity.”¹⁶³

Effective control may be exercised in different ways, for instance, by selecting the programmes which should be acquired for transmission, or determining which programme should be broadcast during

¹⁵⁷ Article 4 AVMSD: “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.”

¹⁵⁸ R. Mansell and M Raboy (eds.) (2011). *The Handbook of Global Media and Communication Policy*.

¹⁵⁹ The scope of the AVMSD was considerably extended in comparison to its predecessor the TWFD, which only covered traditional broadcasting.

¹⁶⁰ R. Chavanne and O. Castendyk (2008). Audiovisual Media Services Directive. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 806.

¹⁶¹ Article 1(d) AVMSD.

¹⁶² R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 822-827.

¹⁶³ *Ibid.*, 823. This is also confirmed by Recital 19, which excludes natural or legal persons who merely transmit programmes (for which the editorial responsibility lies with another party) from the definition of a media service provider.

which particular timeslot. Moreover, it needs to be looked at in terms of final or end responsibility for the selection or programming.¹⁶⁴ Important to note is that it does not relate to control over the content of a certain programme.¹⁶⁵ Finally, editorial responsibility for the programming of a service does not necessarily imply any legal liability under national law for the programme content or the services provided.¹⁶⁶

B. Audiovisual media service

DEFINITION. The notion of audiovisual media service is a central definition to which the other definitions of the AVMSD relate.¹⁶⁷ An audiovisual media service covers both television broadcasts (linear) and on-demand (non-linear) audiovisual media services (e.g., Netflix) irrespective of the delivery platform used.¹⁶⁸ Any service other than audiovisual media services are simply not covered by the Directive. To qualify as an audiovisual media service, **seven (cumulative) constitutive elements** need to be fulfilled:

¹⁶⁹

CRITERION	COVERED	EXCLUDED
Economic activity	A service normally provided for remuneration by a public or private service enterprise.	Primarily non-economic activities not in competition with television broadcasting (e.g. personal websites or weblogs, private communications, or user-generated content, videoblogs without advertising or banners).
Editorial responsibility	Only audiovisual media services in which a professional media service provider is responsible for the editorial design and final compilation of a programme for broadcasting in accordance with a fixed programme schedule or for viewing on-demand from catalogue.	A-posteriori control (e.g. Youtube).
Programmes	Moving images with or without sound constituting an individual item in a schedule or catalogue. Including on-demand AVMS.	Audio-only and not sufficiently television-like services (e.g. radio, electronic versions of newspapers and magazines, blogs).
Principal purpose	Focus on audiovisual aspect.	Service with ancillary audiovisual aspect (e.g. websites that contain audiovisual

¹⁶⁴ *Ibid.*, 824.

¹⁶⁵ *Ibid.*, 824.

¹⁶⁶ Article 1 (c) AVMSD.

¹⁶⁷ R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC 'Audiovisual Media Services' Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 812.

¹⁶⁸ Defined as follows under article 1 (a) of the AVMSD "a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive' 2002/21/EC."

¹⁶⁹ *Ibid.*

CRITERION	COVERED	EXCLUDED
		elements only in an ancillary manner like a travel agent, car manufacturer).
Inform, entertain, educate	Impact on the way people form their opinions.	Audiovisual content with no editorial aspects (e.g. webcams of ski resorts).
General public	‘Mass media’, ‘that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public’.	Private correspondence (such as e-mail and faxes) or distribution of programmes to a restricted group, ‘narrowcasting’ (i.e. promotion spots on internal video circuit of supermarket).
Electronic communications network	In line with the e-commerce Directive. Examples are the provision of service via telephone lines (such as xDSL), cable, satellite and wireless communication systems such as GSM, UMTS and Wifi.	/

Table 3: Criteria for audiovisual media services

Only those services that are somewhat “television-like” are covered by the AVMSD.¹⁷⁰

C. Audiovisual commercial communication

AUDIOVISUAL COMMERCIAL COMMUNICATION. In the context of advertising, the term ‘audiovisual commercial communication’ (“ACC”) is of utmost importance. It is a basic concept which was newly introduced by **Article 1 (h) AVMSD**¹⁷¹ and means the following:

“images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.”

The legislator’s idea at the time was to establish a common set of rules applicable to all different forms of promotional activities.¹⁷² This set of rules includes for instance rules on the protection of minors, public health provisions, etc.¹⁷³ Moreover, the structural function of this article was to cover potential

¹⁷⁰ This was due to severe lobbying from online media businesses, spearheaded by the UK. O. Castendyk and L. Woods (2008) *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 273.

¹⁷¹ P. Valcke and E. Lievens (2009). Rethinking European broadcasting regulation. Unraveling Europe’s policy for the digital landscape: critical analysis of the Audiovisual Media Services Directive. In: C. Pauwels, H. Kalimo, K. Donders and B. Van Rompuy (eds.). *Rethinking European Media and Communications Policy*. Brussels: VUB Press 127-164.

¹⁷² R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 821-822.

¹⁷³ See Article 3(e) AVMSD.

legal gaps and loopholes.¹⁷⁴ From this definition, two key concepts can be extracted, namely images with the purpose to promote and programme.

PURPOSE TO PROMOTE. First, the images (with or without sound) as well as the person or entity making them or on whose behalf the communication is made, must have a promotional purpose. To the extent this intent is invisible, circumstantial evidence may help to identify this intent.¹⁷⁵ An indicator can, for example, be found in the fact that an announcement is made against financial compensation or that there are financial interests between the programme maker and the owner of the product, even when no financial compensation was foreseen.¹⁷⁶

PROGRAMME. Second, the images should accompany or form part of a programme,¹⁷⁷ a set of moving images with or without sound¹⁷⁸ constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. In short, the images need to be part of a television broadcast (which is scheduled) or an on-demand service (which has a catalogue) in which it seems sufficient for the service provider to have a schedule or catalogue.¹⁷⁹ More specifically, on-demand services need to be “television-like”, i.e. for viewers they need to be comparable with a television broadcast¹⁸⁰ and the nature and the means of access to the service would lead the user to reasonably expect a regulatory protection within the scope of the AVMSD. In other words, a service’s form and content needs to be sufficiently comparable to the form and content of television broadcasting¹⁸¹. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama. The notion of programme should in any case be interpreted in a dynamic way, taking into account developments in television broadcasting.¹⁸²

¹⁷⁴ R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 821-822.

¹⁷⁵ Similar to the interpretation in the concept of television advertising (see *infra*).

¹⁷⁶ *Degheldere vs. VRT*, decision nr. 2000/42, 13 juli 2000; P. Valcke and D. Voorhoof (2014). *Commerciële Communicatie Handboek*. In: *Handboek Mediarecht*, Larcier, 561.

¹⁷⁷ Article 1 (b) AVMSD.

¹⁷⁸ Silent movies are included but electronic magazines and newspapers, audio transmissions and radio broadcasts are not.

¹⁷⁹ A user cannot select an on-demand service without being able to access the catalogue in some form but that does not mean the catalogue needs to be available in the form of a complete list of programmes: a search engine might equally provide access to the available content and content made available in such a fashion would presumably qualify as constituting an item within a catalogue. A broadcast service: the schedule will generally be publicised in advance, but the service is a broadcasting service even if the schedule becomes apparent by watching the various programmes as they are broadcast; P. Valcke and E. Lievens (2009). *Rethinking European broadcasting regulation. Unraveling Europe’s policy for the digital landscape: critical analysis of the Audiovisual Media Services Directive*. In: C. Pauwels, H. Kalimo, K. Donders and B. Van Rompuy (eds.), *Rethinking European Media and Communications Policy*. Brussels: VUB Press 127-164.

¹⁷⁹ R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law, European Media Law*. Alphen a/d Rijn: Kluwer Law International, 821-822.

¹⁸⁰ *Ibid.*, 821

¹⁸¹ Television broadcasting’ or ‘television broadcast’ (i.e. a linear audiovisual media service) is, according to article 1 (e) to be defined as an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.

¹⁸² P. Valcke and E. Lievens (2009). *Rethinking European broadcasting regulation. Unraveling Europe’s policy for the digital landscape: critical analysis of the Audiovisual Media Services Directive*. In: C. Pauwels, H. Kalimo, K. Donders and B. Van Rompuy (eds.), *Rethinking European Media and Communications Policy*. Brussels: VUB Press 127-164.

CONCLUSION. ACC is a generic term, covering a variety of promotional activities ranging from television advertising, sponsorship, teleshopping and product placement (which are explicitly listed¹⁸³) to split screens and various forms of interactive advertising.

D. Television advertising

TELEVISION ADVERTISING. One example of ACC for which the AVMSD foresees in a specific definition is television advertising.¹⁸⁴ According to [Article 1 \(i\) AVMSD](#), Television advertising can be defined as:

“any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment”.¹⁸⁵

Accordingly, the key components of this definition are (1) the form of the broadcast, (2) the intentional element and (3) the remuneration condition.

FORM OF BROADCAST. The first component of television advertising is quite straightforward, as it requires a promotional announcement on television. Thus, other types of announcements, for instance on the radio, fall outside the scope of the AVMSD.¹⁸⁶

INTENTIONAL ELEMENT. As for the intentional aspect, the purpose of the broadcast of the announcement must be the promotion of goods or services.¹⁸⁷ It must also reflect the intent of the person who makes the announcement or on whose behalf the announcement is made. The intent can be visible or invisible, the latter to be verified by circumstantial evidence.¹⁸⁸ Furthermore, the ECJ has clarified in the *Bacardi France* case that only those advertising images present in an announcement broadcast qualify as television advertising if they can be separated from non-commercial content so that the broadcaster can exercise influence on the appearance of those images.¹⁸⁹

REMUNERATION. The promotional announcement needs to be broadcast either in return for remuneration or for self-promotion purposes.¹⁹⁰ At the same time, these announcements need to promote the supply of goods or services in return for payment. The party effecting the payment has to be the actual beneficiary of television advertising, i.e. the entity whose products are advertised, or a party which is acting on behalf of the actual beneficiary.¹⁹¹

¹⁸³ In article 1(h) AVMSD.

¹⁸⁴ Which was integrally taken from the TWFD.

¹⁸⁵ O. Castendyck (2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyck, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 302.

¹⁸⁶ *Ibid.*, 301.

¹⁸⁷ ECJ, *Bacardi France*, 2004 ECR I-6613, Case C-429/02.

¹⁸⁸ The strongest circumstantial evidence is the identification as ‘advertising’ and hence also the promotional intent.

¹⁸⁹ More specifically, the ECJ held that images on advertising hoardings which appear necessarily in the background of the pictures broadcast throughout an event and are unavoidable cannot be considered as television advertising. ECJ, *Bacardi France*, 2004 ECR I-6613, Case C-429/02.

¹⁹⁰ In the framework of this report, we will not look into detail in the self-promotional aspect.

¹⁹¹ As such, payments made by third parties such as viewers in form of subscription or license fees are not considered payments, as ruled by a.o. the Administrative Court of Berlin, *ars vivendi* (Court Order), 1998, ZUM-RD, 411.; O. Castendyck

2.1.2 General principles for audiovisual commercial communication

INTRODUCTION. The two most important principles of the AVMSD in relation to commercial communication are (1) the principle of identification and (2) the principle of separation. As per SCHAAR, “these principles codify the fundamental concept of fairness in advertising”.¹⁹² Both principles aimed at reconciling the principle of freedom to produce television advertising with adequate protection for both audiovisual works and the general public, seen as both viewers and consumers.¹⁹³ In concreto, compliance with three key principles was envisaged¹⁹⁴: (1) protecting the consumer, (2) guaranteeing the neutrality of media in view of the economic competition of third parties and (3) ensuring the editorial integrity of television programmes.¹⁹⁵ Protecting the consumer against disguised messages¹⁹⁶ seems the most obvious. If it is not clear what constitutes advertising or when the line between editorial and commercial content is blurred, viewers can be misled as to the nature of what they see. The same is valid in relation to competing market players, who want to be judged fairly and on editorial grounds by the media, not because a competitor has paid more to the media enterprise.¹⁹⁷ Further, the mandatory separation and identification of television advertising guarantees the editorial integrity of television programmes¹⁹⁸. In an environment in which companies want to be perceived positively, undue influencing of editorial and fictional content are not unlikely, which could undermine the function of television as a ‘as a medium of information, education, social and cultural development and entertainment’¹⁹⁹, which should be protected.²⁰⁰ As phrased by CASTENDYCK

(2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 303-4.

¹⁹² O. Schaar (2008). Television advertising, Sponsorship and Teleshopping. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 479.

¹⁹³ European Commission (2004). Interpretative communication on certain aspects of the provisions on televised advertising in the ‘Television without frontiers’ Directive (2004/C 102/02), C (2004) 1450. *O.J. C 102*, 3. (hereinafter Commission Interpretative Communication).

¹⁹⁴ O. Castendyk (2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 312-313; O. Schaar (2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 492-493; O. Castendyk and O. Schaar (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 10 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, The Netherlands, Kluwer Law International BV, 945.

¹⁹⁵ O. Castendyk (2005). Werbeintegration im TV-Programm – wann sind Themen placements Schleichwerbung oder Sponsoring? *ZUM*, 857.

¹⁹⁶ J.J.C. Kabel (2003). Swings on the Horizontal - the Search for Consistency in European Advertising Law. *IRIS plus* 2, 3; O. Castendyk (2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 313; O. Schaar (2008). Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International 492-493.

¹⁹⁷ O. Castendyk, Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 313.

¹⁹⁸ O. Schaar, Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 492.

¹⁹⁹ Section 228 of the Explanatory Report to the revised European Convention on Transfrontier Television of the Council, as amended by the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002,

<http://conventions.coe.int/Treaty/EN/Reports/Html/132.htm> accessed 30.09.2015, making reference to the Council of Europe, Committee of Ministers (1984). Recommendation No. R (84) 3 of the Committee of Ministers to Member States on Principles on Television Advertising.

²⁰⁰ *Ibid.*; O. Schaar, Directive 89/552/EEC ‘Television without Frontiers’ Directive. Article 1 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 492.

*“money should not buy love, and it should also not be able to buy ‘truth’ (i.e. secretly paid expert opinions, disguised as ‘independent science’) or editorial or fictional content”.*²⁰¹

The principles of identification and separation have been implemented in the various Member States by means of national legislative and/or self-regulatory instruments.

A. The principle of identification

PRINCIPLE OF IDENTIFICATION. The principle of identification can be found in **Article 9 (a) of the AVMSD** (and Article 19), which requires that

*“audiovisual commercial communications shall be **readily recognisable** as such. Surreptitious audiovisual commercial communication shall be prohibited;”*²⁰²

As Article 9 is included in chapter III - a new chapter of the AVMSD introducing general principles – it is applicable to all audiovisual media services. As such, this article links the newly introduced concept of ‘audiovisual commercial communication’²⁰³ to the identification principle, while also adding in a second sentence the prohibition of surreptitious audiovisual commercial communication. However, various attempts during the legislative process to widen the scope of article 9 i.e. as to integrate the words ‘kept quite separable from other parts of the programme service’²⁰⁴ as well as further specifying it, i.e. adding the words ‘distinguishable from editorial content’,²⁰⁵ were not upheld. The provisions of article 9 apply to all types of audiovisual commercial communication used in linear as well as non-linear media services.²⁰⁶ As mentioned, the principle of identification is also withheld in Article 19 AVMSD focusing on television advertising and teleshopping.

²⁰¹ O. Castendyk (2005). Werbeintegration im TV-Programm – wann sind Themen placements Schleichwerbung oder Sponsoring? *ZUM*, 857.

²⁰² The concept finds its origins in the predecessor of the AVMSD, more specifically in article 10 of the Television without Frontiers Directive (TWFD).

²⁰³ See section 3.2. above.

²⁰⁴ The EP was in favour to widen the scope by not only maintaining the principle of identification but also introducing the principle of separation ‘audiovisual commercial communication must be clearly identifiable as such and kept quite separable from other parts of the programme service, in terms of both time and space, by optical and acoustic means’. European Parliament (2006). Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. (Amendment 111, Art. 1 point 6, Art. 3 g, point (a)).

²⁰⁵ Also, the proposal to specify the principle of identification further by additionally introducing ‘distinguishable from editorial content’ was not upheld. European Parliament (2006). Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. (Amendment 113, Art. 1 point 6, Art. 3 g, point (b)).

²⁰⁶ K. Böttcher et al. (2008). Directive 2007/65/EC ‘Audiovisual Media Services’ Directive. Article 3 e AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 898.

B. The principle of separation

PRINCIPLE OF SEPARATION. Specifically for television advertising and teleshopping Article 19 defines that²⁰⁷:

*1. Television advertising and teleshopping shall be readily recognisable and **distinguishable from editorial content.***"

This so-called 'principle of separation' can be traced back to article 10 TWFD, requiring that television advertising and teleshopping shall be kept 'quite separate' from other parts of the programme service. The goal of this principle is to guarantee the editorial integrity of television programmes.²⁰⁸ Important to note is that it is only applicable to linear audiovisual media services, there is no corresponding provision for on-demand services.²⁰⁹ Furthermore, Article 19 states that

*"Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be **kept quite distinct** from other parts of the programme by **optical and/or acoustic and/or spatial means.**"*

This specification of the means is broader than the original wording of article 10 TWFD: the option to use 'spatial' means was added when revising the AVMSD. Interestingly, recital 81 of the AVMD emphasises that the principle of separation should not prevent the use of new advertising techniques, which was also confirmed by the European Commission in its interpretative communication.²¹⁰ For example in relation to split screen advertising (i.e. advertising consisting of the simultaneous or parallel transmission of editorial content and advertising content²¹¹), the European Commission ("EC") stressed that the principle of separation between advertising and editorial content should, therefore, not be interpreted as prohibiting it. However, split screen advertising must be in compliance with the principle of separation in the AVMSD. Accordingly, split screen advertising must be readily recognisable as such and kept clearly separate from other parts of the programme by acoustic or optical means aimed at preventing the viewer from mistaking advertising for editorial content. According to the EC, "a spatial

²⁰⁷ Similar to article 6 of the e-Commerce Directive provides in its article 6 that commercial communication which are part of, or constitute, an information society service, shall be 'clearly identifiable as such'. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178 and Article 5 of the Unfair Commercial Practices Directive explicitly prohibits, as an unfair commercial practice, using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer. (Even referring to 'advertorial' and without prejudice to the AVMSD; Point 11 of Annex 1 (Commercial Practices which are in all circumstances considered unfair) as referred to in article 5 of the 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, OJ L 149, 22–39).

²⁰⁸ L. Hellemans, E. Lievens, P. Valcke (2015). Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats. *info*, Vol. 17 Iss 6, 19 – 34.

²⁰⁹ O. Castendyk and O. Schaar (2008). Directive 2007/65/EC 'Audiovisual Media Services' Directive. Article 10 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 947.

²¹⁰ Commission Interpretative Communication, see footnote 21.

²¹¹ For example, one or more advertising spots appear in a window during the transmission of a programme in such a way that two separate images are visible on the screen. Provided the space set aside for advertising is not excessive, this technique enables the viewer to continue to watch the editorial programme during the transmission of an advertising spot; Commission Interpretative Communication, nr. 41.

*separation by optical and/or acoustic means is adequate, provided it identifies advertising clearly and enables the viewer to readily recognise it”.*²¹²

2.1.3 Protection of minors in the AVMSD

A. Protection of minors from unsuitable and harmful audiovisual content

PROTECTION OF MINORS. The protection of minors from unsuitable and harmful audiovisual content has remained high on the policy agenda for decades. This concern was already reflected in the TWFD since its initial adoption in 1989.²¹³ In particular, Article 22 TWFD (current Article 27 AVMSD), required broadcasters to identify programmes which were inclined to harm children and adolescents and were broadcast in an un-encoded form on free TV. In relation to television broadcasts, **Article 27 AVMSD** defines that

- 1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might **seriously impair** the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.*
- 2. These measures shall also extend to other programmes which are **likely to impair** the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.*
- 3. In addition, when such programmes are broadcast in unencoded form, Member States shall ensure that they are preceded by an **acoustic warning** or are identified by the presence of a **visual symbol** throughout their duration.*

From this article it can be concluded that the Directive takes into account the view that as children get older, they will be better able to cope with broadcasts without impairment.²¹⁴ The Directive does not, however, clarify what constitutes impairment. Accordingly, this is left to the discretion of the Member States, as well as definitions for terms like ‘pornography’ and ‘gratuitous violence’. When in 2007 the scope of the AVMSD broadened to on-demand audiovisual media services, a rule purporting the protection of minors in these on-demand services was included.²¹⁵

ON-DEMAND SERVICES. As mentioned, similar provisions are set in relation to non-linear(on-demand) audiovisual media services. More specifically **Article 12 AVSMD** explicitly requires Member States to

²¹² Commission interpretative Communication, nr. 47.

²¹³ J. Metzdorf (2014). The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities National Responses to Regulatory Challenges. *Jipitec* Vol. 5., 92.

²¹⁴ J. Ukrow (2008). Protection of Minors and Public Order. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 706.

²¹⁵ Article 12 AVMSD which states that on-demand services which “*might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see [them]*”.

take measures which are appropriate to ensure that seriously harmful on-demand audiovisual media services are normally not accessible to minors.

*“Member States shall take appropriate measures to ensure that **on-demand** audiovisual media services provided by media service providers under their jurisdiction which **might seriously impair** the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services.*

By analogy with Article 27, examples of material which “might seriously impair minors” could include pornography and gratuitous violence.²¹⁶ However, since there is no clear correlation between Articles 12 and 27, it was left to the Member States’ discretion to define the kind of content which would qualify as seriously detrimental to children.²¹⁷ Consequently, there may be significantly different ideas in the EU Member States on what type of content should be regarded as seriously impairing the development of minors, especially in case of culturally or morally sensitive issues. Nevertheless, the Court of Justice of the European Union can always provide an interpretation of the term for the entire EU.²¹⁸

Furthermore, [Article 12](#) implies that service providers (of on-demand services) are required to foresee (technical) measures that could restrict minors’ access to this kind of harmful material and thereby protect the physical, mental and moral development of minors. Implementing such measures is a balancing exercise, where the interests of minors should be carefully balanced with the fundamental right to freedom of expression.²¹⁹ Recital 60 of the AVMSD lists some examples of measures which could be taken, such as the use of personal identification numbers to block or unblock access to certain content, the use of labelling by a provider for age rating purposes or filtering.²²⁰ It is important to make a distinction between linear and on-demand services, as different legal consequences result from the existence of harmful content in services or programmes. Indeed, in relation to on-demand services, the only obligation is to ensure that minors do not see or hear the harmful content. For linear services on the other hand, the content may simply not be shown on television.

ADVERTISING AND COMMERCIAL COMMUNICATIONS. Besides the provisions on the protection of minors against certain content, the AVMSD foresees in additional protection for minors in relation to advertising and commercial communications.

²¹⁶ As defined by Article 27 AVMSD.

²¹⁷ A. Scheuer and C. Bachmeier (2012). The Protection of Minors in the Case of New (Non-Linear) Media - European Legal Rules and their National Transposition and Application. *Iris Plus* volume 6, 12.

²¹⁸ A. Scheuer and C. Bachmeier (2012). The Protection of Minors in the Case of New (Non-Linear) Media - European Legal Rules and their National Transposition and Application. *Iris Plus* volume 6, 12.

²¹⁹ J. Metzdorf (2014). The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities National Responses to Regulatory Challenges. *Jipitec* Vol. 5., 92.

²²⁰ A. Scheuer and C. Bachmeier (2012). The Protection of Minors in the Case of New (Non-Linear) Media - European Legal Rules and their National Transposition and Application. *Iris Plus* volume 6, 12.

B. Protection of minors in relation to audiovisual commercial communication

GENERAL RULE. The basic rule protecting minors in view of advertising and commercial communication can be found in [Article 9 \(1\) g AVMSD](#).²²¹ According to this provision,

“audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore, they shall not

- directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity,*
- directly encourage them to persuade their parents or others to purchase the goods or services being advertised,*
- exploit the special trust minors place in parents, teachers or other persons, or*
- unreasonably show minors in dangerous situations.”*

The phrasing of this provision and in particular the use of the word “directly” limits its scope of application. Indeed, not many advertisements are calling “directly” upon the child to buy a certain product or service or to use their so-called “pester power” to convince their parents into buying it for them.²²² As per GARDE, “marketing to children tends to be covert”. Especially in relation to new advertising techniques such as advergames, in-app commercials or ads on social media, which many times embed the commercial message in the non-commercial content, it is questionable whether the AVMSD will be applicable. The appropriateness of the current legal framework will be discussed in greater detail in our third report of the AdLit project, “Assessment of the applicability of the current regulatory framework to new advertising formats”.²²³

UNFAIR COMMERCIAL PRACTICES DIRECTIVE (“UCPD”). As mentioned supra, the AVMSD only foresees in minimum harmonisation and hence, leaves it up to the Member States to decide whether or not to implement stricter rules. Furthermore, it does not cover all aspects of audiovisual commercial communication. For instance, it does not regulate misleading or aggressive commercial practices.²²⁴ In this regard, reference should also be made to the Unfair Commercial Practices Directive (infra section 3) which lists “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” as an aggressive commercial practice. This type of practice is considered to be unfair in all circumstances. Under this Directive, simply asking children to buy a certain product in a plain and correct manner would not be acceptable under the UCPD.²²⁵ However, the UCPD does not contain an outright ban on advertising, but only a protection against direct exhortations to purchase.²²⁶

²²¹ This provision is applicable to both Television advertising and teleshopping as well as to advertising on on-demand services.

²²² A. Garde (2012). The best interests of the child. In: J. Devenney and M. Kenny (eds.), *European Consumer Protection: Theory and Practice*. Cambridge University Press, 190.

²²³ This deliverable is expected in August 2017.

²²⁴ A. Garde (2012). The best interests of the child. In: J. Devenney and M. Kenny (eds.), *European Consumer Protection: Theory and Practice*. Cambridge University Press, 191.

²²⁵ Conversely under the AVMSD this would be acceptable, as the AVMSD requires in addition the exploitation of the inexperience and credulity of minors.

²²⁶ M. Capello (2008). Article 13 TWFD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 2008, 612.

C. Specific provisions limiting the amount of marketing to children

SPONSORSHIP. Member States may further choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.²²⁷

PRODUCT PLACEMENT. Under the AVMSD, product placement shall be prohibited in children's programmes.²²⁸ Product placement is any form of ACC which consists of *"the inclusion of or reference to a product, service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration"*.²²⁹ Conversely, the placement of production props or prizes of insignificant value can be included in children's programme.²³⁰

SCHEDULING OF CHILDREN'S PROGRAMMES. Children's programmes may not be interrupted by television advertising or teleshopping if they are shorter than 30 minutes. Thus, for each scheduled period of at least 30 minutes, a television advertising may interrupt the programme, but only if the scheduled duration of the programme exceeds 30 minutes. Programmes that qualify as children's programmes if - taking into consideration its content, form and time of transmission – it is targeted at persons below a certain age threshold.²³¹ This threshold differs in the different EU Member States, for instance in the Netherlands it is set at 12 years whereas in the UK it is set at 16 years.²³²

PRODUCT-SPECIFIC PROVISIONS. The provisions on the protection of minors from advertising for specific products (e.g., food, tobacco, alcohol) will be discussed in detail in section 5.2 of this deliverable.

2.1.4 Concluding remarks

SUMMARY. The snapshot below, drawn up by the European Commission, provides a brief overview of both the general rules for audiovisual commercial communications as well as the specific provisions vis-à-vis the protection of minors, as defined by the AVMSD.

²²⁷ Article 10.4. AVMSD.

²²⁸ Article 11. 3 AVMSD, in fine.

²²⁹ Article 1(1)(m) AVMSD.

²³⁰ C. Angelopoulos (2010). Product placement in European audiovisual productions. *IRIS plus* 2010-3, 17.

²³¹ C. Angelopoulos (2010). Product placement in European audiovisual productions. *IRIS plus* 2010-3, 17.

²³² See Dutch Medialaw 2008, Article 3.19a (2) and Ofcom Broadcasting Code, Section 10.5.

Rules for audiovisual commercial communications

All audiovisual commercial communications (TV and on-demand) must:

[Click to read the the legal text](#)

Main provisions:

- be readily recognisable
- not use subliminal techniques
- not use surreptitious techniques
- respect human dignity
- not include/promote discrimination (e.g. based on sex, nationality, religion)
- not encourage behaviour harmful to health (see [codes of conduct on fatty food](#)), safety or the environment
- not promote tobacco or prescription medication

Protection of minors

Audiovisual commercial communications:

- must not cause physical or moral harm to minors
- must not directly exploit minors' inexperience or credulity
- must not encourage minors to pressurise parents to make a purchase.

Further, audiovisual commercial communications for alcohol must not be aimed at minors or encourage excessive alcohol consumption

Source: <https://ec.europa.eu/digital-agenda/en/audiovisual-commercial-communications-avmsd>.

CHALLENGES RELATED TO THE INTERNET. It has been argued that it has become ever more difficult to precisely determine the scope of the EU provisions on the protection of minors.²³³ Indeed, the actual level of protection is hard to decipher, especially given the constant evolution of new technologies and economic developments in the field of (on-demand) audiovisual services. However, as mentioned, the exact applicability of the current legal framework remains outside the scope of this deliverable and will be discussed in greater detail in our third report, "Assessment of the applicability of the current regulatory framework to new advertising formats". The concerns have been taken up by the European Commission, who is planning to review the AVMSD.

2.1.5 Review of the AVMSD

PUBLIC CONSULTATION. The European Commission recently announced that it would review the AVMSD during a presentation on its Digital Single Market Strategy.²³⁴ In particular, the EC will examine the functioning of the Directive and its scope. An important element of this examination will be the nature the rules on the protection of minors as well as advertising rules. Therefore, the EC has launched a

²³³ A. Scheuer and C. Bachmeier (2012). The Protection of Minors in the Case of New (Non-Linear) Media - European Legal Rules and their National Transposition and Application. *Iris Plus* volume 6, 9-10.

²³⁴ European Commission (2015). Questions and answers on the public consultation on the Audiovisual Media Services Directive (AVMSD). <https://ec.europa.eu/digital-agenda/en/news/questions-and-answers-public-consultation-avmsd> accessed 30.09.2015.

public consultation, in line with the new Regulatory Fitness evaluation process.²³⁵ The full review of the AVMSD will then follow in 2016.

2.2 United Kingdom

CO-REGULATORY FRAMEWORK. In the United Kingdom, the advertising and other requirements related to children are integrated in the complex co-regulatory framework which includes elements of statutory legislation and self-regulation. In this framework, both Ofcom (the Independent Regulator and Competition Authority for the UK communications industries)²³⁶, CAP (Committee of Advertising Practice)²³⁷ and ASA (Advertising Standards Authority)²³⁸ play a significant role. For this study, we only pay attention to the statutory legislation. Self-regulating aspects will be discussed in detail in the second report (cfr. *supra*).

THE OFCOM BROADCASTING CODE. Ofcom was required by the UK Communications Act of 2003 to draft a code for both television and radio, which would cover the standards in programmes regarding sponsorship, product placement, fairness and privacy. This resulted in the Ofcom Broadcasting Code, which offers guidance for broadcasters to comply with the general principles and rules.

2.2.1 General principles for audiovisual commercial communication and the protection of minors

GENERAL PRINCIPLES AND RULES. The Ofcom Broadcasting Code contains a set of principles and general overarching rules, which are applicable to all types of commercial references²³⁹ in television programming. More specifically, the Code mentions the following principles²⁴⁰:

1. To ensure that broadcasters maintain **editorial independence** and control over programming (editorial independence).
2. To ensure that there is **distinction** between editorial content and advertising (distinction).
3. To protect audiences from surreptitious advertising (**transparency**).
4. To ensure that audiences are protected from the risk of financial harm (**consumer protection**).
5. To ensure that unsuitable sponsorship is prevented (**unsuitable sponsorship**)

²³⁵ REFIT is the European Commission's Regulatory Fitness and Performance programme. Action is taken to make EU law simpler and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs. See European Commission (2015). What is REFIT? http://ec.europa.eu/smart-regulation/refit/index_en.htm accessed 30.09.2015.

²³⁶ See <http://www.ofcom.org.uk/>.

²³⁷ See <http://www.cap.org.uk/>.

²³⁸ See <http://asa.org.uk/>.

²³⁹ A commercial reference is defined as: "Any visual or audio reference within programming to a product, service or trade mark (whether related to a commercial or non-commercial organisation), and a trademark is defined as "in relation to a business, includes any image (such as a logo) or sound commonly associated with that business or its products or services".

²⁴⁰ Ofcom Broadcasting Code, Section Nine: Commercial References in Television Programming, 45, http://stakeholders.ofcom.org.uk/binaries/broadcast/code-july-15/Ofcom_Broadcast_Code_July_2015.pdf accessed 6.10.2015.

Additionally, it provides more specific rules in relation to specific types of commercial references (e.g. product placement²⁴¹, sponsorship). The Code defines that no undue prominence may be given in programming to a product, service or trademark.²⁴² Such undue prominence could result from the fact that a commercial reference is present without any editorial justification.

PROTECTION OF MINORS. With regard to the protection of minors it is significant to note that the Ofcom Broadcasting explicitly prohibits product placement in children's programmes.²⁴³

2.2.2 Protection of minors from unsuitable and harmful audiovisual content

PROTECTION OF MINORS. With regard to television programming, the Ofcom Broadcasting Code²⁴⁴, applicable to all Ofcom licensed broadcasters, provides, in its section 1²⁴⁵, a set of principal and general overarching rules aimed at 'protecting under eighteens', defining children as people under the age of 15 years. The rules relate, a.o. to (1) scheduling and content information, (2) smoking, solvents, drugs and alcohol, (3) violence and dangerous behaviour, (4) offensive language and (5) sexual material and the coverage of sexual and other offences in the UK and (6) the involvement of people under eighteen in programmes.

GENERAL RULE. In essence, material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast.²⁴⁶ Further, in the provision of services, broadcasters must take all reasonable steps to protect people under eighteen, additional to their obligations resulting from the Audiovisual Media Services Directive.²⁴⁷ Children must also be protected by appropriate scheduling from material that is unsuitable for them.²⁴⁸ Whether a scheduling is appropriate for children, various elements need to be judged, such as the nature of the content, the likely number and age range of children in the audience, taking into account school time, weekends and holidays, the start time and finish time of the programme, the nature of the channel or station and the particular programme and the likely expectations of the audience for a particular channel or station at a particular time and on a particular day.

²⁴¹ Defined as: *The inclusion in a programme of, or of a reference to, a product, service or trade mark where the inclusion is for a commercial purpose, and is in return for the making of any payment, or the giving of other valuable consideration, to any relevant provider or any person connected with a relevant provider, and is not product placement.* Whereas product placement is: *"The inclusion in a programme of, or of a reference to, a product, service or trade mark where the provision of the product, service or trade mark has no significant value, and no relevant provider, or person connected with a relevant provider, has received any payment or other valuable consideration in relation to its inclusion in, or the reference to it in, the programme, disregarding the costs saved by including the product, service or trade mark, or a reference to it, in the programme."* Ofcom Broadcasting Code.

²⁴² Article 9.5 Ofcom Broadcasting Code.

²⁴³ Article 9.7 Ofcom Broadcasting Code.

²⁴⁴ And the Ofcom Code on Scheduling of Television Advertising, <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/> accessed 30.09.2015.

²⁴⁵ 'Section 1: 'Protecting the Under-Eighteens', Ofcom Broadcasting Code, <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/protecting-under-18s/> accessed 30.09.2015.

²⁴⁶ Article 1.1., retrieved from <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/protecting-under-18s/>.

²⁴⁷ Article 1.2 Ofcom Broadcasting Code.

²⁴⁸ Article 1.3 Ofcom Broadcasting Code.

SCHEDULING. In any event, television broadcasters must observe the watershed, which is at 21.00. Material unsuitable for children should not, in general, be shown before 2100 or after 0530.²⁴⁹

VIOLENCE. Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio) and must also be justified by the context.²⁵⁰ Violence, whether verbal or physical and dangerous behaviour, or the portrayal of dangerous behaviour that is easily imitable by children in a manner that is harmful or dangerous must not be featured in programmes made primarily for children unless there is strong editorial justification.²⁵¹

Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.²⁵² Prizes aimed at children must be appropriate to the age range of both the target audience and the participants.²⁵³

TOBACCO AND ALCOHOL. Specific provisions relate to smoking and alcohol, which are discussed in the sector-related sections below.

2.2.3 Enforcement

ENFORCEMENT. If a broadcaster breaches the Code, Ofcom will normally publish a finding which explains the reasons for the breach.²⁵⁴ Additionally, if a broadcaster has breached the Code on purpose, the breach is serious, or the broadcaster has repeatedly breached the Code manner, Ofcom may impose statutory sanctions against said broadcaster. Ofcom may investigate cases following the receipt of a complaint or otherwise.²⁵⁵ Finally, members of the public who have no access to the web can request a copy by post.²⁵⁶

²⁴⁹ Article 1.4 Ofcom Broadcasting Code.

²⁵⁰ Article 1.11 Ofcom Broadcasting Code.

²⁵¹ Articles 1.12 and 1.13 Ofcom Broadcasting Code.

²⁵² Article 1.28 Ofcom Broadcasting Code.

²⁵³ Article 1.30 Ofcom Broadcasting Code.

²⁵⁴ These findings are available in Ofcom's Broadcast Bulletins at www.ofcom.org.uk.

²⁵⁵ For more information regarding the investigatory proceedings or the statutory sanctions, see www.ofcom.org.uk.

²⁵⁶ Ofcom Broadcasting Code, 4.

3. Consumer protection law

GENERAL CONSUMER PROTECTION LAW. As mentioned, besides the audiovisual media framework, there are several other legislative instruments that contain rules on advertising i.e. the Directive on Misleading and Comparative Advertising²⁵⁷ and the Unfair Commercial Practices Directive²⁵⁸, the E-Commerce Directive²⁵⁹ and the Claims Regulation (infra section 5.1.1)²⁶⁰ which could be of particular interest. These instruments form part of the consumer protection framework in Europe. Nowadays, children face many consumer risks whenever they go online. In particular, children may be exposed to inappropriate online messages (e.g. tobacco or alcohol advertisements); they may not acknowledge the commercial character of a message (e.g. product placement); or their immaturity and vulnerability may be exploited (e.g. online fraud).²⁶¹ In these situations, the provisions of the general consumer protection framework could be applicable. The framework is applicable to commercial communication, regardless of the format of the advertising.

ROADMAP. This section of the deliverable discusses three major Directives that form part of the European consumer protection framework. First, it gives an overview of the scope and main provisions of the Directive on Misleading and Comparative Advertising. Second, this section touches upon the Unfair Commercial Practices Directive and the provisions which could be of relevance when it comes to advertising aimed at children, while also taking into account the relevant case law of the Court of Justice of the European Union. Finally this section will discuss the relevant provisions of the E-Commerce Directive. The Claims Regulation will be discussed under section 5.1.1 as this deals specifically with food related advertising.

3.1 Europe

EU CHARTER OF FUNDAMENTAL RIGHTS. Specifically in relation to consumer protection, Article 38 of the Charter of Fundamental Rights of the EU provides that EU policies shall ensure a high level of consumer protection. This involves *inter alia* the empowerment of users, enhancing their welfare as well as protecting their economic interests. In relation to consumer protection against harmful or misleading advertising, three Directives are of particular relevance, as mentioned the Directive on Misleading and Comparative Advertising, the Unfair Commercial Practices Directive and the E-Commerce Directive. The middle of these Directives also contains a specific provision governing advertising aimed at children.

²⁵⁷ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. *O.J.* L 376/21.

²⁵⁸ 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, *O.J.* L 149/22, (hereinafter the 'Unfair Commercial Practices Directive').

²⁵⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). *O.J.* L 178/1. This Directive also covers other provisions besides those on the rights of users and advertising.

²⁶⁰ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods. *O.J.* L 404.

²⁶¹ OECD (2012). The protection of children online recommendation of the OECD Council report on risks faced by children online and policies to protect them. http://www.oecd.org/sti/ieconomy/childrenonline_with_cover.pdf accessed 30.09.2015.

3.1.1 Comparative Advertising Directive

Directive 2006/114/EC on misleading and comparative advertising fully harmonises the rules of the EU Member states regarding comparative advertising.

A. Scope

MATERIAL SCOPE. Directive 2006/114/EC applies to all forms of misleading or comparative advertising, irrespective of the specific medium involved. In this regard, the concept of **advertising** should be defined as “*the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services*”.²⁶² When it comes to the rules on **comparative advertising**, they are only applicable to

*“any advertising which explicitly or by implication **identifies a competitor** or his goods or services.”*²⁶³

Straightforward examples include criticising comparative advertising (i.e. X is better than Y), reverential comparisons (i.e. X is just as good as Y). However, it is not entirely clear whether a one-sided reference would be included here (e.g. X is bad).²⁶⁴ Nevertheless, the legal definition does not require that an actual comparison is made.²⁶⁵

PERSONAL SCOPE. Whereas the application of the Directive has been restricted to business-to-business relations concerning misleading advertising, the provisions on comparative advertising also apply in the context of advertising directed at consumers, including children.²⁶⁶

B. Comparative advertising

The Directive lays down the conditions under which comparative advertising would be allowed. More specifically, it obliges traders to ensure that their advertisements:

ARTICLE	CONDITION
Article 4 (a)	are not misleading;
Article 4 (b)	compare “like with like” - goods and services meeting same needs or intended for the same purpose ²⁶⁷ ;
Article 4 (c)	objectively compare important features of the products or services concerned;
Article 4 (d)	do not discredit other companies trademarks;

²⁶² Article 2 (a) 2006/114/EC.

²⁶³ Article 2 (c) 2006/114/EC.

²⁶⁴ F. Henning-Bodewig (2008). Directive 2005/29/EC & Directive 2006/114/EC. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 1062.

²⁶⁵ The ECJ decided that it is sufficient for a representation to be made in any form which refers even by implication to a competitor or to his goods or services. ECJ, Case C-112/99, *Toshiba Europe*, 2001, ECR I-7945.

²⁶⁶ European Commission. Misleading advertising. http://ec.europa.eu/consumers/consumer_rights/unfair-trade/false-advertising/index_en.htm accessed 28 August 2015.

²⁶⁷ This includes comparisons relating to selections of consumables of two competing chains, if these selections contains individual products which - when viewed in pairs – individually satisfy the requirement. ECJ, Case C-356/04, *Lidl Belgium*, 2006, OJ C 281/7.

Article 4 (e)	for products with designation of origin, that they relate in each case to products with the same designation;
Article 4 (f)	do not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products
Article 4 (g)	do not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
Article 4 (h)	do not create confusion among traders ²⁶⁸ .

Table 4: Conditions for comparative advertising.

C. Enforcement

ENFORCEMENT. The competent authorities and courts of the different EU Member States are responsible for the enforcement of this legislation. Indeed, the Directive obliges the Member States to establish adequate mechanisms enabling persons and organisations with legitimate interests to bring actions to competent courts or administrative bodies. Such actions could include the cessation and/or the prohibition of misleading or unlawful comparative advertising.²⁶⁹

3.1.2 Unfair Commercial Practices Directive

UNFAIR COMMERCIAL PRACTICES DIRECTIVE. In 2005, a somewhat comprehensive approach to advertising was adopted in the Unfair Commercial Practices Directive (UCP Directive).²⁷⁰ The Directive is not restricted to specific products, media or types of market behaviour and thus quite broad. On the other hand, it is also narrower than most directives as it only applies to business-to-consumer practices and not to all market participants alike.²⁷¹ This Directive is of particular interest in relation to advertising directed at children. Despite the fact that the UCPD is now ten years old, it has been receiving increasing attention in the context of for instance in-app games.²⁷²

A. Scope

MATERIAL SCOPE. First of all, the UCP Directive is applicable to commercial practices, which includes commercial communication such as advertising and marketing by a trader. Such commercial communication has to be “*directly connected with the promotion, sale or supply of a product to consumers*”.²⁷³

²⁶⁸ If the advertisement creates confusion among consumers, the Unfair Commercial Practices Directive (infra) applies.

²⁶⁹ European Commission. Misleading advertising. http://ec.europa.eu/consumers/consumer_rights/unfair-trade/false-advertising/index_en.htm accessed 28 August 2015.

²⁷⁰ Unfair Commercial Practices Directive.

²⁷¹ F. Henning-Bodewig (2008). Directive 2005/29/EC & Directive 2006/114/EC. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 2008, 1070.

²⁷² D. Mac Síthigh (2014). Multiplayer games: tax, copyright, consumers and the video game industries. *European Journal of Law and Technology*, Vol 5, No 3.

²⁷³ Article 2 (e) Directive 2005/29/EC.

PERSONAL SCOPE. The UCP Directive aims at protecting consumers from unfair business-to-consumer commercial practices. Consumers are to be regarded as “any natural person who is acting for purposes outside of his trade, business or profession”²⁷⁴, which may include children. Important to note is that the Directive only protects the economic interests of consumers and no other interests like health and safety aspects of products.²⁷⁵

CATEGORIES. Unfair commercial practices towards consumers can be grouped in three categories, depending on the extent they breach consumer right: (1) unfair commercial practices, (2) misleading commercial practices and (3) aggressive commercial practices.

B. Unfair commercial practices and children

GENERAL CLAUSE. The core provision of the Directive is [Article 5 \(1\)](#), which states the general prohibition of unfair commercial practices. According to this article, a commercial practice shall be unfair if

(a) it is contrary to the requirements of professional diligence, and
(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Thus, there is a two-step criterion for determining unfairness.²⁷⁶ First, the lack of professional diligence of the trader and second, the influence on the economic behaviour of the consumer. Although the idea of the Directive is to protect all consumers from unfair commercial practices, the Directive takes as a benchmark the **average consumer**, who is “reasonably well-informed and reasonably observant and circumspect”²⁷⁷, taking into account social, cultural and linguistic factors.²⁷⁸ Especially in relation to vulnerable consumers²⁷⁹, Recital 19 stresses that

*Where certain characteristics such as **age**, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the **perspective of the average member of that group**.*

²⁷⁴ Article 2 (a) Directive 2005/29/EC.

²⁷⁵ “For example, since the marketing of alcohol and tobacco is related to the consumers' health, this type of marketing is not within the scope of the Directive. This also applies to the consideration for public interests and questions of taste and decency.” Danish Consumer Ombudsman (2014). Guidance on children, young people and marketing. <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/childrenmarketing> accessed 1.10.2015.

²⁷⁶ F. Henning-Bodewig (2008). Directive 2005/29/EC & Directive 2006/114/EC. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 1072.

²⁷⁷ Article 2 (b) Directive 2005/29/EC.

²⁷⁸ M. L. Chiarella (2009). The Regulation of Child Consumption in European Law: Rights, Market and New Perspectives. (Presented at Child and Teen Consumption, Trondheim, 5).

²⁷⁹ European Commission (2009). Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices.

²⁷⁹ M. L. Chiarella (2009). The Regulation of Child Consumption in European Law: Rights, Market and New Perspectives. (Presented at Child and Teen Consumption, Trondheim, 5).

For instance, children might be particularly vulnerable to advertisements about videogames, whereas teenagers are often targeted by rogue traders that promote appealing products by exploiting teenagers' immaturity and their lack of attention or reflection (e.g. mobile phone services ad saying that by subscribing to the service, they will make friends more easily).²⁸⁰ However, the average consumer test is not a statistical test.²⁸¹ National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice of the European Union, to determine the typical reaction of the average consumer in a given case.²⁸² This is also why the European Commission thought it was appropriate to include (as mentioned) in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase (infra).²⁸³

B.1 Misleading practices

DEFINITION. Deception is one of the examples the UCP Directive mentions, where unfairness should be assumed in particular.²⁸⁴ There are two types of deception, (1) misleading commercial practices and (2) misleading omissions. A **commercial practice** will be misleading if an average consumer takes a transactional decision which he would normally not have taken, because he is deceived.²⁸⁵ The assessment should take into account the facts and circumstances of the specific case. Moreover, particular points of reference include the nature of the product, its main characteristics, the price, etc.²⁸⁶ A **misleading omission** on the other hand concerns material information needed by the average consumer, to make an informed transactional decision, thereby causing him or her to take a decision which he or she would not have taken otherwise.²⁸⁷ As mentioned, the benchmark is the average consumer (this can be a child when the commercial communication is aimed at children).

BLACKLIST. Finally, the Directive has added a practice which is relevant for new advertising formats to its blacklist of practices which are under all circumstances prohibited. More specifically, **Annex I** prohibits:

*practices using editorial content in the media to promote a product where a trader has paid for the promotion **without making that clear** in the content or by images or sounds clearly identifiable by the consumer (misleading commercial practices)*²⁸⁸

This could be of particular relevance for advertisements posted by bloggers or Twitter account holders who are being paid to do so by the brand.²⁸⁹

²⁸⁰ European Commission (2009). Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, 30.

²⁸¹ Tribunale Amministrativo Regionale del Lazio, Sezione I, Sentenza del 25 Marzo 2009 caso Enel S.p.A. contro Autorità Garante della Concorrenza e del Mercato, as cited by European Commission (2009). Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, 26.

²⁸² Recital 18 of the Unfair Commercial Practices Directive.

²⁸³ *Ibidem* as well as Article 5.3. of the Unfair Commercial Practices Directive and Annex I, point 28 of this Directive

²⁸⁴ F. Henning-Bodewig (2008). Directive 2005/29/EC & Directive 2006/114/EC. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 1073.

²⁸⁵ Article 6 Directive 2005/29/EC.

²⁸⁶ See Article 6 (1) subparagraphs a-g Directive 2005/29/EC.

²⁸⁷ Article 7 Directive 2005/29/EC.

²⁸⁸ Annex I, point 28 and 11 of the Unfair Commercial Practices Directive.

²⁸⁹ L. Scaife (2015). *Handbook Of Social Media And The Law*. Informa Law from Routledge, 346.

B.2 Aggressive commercial practices

DEFINITION. The UCP Directive protects consumers against so-called ‘aggressive’ commercial practices. According to the UCP Directive, marketing techniques are aggressive, if they “*by harassment, coercion or undue influence significantly impair the freedom of choice or conduct of the average consumer*”.²⁹⁰ Although actual harassment or coercion (including the use of physical force) are not realistic in the context of advertising, the milder form of influence, i.e. undue influence, could be applicable.²⁹¹ Indeed, according to the European Consumer Organisation (BEUC) advertisers hold a position of power as they collect a lot of information of consumers without them really knowing what is going on.²⁹² Moreover, the repetitive aspect of behavioural advertising may put pressure on consumers, while the selection of advertising based on the presumed consumer choice may prevent the display of other advertisements thereby restricting informed commercial decisions.²⁹³ The qualification of undue influence will depend on the specificities of the particular case. Therefore, when it comes to children, the assessment should take into account children’s innocence resulting in a much lower threshold than for adults.²⁹⁴

BLACKLIST. Of particular relevance to this study is the provision included in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. Indeed, Annex I lists the following practices as being aggressive:

*practices which include in an advertisement a **direct exhortation** to children to buy advertised products or persuade their parents or other adults to buy advertised products for (**aggressive commercial practices**).*

Thus, the key element here is the direct exhortation to children. Indeed, it is an unfair practice for sellers to exhort children to pester an adult to buy advertised products. This ban is valid for all media, including television as well as internet advertising.²⁹⁵ For instance, the TV advertisement “Your favourite book is now out on DVD – tell your dad to buy it for you!” would constitute an aggressive commercial practice, prohibited under the Unfair Commercial Practices Directive.²⁹⁶ Conversely, mere indirect exhortations do not automatically constitute unfair commercial practices. An **indirect exhortation** requires an intermediate step between the advertisement and the decision to buy, and only generally presents the options to do this. For instance in a case before the Austrian Supreme Court, a website operator had advertised a video game for schoolchildren (up to 14 years) both on the

²⁹⁰ Article 8 Unfair Commercial Practices Directive.

²⁹¹ By undue influence is meant that the company holds a position of power in relation to the consumer and exploits this to exert pressure, in order to significantly restrict the consumer’s ability to make an informed decision. Article 2 (j) Unfair Commercial Practices Directive.

²⁹² BEUC (2010). Data collection, targeting and profiling of consumers online BEUC discussion paper, 6.

²⁹³ *Ibid.*

²⁹⁴ The Consumer Ombudsman (2009). Guidelines on Commercial Practices towards Children and Youth, 8 http://www.forbrukerombudet.no/asset/3607/1/3607_1.pdf accessed 24.09.2015.

²⁹⁵ European Commission (2013). Communication From The Commission To The European Parliament, The Council And The European Economic And Social Committee On the application of the Unfair Commercial Practices Directive - Achieving a high level of consumer protection Building trust in the Internal Market.

²⁹⁶ *Ibid.*

website and on Austrian television.²⁹⁷ The advertisement contained general wording such as ‘now available’ and ‘available in retail’. In addition, it included info on how to order the product (e.g. reference to the website link). Both the court at first instance and the court of appeal ruled that these advertisements were direct exhortations aimed at children. However, the Austrian Supreme Court overruled these decisions as these were only indirect exhortations.

C. Enforcement

ENFORCEMENT. The Unfair Commercial Practices Directive contains a rudimentary regulation of sanctions and leaves it up to the Member State to decide what constitutes adequate and effective means to combat unfair commercial practices.²⁹⁸ However, a mere self-control system (e.g. code of conduct) would not be sufficient. Consumers need to be able to take legal action or bring the matter before an administrative body.²⁹⁹ Furthermore, Member States must lay down penalties for infringements of the national provisions that implement the Directive, including an action for injunction and interlocutory protection based thereon.³⁰⁰

3.1.3 E-Commerce Directive

BACKGROUND. The main objective of the European E-Commerce Directive, adopted in 2000, is to establish an internal market for information society services. One of the topics that requires regulation and is necessary to achieve this objective is commercial communications in online services (Articles 6-8 E-Commerce Directive). Furthermore, this Directive contains a liability exemption for hosting service providers which could be of interest to our future analysis. The rationale of these exemptions is that in the late 1990s several European courts had ruled that online intermediaries could be held liable for the content that was uploaded by users. Yet eventually, the idea grew in Europe that intermediaries should be protected against liability for content originating from third parties, but only if they were prepared to cooperate when it comes to content removal or blocking access to illegal or harmful content.³⁰¹ Aside from this, the Directive also contains other provisions than those related to consumer rights and advertising, but these remain outside the scope of this report.

A. Scope

INFORMATION SOCIETY SERVICE. According to Recital 17, the E-Commerce Directive is applicable to “*any service normally provided for remuneration, at a distance by electronic means and at the individual request of a recipient of services*”. The Directive clarifies that services financed by advertising are

²⁹⁷ Austrian Supreme Court, *Videospiel D-Universe*, 9 July 2013, <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=570&articleID> accessed 28.08.2015.

²⁹⁸ Article 11 (1) Directive 2005/29/EC.

²⁹⁹ F. Henning-Bodewig (2008). Directive 2005/29/EC & Directive 2006/114/EC. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 1075.

³⁰⁰ Article 13 Directive 2005/29/EC.

³⁰¹ P. Van Eecke (2011). Online Service Providers and Liability: a Plea for a Balanced Approach. *Common Market Law Review* 48, Issue 5, 1455 et seq. as cited by B. Van Alsenoy and V. Verdoodt (2014). Liability and accountability of actors in social networking sites. SPION Project, 23.

included under the scope of the Directive (for instance this could include access to website content).³⁰² More specifically, Recital 18 states that

*“information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or **commercial communications**, or those providing tools allowing for search, access and retrieval of data.”*

The Court of Justice of the European Union has supported this by finding that services, as defined by Article 57 of the Treaty on the Functioning of the European Union (“TFEU”), do not necessarily require payment by the users themselves.³⁰³ Furthermore, Recital 18 specifies that whereas television and radio broadcasting would not fall under the definition, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail would be considered information society services. Finally, information society services also include services in hosting information provided by a recipient of the service (e.g. online social networks).

COMMERCIAL COMMUNICATION. Under Article 2(f) of the E-Commerce Directive, commercial communication is defined as *“any form of communication designed to promote”*. This definition should be interpreted broadly and entails both direct and indirect promotion, as a way to prevent circumvention of the ban on commercial communications for certain products (e.g., tobacco, alcohol).³⁰⁴ The commercial character of the communication entails that it promotes goods or services of a certain company or organisation. Excluded from this definition is the mere ownership of a website or e-mail address, linking to a commercial site without getting paid for it, providing information not constituting promotion, consumer-testing services, and price or product comparisons.³⁰⁵

B. Requirements for commercial communication

INFORMATION REQUIREMENTS. The e-Commerce Directive establishes de facto obligations for advertisers, by requiring Member States to implement rules regarding the information to be provided together with **commercial communications which are part of or constitute an information society service**. More specifically, **Article 6** determines the following conditions:

(a) the commercial communication shall be clearly identifiable as such;
(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

³⁰² Recital 18 e-Commerce Directive.

³⁰³ Case C-155/73 *Giuseppe Sacchi. Reference for a preliminary ruling: Tribunale civile e penale di Biella v Italy* [1974] ECR 409; ECJ Case C-352/85 *Bond van Adverteerders v the Netherlands* [1998] ECR 2085; Furthermore, the European Data Protection Supervisor (“EDPS”) has stated in its analysis of the overlap between data protection, consumer protection and competition law that it works from the assumption that all three of these areas are applicable to “free” services. European Data Protection Supervisor (2014). Preliminary Opinion on Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf accessed 24.09.2015.

³⁰⁴ A. R. Lodder (2007). European Union E-Commerce Directive - Article by Article Comments. *Guide to European Union Law on E-Commerce* Vol. 4., 73, <http://ssrn.com/abstract=1009945> accessed 1.10.2015.

³⁰⁵ *Ibid.*

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

REQUIREMENTS FOR UNSOLICITED COMMERCIAL COMMUNICATION. Furthermore, the e-Commerce Directive obliges Member States to implement rules concerning unsolicited commercial communications by electronic mail. In particular, the Member States need to oblige service providers established in their territory who make use of unsolicited commercial communications, ensure that such communication “shall be identifiable clearly and unambiguously”.³⁰⁶ Finally, each Member State must have measures in place to ensure service providers of such communications to consult on a regular basis and respect the opt-out registers, in which natural persons can register if they do not want to receive such commercial communications.³⁰⁷

EXEMPTION FOR HOSTING PROVIDERS. Nowadays, commercial messages are often spread via social network sites, for instance by sponsored bloggers. If such commercial messages are harmful or illegal, the question may rise whether the social network platform could be liable for any damage. As mentioned, the e-Commerce Directive contains a liability exemption for providers of hosting services for illegal web content uploaded by the users of the service.³⁰⁸ In essence, a hosting service is any service which consists of the storage of information at the request of the recipient of the service (e.g. social network providers).³⁰⁹ Hosting providers can only benefit from the liability exemption if three conditions are fulfilled: (1) absence of knowledge³¹⁰ of the illegal web content, (2) absence of control³¹¹ and (3) expeditious action upon obtaining awareness over the illegal activity or web content.³¹²

C. Enforcement

The E-Commerce Directive has defined certain obligations for Member states in relation to the implementation of enforcement mechanisms. First of all, the Directive encourages the use of codes of conduct at the Community level.³¹³ However, this is not enough, Member states are also required to ensure that their national legislation does not hamper the use of out-of-court schemes for dispute

³⁰⁶ Article 7 E-Commerce Directive.

³⁰⁷ Article 7 §2 E-Commerce Directive.

³⁰⁸ Article 14 E-Commerce Directive.

³⁰⁹ B. Van Alsenoy and V. Verdoodt (2014). Liability and accountability of actors in social networking sites. SPION Project, 23. More specifically: “A typical example of a hosting service is that of a “webhosting company”, which provides web space to its customers who can then upload content to be published on a website. However, the hosting exemption is defined in broad terms and may benefit any online service provider storing information at the request of its users”.

³¹⁰ Thus, the host may still be held liable once it has obtained knowledge of facts or circumstances from which the illegal activity or web content is apparent. See A. Kuczerawy (2015). Intermediary Liability & freedom of expression: Recent developments in the EU Notice & Action Initiative. *Computer Law and Security Review*, Vol 31, n° 1.

³¹¹ For example, if the illegal content was introduced by an employee of the host, the latter will not be able to benefit from the liability exemption.

³¹² B. Van Alsenoy and V. Verdoodt (2014). Liability and accountability of actors in social networking sites. SPION Project, 24.

³¹³ Article 16 E-Commerce Directive.

settlement, including appropriate electronic means.³¹⁴ Furthermore, the court actions available under national law in relation to information society services need to allow for the rapid adoption of measures (e.g. interim measures), in order to cease the alleged infringement allow the prevention of further impairment of interests and.³¹⁵ Finally, Member states need to define effective, proportionate and dissuasive sanctions for infringements of the national measures implementing the E-Commerce Directive.³¹⁶

³¹⁴ Article 17 E-Commerce Directive.

³¹⁵ Article 18 E-Commerce Directive.

³¹⁶ Article 20 E-Commerce Directive.

4. Data protection law

COLLECTING CHILDREN'S PERSONAL DATA. The increase of the collection and further processing of children's personal data through advanced technologies raises a fundamental question with regard to the protection of children's privacy in a broad sense and the protection of their personal data, in a more narrow sense. Research has found that up to 79 % of websites addressed to children collect their personal data.³¹⁷ In addition, the collection of children's personal data is a key-feature in the majority of children-oriented apps.³¹⁸ Increased computing capabilities mean that commercial entities are now able to profile individual consumer behaviour online and assess how it differs from rational decision-making and to leverage this for economic gain.³¹⁹ Such profiles facilitate the targeting of personalised advertisements thereby focusing marketing campaigns on children's behaviour. However, it has been recognised that children have little or no understanding of and knowledge about the extent and sensitivity of the data to which apps may gain access, or the extent of data sharing with third parties for advertising purposes.³²⁰ This is in particular relevant for mobile apps.³²¹ These services can, even when children do not explicitly type personal details into the device, by means of sophisticated technologies, such as cookies or other tracking mechanisms, capture a broad range of user information automatically stored on smart phones, such as the user's precise geolocation, phone number.³²² These data may then be further used and/or shared by advertisers, without even alerting the user.³²³ Additionally, information on the data collected, purpose and sharing practices at the moment of the data collection is often lacking, unclear or incorrect, as revealed by an extensive study performed in 2011 by the Federal Trade Commission in the United States.³²⁴ These findings raise significant concerns as to the proper collection as well as further use, sharing and invisible transmission of the child's collected data to a wider variety of entities.

CHILDREN'S RIGHT TO PRIVACY AND DATA PROTECTION. As mentioned (see supra Chapter 2 Section 1), children as human beings, have a fundamental right to privacy and data protection. In Europe, the Data Protection Directive was designed to give substance to the principles of the right to privacy.³²⁵ Indeed, this Directive contains the key principles and rules of the right to privacy and data protection. However, in the EU, no specific laws are in place that deal with the processing of children's personal data. Furthermore, there are no particular rules establishing the children's minimum age for consent, but

³¹⁷And even up to 87% of the websites to youngsters. In particular name, address, e-mail address, phone, mobile phone and even data of third parties are requested; V. Cauberghe et al. (2012). Advertising literacy of children and youngsters [Reclamewijsheid bij kinderen en jongeren], 54.

³¹⁸ Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 2.

³¹⁹ R. Calo (2014). Digital Market Manipulation. *The George Washington Law Review*, Vol. 82, 995-1051.

³²⁰ L. Hudders, V. Cauberghe, et al. (2014). Children's Advertising Literacy in a New Media Environment: An Introduction to the AdLit Research Project, 10.

³²¹ Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 1 and 10.

³²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Strategy for a Better Internet for Children. COM (2012), 196 final, 5.

³²³ A study in 2011 performed by the US Federal Trade Commission pointed to this risk. Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 10, 13 and 17.

³²⁴ Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 1, 2 and 10-17.

³²⁵ As mentioned, this right is included in the European Convention on Human Rights as well as in the Charter of the Fundamental Rights of the European Union (supra 1.2) European Union Agency for Fundamental Rights (2014). *Handbook on European data protection law*.

leaves this as a matter of national law.³²⁶ Accordingly, it is interesting to compare the EU's rather fragmented approach with the US approach, where there is an actual Federal law which deals with this topic (i.e. the Children's Online Privacy Protection Act of 1998, "COPPA").³²⁷

ROADMAP. This section first provides an overview of the main provisions of the US Children's Online Privacy Protection Act. It discusses the scope and main obligations for operators that want to collect children's personal data online. It also touches upon the COPPA enforcement mechanisms. Secondly, the section reflects on the European data protection framework and how it applies to the processing of children's personal data. As the European framework is currently under reform, this section focuses on the potential impact of the proposed changes for the processing of children's personal data.

4.1 United States of America

In the United States ("US"), the Children's Online Privacy Protection Act was enacted in 1998 by the US Congress. This Act required the Federal Trade Commission to issue and enforce regulations concerning children's online privacy.³²⁸ The Commission's original COPPA Rule entered into force on April 21, 2000 and was later revised in 2013. The primary goal of COPPA is to "put parents in the driver's seat" when it comes to the collection of their children's personal data.³²⁹ Another major objective of the COPPA Rule is to minimise the collection of children's personal data, while at the same time ensuring the safety of their online experiences.³³⁰ The Rule was designed to protect children under the age of 13 while taking into account the dynamic nature of the Internet and has a wide application field materially as well as geographically.

4.1.1 COPPA

A. Scope

A.1 Material Scope

MATERIAL SCOPE. The material scope of the Rule is very broad as COPPA applies to

- 1) operators of commercial websites and online services (including mobile apps) directed to children under 13 that collect, use, or disclose personal information from children,*
- 2) operators of general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13.*

³²⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281, 31-50.

³²⁷ 15 U.S. Code Chapter 91 - Children's Online Privacy Protection.

³²⁸ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> accessed 14.08.2015.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

3) websites or online services that have actual knowledge that they are collecting personal information directly from users of another website or online service directed to children.

Thus, there are five key elements which require some further investigation, i.e. (1) children, (2) personal information, (3) online services, (4) an operator and (5) a website directed to children.

CHILDREN. Under the COPPA Rule, the term 'child' means individuals *under 13*.³³¹ By enacting COPPA, the US Congress recognised that younger children are particularly vulnerable to marketing and may not understand the safety and privacy risks related to the online collection of personal information. However, the FTC is also concerned about teens' privacy and does believe that strong, more flexible, protections may be appropriate for this age group, which led to a number of guidance documents issued by the FTC for teens and their parents.³³² Furthermore, one needs to recognise that only all online interactions by which personal information is *collected from children*, whether direct or indirect, are covered including personal information from themselves, their parents, friends or other persons. The Rules thus do not apply to information about children collected online from parents or other adults, although for the latter type of information the general confidentiality rules apply.³³³

PERSONAL INFORMATION. The Rule applies to personal information, i.e. individually identifiable information about children collected online, meaning *any information that would allow someone to identify or contact the child*.³³⁴ The definition of personal information under the Rule has been updated over time, in order to remain in line with evolving technologies.

ONLINE SERVICES. The Rule applies to online services, which are to be defined very broadly. It covers *any service available over the Internet, or that connects to the Internet or a wide-area network*. Examples of online services include services that allow users to play network-connected games, engage in social networking activities, purchase goods or services online, receive online advertisements, or interact with other online content or services.³³⁵ Mobile applications that connect to the Internet, Internet-enabled gaming platforms, voice-over-Internet protocol services, and Internet-enabled location-based services also are online services covered by COPPA.³³⁶ The definition of online services was amended by the 2013 Rule to clarify that the Rule also covers a plug-in or ad network when it has actual knowledge that it is collecting personal information through a child-

³³¹ Children's Online Privacy Protection Act, SEC. 1302 (1), <http://www.ftc.gov/ogc/coppa1.htm> accessed 14.08.2015.

³³² Federal Trade Commission (2012). Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers, 29, 60.

³³³ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015; 64 Fed. Reg. 59888, 59902 n.213.

³³⁴ Examples include full name; a home or other physical address including street name and name of a city or town; online contact information; a screen or user name that functions as online contact information, which includes not only an e-mail address, but any 'substantially similar identifier that permits direct contact with a person online'; a telephone number; a social security number; a persistent identifier that can be used to recognize a user over time and across different websites or online services; a photograph, video, or audio file, where such file contains a child's image or voice; geolocation information sufficient to identify street name and name of a city or town; or information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described above. As such, all types of information, such as hobbies, interests and information collected through cookies or other types of tracking mechanisms are also considered Personal Information when they are tied to individually identifiable information. See Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

directed website or online service and to allow a subset of child-directed sites and services to differentiate among use

OPERATOR. Fourthly, the term operator should be *defined broadly* and should modify over time. For instance, the revised Rule expanded the definition to clarify that the Rule also covers “*operators of a child-directed site or service where it integrates outside services, such as plug-ins or advertising networks, that collect personal information from its visitors*”.³³⁷

WEBSITE DIRECTED TO CHILDREN. To determine whether a website or online service is directed to children, depends on the facts specific to each case and on various *factors*. Such factors range from *the use of animated characters or child-oriented activities and incentives over music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, or whether advertising promoting or appearing on the website or online service is directed to children*”.³³⁸ In addition, the Rule stresses that the FTC will take into account competent and reliable empirical evidence regarding audience composition, as well as evidence regarding the intended audience of the site or service when determining whether or not a website is directed to children.³³⁹ Finally, the amended Rule also considers a website or online service to be “directed to children” where it has actual knowledge that it is collecting personal information directly from users of another website or online service that is directed to children.³⁴⁰

A.2 Territorial scope

TERRITORIAL SCOPE. COPPA applies to websites and services based in and outside the US. Indeed, the definition of an ‘operator’ also includes foreign-based websites and online services that are involved in commerce in the United States or its territories. More specifically, COPPA applies to websites and services based outside the United States “*if they are directed at children*” in the United States’ or “*if they knowingly collect personal information from children in the United States*”.³⁴¹ Finally, U.S.-based websites and services that collect information from foreign children need to comply with COPPA.

B. Obligations under the COPPA rule

As mentioned supra, the primary goal of COPPA is to place parents in control over which information is collected from their young children online. In this regard, the most important obligations set forth in the COPPA rule relate to obtaining (verifiable) parental consent.

³³⁷ *Ibid.*

³³⁸ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³³⁹ 16 C.F.R. § 312.2 (definition of “Web site or online service directed to children,” paragraph (1)).

³⁴⁰ *Ibid* para 2.

³⁴¹ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

B.1 General obligations for operators

ONLINE PRIVACY POLICY. The operators covered by the COPPA Rule must have in place a clear and comprehensive online privacy policy. Such a privacy policy should contain a description of the operator's information practices for the personal data collected from children online.³⁴²

DIRECT NOTICE TO PARENTS. Secondly, before collecting any personal information online from children, operators that fall under the scope of COPPA must provide a direct notice to parents.³⁴³ In addition, operators should obtain verifiable parental consent, which will be discussed further infra (section B2).

RIGHTS FOR PARENTS. Furthermore, COPPA provides certain rights to parents, which can be enforced against operators. First of all, as mentioned, operators should obtain parental consent. Accordingly, this requirement gives parents the choice of consenting to the operator's collection and internal use of a child's information. In turn, operators are prohibited from sharing that information to third parties (unless disclosure is integral to the site or service, in which case, this must be made clear to parents).³⁴⁴ Operators also have to provide parents access to the personal data of their children, so that they can review or request deletion of information. Finally, parents may prevent the further use or online collection of their children's personal data.³⁴⁵

SECURITY AND CONFIDENTIALITY. Last but not least, operators have an obligation to establish and maintain reasonable procedures, in order to ensure the confidentiality, security and integrity of the personal data they collect online from children. This entails that personal data should only be stored for as long as is necessary to achieve the purpose of collection. Furthermore, providers need to have reasonable measures in place to protect personal data against unauthorised access or use.³⁴⁶

B.2 Direct notice to parents and 'verifiable' parental consent

DIRECT NOTICE TO PARENTS. Operators that want to collect personal information online from children, have an obligation under COPPA to provide a direct notice to parents and obtain verifiable parental consent. According to [section 312.4 \(b\) of the amended COPPA Rule](#),

*operators must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives the required **direct notice** of the operator's practices with regard to the collection, use, or disclosure of personal information from children.*³⁴⁷

Whereas originally less detailed, the amended rule significantly changed the format and content of the information that must be included in an operator's direct notice to parents. It now provides for a very detailed roadmap of what information must be included, depending upon what personal information

³⁴² Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ 16 C.F.R. §312.4 (b) [COPPA]

is collected and for what purposes.³⁴⁸ More specifically, there are four instances where a direct notice is required or appropriate, depending on the format and content of the notice depends upon the timing of the consent and the extent and frequency of the personal information collected, used or disclosed.³⁴⁹ In relation to apps directed to children, the direct notice should be sent prior to the collection of any personal information from the child.³⁵⁰

VERIFIABLE PARENTAL CONSENT. The notion of ‘**verifiable parental consent**’ is unique in the world, the more since it takes into account available technology³⁵¹ and it explicitly refers in detail to the methods through which this consent can be obtained in various situations. According to

*An operator must make reasonable efforts to obtain verifiable parental consent, taking into consideration **available technology**. Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.*

Furthermore, the amended Rule prescribes various methods to obtain such consent, including the ‘e-mail plus’ consent³⁵², ‘print-and-sent’ method³⁵³ or the use of government-issued identification³⁵⁴ and even newly recognised mechanisms such as electronic scans or even video verification methods³⁵⁵, taking also into account whether the obtained personal data is used for ‘external’ or only ‘internal’ purposes, i.e. only for the internal use of the operator collecting it. For certain types of processing, operators are exempted from obtaining verifiable parental consent. For instance, where the sole purpose of collecting the name or online contact information of the parent or child is in fact to provide notice and obtain parental consent, or to respond directly to a specific request of the child.³⁵⁶

ONLINE PRIVACY POLICY. The amended COPPA Rule also requires that each direct notice sent contains a **link** to the operator’s **online privacy policy**. A simple e-mail containing a link to the online privacy policy is however not sufficient. The clearly and prominently labelled link to the online privacy policy should be posted on the home or landing page or screen of the website or online service, and at each area of the site or service where personal information is collected from children.³⁵⁷ This link must be

³⁴⁸ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁴⁹ 16 C.F.R. § 312.4(c)(1) – (4) [COPPA] retrieved from <http://bit.ly/1MTQGYG> accessed 26.08.2015; Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁵⁰ Unless exceptions 2H; The limited exception to this is that you may collect the parent’s online contact information for the sole purpose of sending the parent the direct notice. Alternatively, you may provide the direct notice to the parent through other means, such as through the device onto which the app is downloaded, if the mechanisms both (1) provide such notice and obtain the parent’s consent before any collection of personal information and (2) are reasonably designed to ensure that it is the parent who receives the notice and provides the consent; Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁵¹ Section §312.5 of the COPPA.

³⁵² This consent method is used for the collection of personal information for internal purposes only. The verifiable parent consent is obtained through an e-mail completed with an additional step, such as obtaining a postal address or telephone number from the parent and confirming the parent’s consent by letter or telephone call, or sending a delayed confirmation e-mail to the parent after receiving consent. Federal Trade Commission (2013). Children’s Online Privacy Protection Rule - Final Rule. *Federal register* vol. 78, no 12, part II, 3990.

³⁵³ Providing a consent form to be signed by the parent and returned via U.S. mail, fax or electronic scan.

³⁵⁴ Verifying a parent’s identity by checking a form of government issued identification against databases of such information, provided that the parent’s identification is promptly deleted after completing the verification.

³⁵⁵ Federal Trade Commission (2013). Children’s Online Privacy Protection Rule - Final Rule. *Federal register* vol. 78, no 12, part II, 3986-3992; 315.5; 5(b).

³⁵⁶ For an overview of all exceptions, see 16 C.F.R. §312.5, (c) 1-8.

³⁵⁷ 16 C.F.R. § 312.4(d).

in close proximity to the requests for information in each such area.³⁵⁸ The information that must be disclosed in the operators online privacy policy is divided into four categories of information, i.e. (1) The name, address, telephone number, and email address of all operators collecting or maintaining personal information through the site or service³⁵⁹, (2) a description of the types of information the operator collects from children, (3) the possibility for parents to review or have deleted the child's personal information and refuse to permit its further collection or use (i.e. the procedures for doing so) and (4) information regarding the collection, use or disclosure of persistent identifiers, such as cookies, GUID's, IP addresses or other passive information collection technologies.³⁶⁰ Promotional materials may not be included in the privacy policy.³⁶¹

APPS DIRECTED TO CHILDREN. In relation to apps directed to children, the amended Rule does not mandate that a privacy policy is provided at the point of purchase (i.e. in the app store). However, the Rule requires that it is posted on the home or landing screen.³⁶² If child-directed apps collect personal data as soon as it is downloaded, the actions of providing direct notice and obtaining verifiable consent should take place at the point of purchase.³⁶³

C. Enforcement

COMPLAINT PROCEDURE. First of all, COPPA foresees in a complaints procedure. Parents, consumer groups, industry members, and others that believe an operator is violating COPPA may submit complaints to the FTC through the FTC's website³⁶⁴ or a specific toll free phone number.³⁶⁵

PENALTIES. Civil penalties can go up to \$16,000 per violation.³⁶⁶ The amount of civil penalties a court assesses may depend on a number of factors, including the level of outrageousness of the violations, whether the operator has previously violated the Rule, the number of children involved, the amount and type of personal information collected, how the information was used, whether it was shared with third parties, and the size of the company.³⁶⁷

³⁵⁸ 16 C.F.R. § 312.4(d).; In addition, an operator of a general audience website or online service that has a separate children's area must post a link to its notice of information practices with regard to children on the home or landing page or screen of the children's area. 16 C.F.R. § 312.4(d).

³⁵⁹ "Or, after listing all such operators, provide the contact information for one that will handle all inquiries from parents". See Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁶⁰ Unless (1) you collect no other "personal information," and (2) such persistent identifiers are collected on or through the site or service solely for the purpose of providing "support for the internal operations" of the website or service. ; Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁶¹ *Ibid.*; 16 C.F.R. § 312.4(a) ("General principles of notice").

³⁶² In fact, the FTC notes that "*information provided prior to download is most useful in parents' decision-making since, once an app is downloaded, the parent already may have paid for the app.*"⁷. Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 7.

³⁶³ Or to insert a landing page where a parent can receive notice and give consent before completing the download. See Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015. (Section C. Privacy Policies and direct notices to parents, question 9).

³⁶⁴ <https://www.ftc.gov/>.

³⁶⁵ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

³⁶⁶ Federal Trade Commission (2008). A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, <http://1.usa.gov/1fHGIER> accessed 27.08.2008.

³⁶⁷ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

FEDERAL AGENCIES. Furthermore, COPPA gives states and “*certain federal agencies authority to enforce compliance*” with respect to entities over which they have jurisdiction. In the past, the states of Texas and New Jersey have for example brought COPPA enforcement actions.³⁶⁸ In addition, certain federal agencies, such as the Office of the Comptroller of the Currency and the Department of Transportation, are responsible for handling COPPA compliance for the specific industries they regulate.

D. Concluding remarks

LOOPHOLES. Although the COPPA rule foresees in a strict parental-consent requirement, some issues also slip through the legal net. COPPA can for example not prevent that children lie about their age to register for general audience sites or online services whose terms of service prohibit their participation.³⁶⁹ These websites and online services are only subject to the Rule to the extent that such operators have **actual knowledge** that a child under age 13 is the person providing personal information.³⁷⁰ The Rule does not require operators to ask the age of visitors.

4.1.2 Envisaged legislation

In January 2015, president Obama launched three new steps in the protection of consumer’s data. All envisage an increased protection of consumers’ data and as such children. The table below will provide a brief overview of the proposed acts.

PROPOSED ACT	SUMMARY
<i>The Personal Data Notification & Protection Act</i>	This act entails a compromise of personal and financial information of millions of Americans, clarifies and strengthens the obligations companies have to notify customers when their personal information has been exposed, including establishing a 30-day notification requirement from the discovery of a breach, while providing companies with the certainty of a single, national standard. The proposal also criminalises illicit overseas trade in identities.
<i>Consumer Privacy Bill of Rights Legislation</i>	This law enshrines clear principles that should govern online interactions, principles that look at the context in which data is collected and ensure that users’ expectations are not abused
<i>The Student Digital Privacy Act</i>	This bill ensures that data collected in the educational context are only used for educational purposes, providing teachers and parents the confidence they need to enhance teaching and learning with the best technology. This bill would prevent companies from selling student data to third parties for purposes unrelated to the educational mission and from engaging in targeted advertising to students based on data collected in school – while still permitting important research initiatives to

³⁶⁸ *Ibid.*

³⁶⁹ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015. (question A.14).

³⁷⁰ Federal Trade Commission (2015). Complying with COPPA: Frequently Asked Questions, <http://1.usa.gov/1H6xVOU> accessed 26.08.2015.

PROPOSED ACT	SUMMARY
	<p>improve student learning outcomes, and efforts by companies to continuously improve the effectiveness of their learning technology products.</p> <p>This Act would provide protections beyond existing law, such as COPPA on various elements.</p> <p>(1) It is not limited to children under 13 but also covers students which are older. The Act also goes even beyond the Family Educational Rights and Privacy Act, as the Act would not be limited to ‘educational records’ but would cover any personally identifiable information provided by a student or parent, created by an employee of the school or gathered through the site, such as food purchases, political affiliations, disability information, search activity, photos, voice recordings and geolocation information.”</p> <p>(2) It covers companies which are able to sell data collected from children in the classroom, which is not covered by COPPA as such. The latter prohibits websites from behavioural targeting children without parental consent. As such, up to now, businesses have had free reign over such data, and were not prevented from amassing profiles on children for behavioural advertising purposes.³⁷¹</p>

Table 5: envisaged legislation.

Source: J. Kenny (2015). Student Digital Privacy Act would cover loopholes in COPPA. *Inside Counsel*.

4.2 Europe

OUTLINE. At European level, currently, no specific legislation exists on the protection of minor’s personal data. As such, the protection of minor’s personal data is subject to the rules set out in the main legal instrument, i.e. the European Data Protection Directive. This document has been extensively interpreted by the Article 29 Data Protection Working Party, an independent advisory body set up under the Framework of the European Data Protection Directive, which has issued a variety of opinions. Some of these opinions touch in particular upon the particularities around minors. This section will discuss the relevant provisions and Working Party opinions. As the EU data protection framework is currently undergoing a major reform, this section will look into the proposed General Data Protection Regulation (“GDPR”)³⁷² and the changes this Regulation introduces, which are most relevant for advertising aimed at minors (infra section 4.2.3).

4.2.1 Data Protection Directive

DATA PROTECTION DIRECTIVE. Up until today, the Data Protection Directive of the European Parliament and the Council which was adopted in 1995 remains the core legal instrument governing the processing of personal data in the European Union.³⁷³ The underlying idea of the Data Protection Directive is that in order to realise a free flow of services, people and goods on the EU’s internal market, a free flow of

³⁷¹ J. Kenny (2015). Student Digital Privacy Act would cover loopholes in COPPA. *Inside Counsel*, <http://www.insidecounsel.com/2015/01/23/student-digital-privacy-act-would-cover-loopholes> accessed 25.08.2015.

³⁷² Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 25 January 2012.

³⁷³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281 , 31 – 50, (hereinafter Data Protection Directive)

data is necessary. To achieve this, all Member States must adhere to a uniform level of data protection.³⁷⁴ The Data Protection Directive further clarifies the privacy principles stemming from fundamental rights documents defines certain general data protection principles that need to be taken into account whenever personal data is processed. Due to the nature of this legal instrument, the Member States had to implement the provisions of the Directive through national law.

A. Scope of the Directive

A.1 Material scope

MATERIAL SCOPE. The material scope of the Directive is very broad. More specifically, according to **Article 3**, the Directive applies to

*“the **processing of personal data** wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.”*

As such, there are two key concepts that determine the material scope, i.e. (1) processing and (2) personal data. These concepts will be discussed more into detail below.

PERSONAL DATA. According to the Data Protection Directive, **personal data** is “**any information relating to an identified or identifiable natural person**”, the so-called data subject.³⁷⁵ An identifiable person is a person 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. In short, a person is identifiable if anyone can ascertain his or her identity, directly or indirectly, through reasonable means.³⁷⁶ Although no explicit reference is made as to the inclusion of children, the Directive applies to any ‘natural’ person, which implies per definition children.³⁷⁷ The interpretation of personal data is very broad and includes for instance a person’s first name, surname, date of birth and IP address. Specific attention needs to be paid to (1) data retrieved from mobile apps, (2) anonymised or encrypted data and (3) the category of ‘sensitive data’.

MOBILE APP DATA. In general, the Data Protection Directive applies in any case where the use of apps on smart devices involves the processing of personal data of individuals.³⁷⁸ Many types of data stored or generated by a mobile device are to be considered personal data. These data usually do not only have a significant impact on the private lives of users but also potentially on other individuals, such as application developers. Often, these data are indeed collected and processed on the device itself and

³⁷⁴ European Union Agency for Fundamental Rights (FRA) and Council of Europe (2014). *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 18.

³⁷⁵ Article 29 Data Protection Working Party (2007). Opinion 4/2007 on the concept of personal data. WP 136, 12-21.

³⁷⁶ Recital 26 of the European Data Protection Directive “*whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person*”.

³⁷⁷ Article 29 Data Protection Working Party (2009). Opinion 2/2009 on the protection of children’s personal data (General Guidelines and the special case of schools). WP 160, 7, 26

³⁷⁸ Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices. WP 202, 7-8.

then - in a later stage - transferred to a third party's infrastructure³⁷⁹ without the knowledge of the end user.³⁸⁰

ANONYMISATION. Debate exists on the 'personal' character of anonymized or encrypted data³⁸¹, in particular on those who do not hold the encryption key. The current European Data Protection regulators take the view they are³⁸² and as such, in general, one recommends to treat encrypted data in practice as personal data, the more since encrypted data must be decrypted for operations, with such operations constituting processing of 'personal data'.

SENSITIVE DATA. A category of personal data deserving specific attention are the so-called 'sensitive data', i.e. data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life.³⁸³ In principle, these data may not be processed. However, the Data Protection Directive foresees a variety of exemptions³⁸⁴ and also leaves some discretion to the Member States in this respect.³⁸⁵ Subject to the provision of suitable safeguards, Member States may indeed, for reasons of substantial public interest (e.g., public health, social protection, government statistic) lay down additional exemptions by national law or by decision of the supervisory authority.

PROCESSING. The second key concept that defines the scope of application of the Directive is "processing". **Processing** entails according to **Article 2b** of the Directive:

"any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."

The scope of what constitutes processing is thus extremely broad. Nearly all type of action performed on personal data (such as collection, storage, use, removal etc.) can thus be qualified as 'processing'.

³⁷⁹ Via a connection to an external API, in real-time.

³⁸⁰ Examples are geo- location data, contacts, unique device and customer identifiers (such as IMEI13, IMSI14, UDID15 and mobile phone number), credit card and payment data, phone call logs, SMS or instant messaging, browsing history, information society service authentication credentials (especially services with social features) pictures and videos and biometrics (such as facial recognition and fingerprint templates).

³⁸¹ According to Article 2 of the Directive, 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.

³⁸² Encrypted personal data remain personal data, and consequently, all data protection law requirements continue to apply to these data in anyone's hands, irrespective of key access or knowledge as to the data's nature; Article 29 Data Protection Working Party (2012). Opinion 05/2012 on Cloud Computing. WP 196.

³⁸³ Article 8 Data Protection Directive; Article 29 Data Protection Working Party (2011). Advice paper on special categories of data ("sensitive data").

³⁸⁴ Articles 2-8 Data Protection Directive. Sensitive data can for example be processed upon explicit consent of the data subject, in the field of employment or in the vital interests of the data subject).

³⁸⁵ Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

A.2 Territorial scope

EU ESTABLISHMENT. Geographically, the Data Protection Directive is first of all applicable to processing carried out in the context of a controller's EU establishment.³⁸⁶ Having an establishment on the territory of a Member State implies that a controller has real and effective activities in the form of stable arrangements on the territory. Moreover, the legal form of the establishment is not the determining factor in this respect.³⁸⁷ Important to note is the ruling of the CJEU of 13 May 2014³⁸⁸ determining that *"even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine."*³⁸⁹

EQUIPMENT. Besides this, in situations where the controller is not established in the EU, but the processing is carried out using equipment located within the EU, the Directive will also apply, unless such equipment is merely used for transit through the territory of the Community.³⁹⁰

B. Actors

A BROAD VARIETY OF ACTORS. In the overall data protection framework, various actors play their role. In general, the most important legally defined players are the data controller, the data processor and the data subject. In practice however, there is a variety of stakeholders, in particular in relation to websites, mobile apps and cloud-oriented platforms, ranging from app developers over web developers, OS and device manufacturers and advertising agencies. Below, we describe how the legal definitions need to be applied in concrete situations.

B.1 Data controller and data processor

DATA CONTROLLER. Article 2 of the European Data Protection Directive defines a 'data controller' as someone who *"alone or jointly with others determines the purposes and means of the processing of personal data"*. As such, the Directive allows more than one legally separate entity to act as a controller and decide together to process data for a shared purpose.³⁹¹

DATA PROCESSOR. A 'data processor' on the other hand is the natural of legal person or any other body which *"processes personal data on behalf of the controller"*. The Article 29 Working Party has defined two requirements for the qualification as processor, i.e. being a separate legal entity from the controller and processing the personal data on the latter's behalf.³⁹² In short, a data controller is the entity determining the purpose and means of a personal data processing activity, a data processor the one that is effectively processing the collected data. The distinction is fact-based³⁹³ and is complex in

³⁸⁶ Article 4 (1) (a) Data Protection Directive.

³⁸⁷ Recital 19 Data Protection Directive.

³⁸⁸ CJEU 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. C-131/12.

³⁸⁹ European Commission (2014), Factsheet on the "Right to be Forgotten" ruling (C-131/12), http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf accessed 30.09.2015.

³⁹⁰ Article 4 (1) (c) Data Protection Directive.

³⁹¹ European Union Agency for Fundamental Rights (FRA) and Council of Europe (2014). *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 50.

³⁹² Article 29 Data Protection Working Party (2010). Opinion 1/2010 on the concepts of controller and processor, 5.

³⁹³ *Ibid.*

an online marketing environment, with its variety of stakeholders involved in the development and distribution of new advertising formats as well as the increasing cross-border and cloud environment setting.

ADVERTISING ENVIRONMENT – IT’S COMPLICATED. In an advertising environment, stakeholders may range from app developers over device manufacturers, app stores, third parties, and advertisers - all with potential subcontractors and affiliates - and, of course, the consumers, e.g. children. As such, actors cannot always be clearly defined given the complex factual situation. Some actors might have a dual nature (for example a provider who processed data for his own purpose but also acts as a controller or joint controller) or there might be two similar actors in one legal setting. Multiple entities might determine the purpose and means of processing activities leading to a joint controllership³⁹⁴, which can be the case in a multinational where various subsidiaries participate in the cloud environment. Consider for example an international toy company with subsidiaries (separate legal entities) spread worldwide. The purpose and collection of the personal data could be decided at global and local level in case of a local marketing campaign where, in the end, the collected data will be used at global as well as local level for further marketing purposes. Also, multiple processors could come into play: an infrastructure provider may outsource (part of the) work attributed to him to subcontractors, leading to a cascade of processors. For information purposes, we provide **some examples of qualifications as controller or processor in the advertising environment**³⁹⁵, as mentioned by the Article 29 Working Party in their opinion on apps on smart devices:

Actor	Potential qualification
App developers	Responsible for the creation of the app and/or making it available to end users, could be qualified as data controllers to the extent they determine purpose and means.
OS and device manufacturers	Can be considered as controllers or even, where relevant joint controllers for any personal data they process for their own purposes, such as the smooth running of the device, security etc. This would include user generated data (such as user details at registration), data automatically generated by the device (for example if the device has a ‘phone home’ functionality for its whereabouts) or personal data processed by the OS or device manufacturer resulting from the installation or use of apps.
App store	An app store records login credentials as well as the history of previously bought apps. It also asks the user to provide a credit card number that will be stored with the account of the user. The app store is the data controller for these operations. On the contrary, websites that allow the download of an app to be installed on the device without any authentication may find that they are not processing any personal data.

³⁹⁴ Article 2 (d) Data Protection Directive states that “controller’ shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.”

³⁹⁵ Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices, 9-13.

Third parties	Third parties (such as analytics providers and communication service providers) can qualify as data controllers or data processors. When they purely execute operations for the app owner, for example provide analytics within the app, they don't process data for their own purposes nor share these data with developers and as such qualify as data processor. When they, on the other hand, collect information across apps to supply additional service such as analyse figures at a larger scale (app popularity, personalised recommendation), they collect personal data for their own purpose and qualify as data controller.
Metrics provider	A company provides metrics for app owners and advertisers through the use of trackers embedded, by the app developer, within apps. The trackers of the company are therefore able to be installed on many apps and devices. One of its services is to inform app developers what other apps are used by a user, through the collection of a unique identifier. The company defines the means (i.e. trackers) and purposes of its tools before offering them to app developers, advertisers and others and therefore acts as a data controller

Table 6: Controller – processors in the advertising environment

Source: Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices, 9-13.

IMPORTANCE OF THE DISTINCTION. The distinction between a data controller and data processor is crucial. Not only does it have consequences for applicable law and the administrative requirements to be fulfilled, but it also determines the allocation of responsibilities.³⁹⁶ More specifically, the controller is responsible for compliance with data protection rules, even if (part of) the services is outsourced and problems arise from the third party's failure. On the other hand, the main obligation of processors relate to security. In any event, a written agreement needs to be put in place between the controller and the processor (i.e. controller-processor agreement³⁹⁷), which will outline in detail the qualification of both data controller and processor, allocate their respective roles and responsibilities and provide in clear wording that the processor must put in place sufficient technical and organisational measures.

GENERAL DATA PROTECTION REGULATION. Although debatable (given the often complex factual situation and the inability to always ensure an appropriate qualification) the distinction between data controller and data processor has been maintained in the Draft Regulation.³⁹⁸ Moreover, in the latest version agreed upon by the Council of the European Union, certain additional obligations for processors are defined. First, processors will be considered to be controllers and subject to joint-controller rules to the extent that personal data are processed beyond the controller's instructions.³⁹⁹ Secondly, processors will have to provide assistance to controllers in fulfilling certain obligations, including the obligation to conduct a data protection impact assessment ("DPIA") (Article 33), prior authorisation (Article 34), to notify breaches (Article 31 and 32) and finally the implementation of appropriate security measures (Article 30). In addition, processors will have to provide controllers with the

³⁹⁶ Article 29 Data Protection Working Party (2010). Opinion 1/2010 on the concepts of 'controller' and 'processor'. WP 169, 4.

³⁹⁷ As mentioned in article 17 of the European Data Protection Directive.

³⁹⁸ According to Recital 62 of the GDPR, a clear attribution of the responsibilities is crucial for "the protection of the rights and freedoms of data subjects as well as the responsibility and liability of controllers and processor."

³⁹⁹ Article 24 GDPR.

necessary information to demonstrate compliance with their obligations and allow controllers to perform audits.⁴⁰⁰

B.2 Data subject

DATA SUBJECT. As mentioned, the data subject is the individual to whom the personal data actually relate. The data subject does not have to be identified, but can also just be ‘**identifiable**’ (i.e., to be determined, taking into account “*all the means likely reasonably to be used either by the controller or by any other person to identify the said person*”).⁴⁰¹ For the purposes of this legal analysis, all individuals of whom data is collected will be considered data subjects, meaning children as well as their legal representatives. Important to note is that the data subject has certain rights which can be enforced against the controller (see below).

C. Conditions for lawful processing of children’s personal data

PROCESSING CHILDREN’S PERSONAL DATA. Children’s personal data, just like these of adults, need to be processed in a fair, lawful and non-excessive manner for a specific purpose and based upon legitimate grounds. The interpretation of these principles is, in relation to children, guided by the principle of ‘best interest’ of the child.⁴⁰²

C.1 The ‘best interest’ principle

BASIC PRINCIPLE. The principle of best interests of the child requires a proper appreciation of the position of the child. The underlying idea of this principle is that persons who have not yet achieved physical and psychological maturity require more protection than others. Thus, the child’s immaturity must be compensated by adequate protection and care.⁴⁰³ Furthermore, the best interest principle entails that the child’s right to development can only be properly enjoyed with the assistance or protection of other entities and/or other people.⁴⁰⁴ The principle should be respected by all entities that make decisions vis-à-vis children (e.g. parents, representatives, companies, public entities).

BEST INTEREST PRINCIPLE IN DATA PROTECTION. When it comes to the processing of children’s personal data, this ‘best interest’ principle needs to be respected as well, by taking into account the specific situation of each child. According to the Article 29 Working Party, a child’s situation needs to be looked at from two points of view, a static and a dynamic one. More specifically,

⁴⁰⁰ Article 26, §2, (h) GDPR (latest version of the Council of the European Union: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 11 June 2015, <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>) accessed 24.08.2015.

⁴⁰¹ Recital 26 Data Protection Directive.

⁴⁰² Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children's personal data

(General guidelines and the special case of schools), 4-5, 8.

⁴⁰³ *Ibid.*, 4.

⁴⁰⁴ *Ibid.*

“from the static point of view, a child is a person who has not yet achieved physical and psychological maturity. From a dynamic perspective, a child is in the process of developing physically and mentally to become an adult.”⁴⁰⁵

Accordingly, children’s need for data protection must always be guided by two important aspects, (1) the varying levels of maturity of children and (2) the right of representatives to represent minors in cases where the processing of personal data would be against the best interests of the child.⁴⁰⁶ Indeed, it could be argued that the best interest principle requires that children’s privacy is protected in the best possible way, by giving effect as far as possible to a minor’s privacy and data protection rights.⁴⁰⁷ This application is not always obvious in practice. The best interest criterion and the right of the child to privacy may, for instance, lead to conflicting interests in which a balance will need to be found.⁴⁰⁸

BEST INTEREST PRINCIPLE AND BEHAVIOURAL ADVERTISING. Finally, it is significant to note the Article 29 Working Party’s interpretation of the best interest principle in the context of behavioural advertising. More specifically, the Working Party stresses that, in the best interest of the child,

“companies should not process children’s data for behavioural advertising purposes, neither directly nor indirectly, as this will be outside the scope of a child’s understanding and therefore exceed the boundaries of lawful processing”.⁴⁰⁹

C.2 Data quality principles

DATA QUALITY PRINCIPLES. Aside from the best interest principle, the general principles regarding data quality as specified by the Data Protection Directive need to be respected when processing children’s personal data. However, they need to be adequately adapted when dealing with children. The following table provides an overview of the relevant principles of the Directive and includes some elements that have been interpreted by the Article 29 Working Party.

⁴⁰⁵ *Ibid.*, 2.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ And in which personal data has a broad scope, i.e. any information allowing an individual to be identified, directly or indirectly, ranging from a name over a birth date, e-mail address, IP address or photo. According to article 2 (a) of the European Data Protection Directive, 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’; European Commission (2012). Why do we need an EU data protection reform, http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/1_en.pdf accessed 14.10.2014; Article 29 Data Protection Working Party (2007). Opinion 4/2007 on the concept of personal data. WP 136, 4.

⁴⁰⁸ Article 29 Data Protection Working Party (2009). Opinion on the protection of children’s personal data (General Guidelines and the special case of schools). WP 160, 5. In case of child abuse for example, the best interest of the child (i.e. protection of his health and welfare) may have priority over the protection of his personal data (name, address, birth date) meaning that, *in concreto*, the name, address and birth data of the child in question may be revealed to the relevant instances to protect his or her health.”

⁴⁰⁹ Article 29 Data Protection Working Party, “Opinion 02/2013 on apps on smart devices”, WP 202, 27 February 2013, 26, accessible at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf.

PRINCIPLE	ARTICLE	COMMENT
Fair and lawful processing	6 (1)(a) DPD	The personal data of children need to be processed <i>fairly and lawfully</i> . Since children's maturity is still developing, this principle needs to be interpreted strictly. ⁴¹⁰
Purpose limitation	6 (1) (b) DPD	The data can only be collected for <i>specified, explicit and legitimate purposes</i> and not further processed in a way incompatible with the initially specified purpose(s).
Proportionality and relevance	6 (1) (c) DPD	Only <i>adequate, relevant and non-excessive</i> data can be collected and/or further processed. The collecting entity needs to carefully consider which data are strictly necessary to meet the goal or, for mobile apps for example, the desired functionality. ⁴¹¹
Accuracy	6 (1) (d) DPD	Personal data must be <i>accurate</i> and, where necessary, kept <i>up to date</i> . Every reasonable step must be taken to ensure that data are inaccurate or incomplete, having regard to the purpose for which they were collected or for which they are further processed, are erased or rectified. In short, only data necessary to reach the purpose can be collected and these data should be kept updated. As children are constantly developing, data controllers must pay particular attention to the duty to keep personal data up-to-date. ⁴¹²
Data retention	6 (1) (e) DPD	When no longer necessary for the purposes of collection, personal data should either be <i>deleted</i> or kept in a form which does not allow identification. This principle is particularly important for children. As they are developing a lot, data related to them could very quickly change and become outdated, so that it becomes irrelevant to the original purpose of collection. Such information should be deleted. ⁴¹³

Table 7: Principles as interpreted by the Article 29 Data Protection Working Party.

⁴¹⁰ Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children's personal data

(General guidelines and the special case of schools), 7.

⁴¹¹ Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices, 17.

⁴¹² Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children's personal data

(General guidelines and the special case of schools), 7.

⁴¹³ Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children's personal data

(General guidelines and the special case of schools), 8.

C.3 Legitimate ground for processing

LEGITIMATE GROUNDS FOR PROCESSING. Another important requirement for the processing of personal data is having a legitimate ground.⁴¹⁴ The European Data Protection Directive foresees various legitimate grounds: (1) consent⁴¹⁵, (2) the existence of a contract⁴¹⁶, (3) the legal obligation of the controller⁴¹⁷, (4) the protection of vital interests of the data subject⁴¹⁸, (5) the performance of a task of public interest⁴¹⁹ and (6) purposes of legitimate interest of the controller or a third party.⁴²⁰ In relation to children, in particular the grounds of consent, public interest and legitimate interest require some further exploration, in light of the best interest principle as described above (section C1).

PUBLIC INTEREST. The best interest principle plays a role in the interpretation of public interest as a legitimate ground. The best interest principle as such might be classified as public interest.⁴²¹ For instance, the provisions of the European Data Protection Directive may be applicable to cases where the youth welfare service needs personal data of the child in order to take care of him/her.⁴²²

LEGITIMATE INTEREST OF CONTROLLER OR THIRD PARTY. Secondly, the best interest principle is important in the application of the widest legitimate ground, i.e. the legitimate interests of the controller or of a third party. This ground can only apply to the extent it is not overridden by the interests or fundamental rights and freedoms of the data subject. As such, when weighing the balance in relation to the status of children as data subjects, their best interest should be the guide.⁴²³

CONSENT. The best interest principle also provides guidance in relation to consent, which not only is a general legal ground for processing, but also key in relation to data processing for **direct marketing purposes** and the use of **tracking** mechanisms, such as cookies. Indeed, Article 14 of the Data Protection Directive stresses that the data subject, i.e. the child, has the right *“to object on request and free of charge, to the processing of personal data processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf*

⁴¹⁴ Article 7 and 8 Data Protection Directive; Article 5 par. 3, 1st sentence e-Privacy Directive: 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.

⁴¹⁵ Article 7 (a): member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent.

⁴¹⁶ Article 7 (b): Member States shall provide that personal data may be processed only if processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

⁴¹⁷ Article 7 (c): Member States shall provide that personal data may be processed only if processing is necessary for compliance with a legal obligation to which the controller is subject.

⁴¹⁸ Article 7 (d): Member States shall provide that personal data may be processed only if processing is necessary in order to protect the vital interests of the data subject.

⁴¹⁹ Article 7 (e): Member States shall provide that personal data may be processed only if processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed

⁴²⁰ Article 7 (f): Member States shall provide that personal data may be processed only if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

⁴²¹ Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children’s personal data (General Guidelines and the special case of schools). WP 147, 9.

⁴²² *Ibid.*

⁴²³ *Ibid.*

for this purposes, and to be expressly offered the right to object free of charge to such disclosures or uses.” For the use of cookies even an ‘active’ choice is required, i.e. an active indication of the user’s wishes.⁴²⁴ ‘Consent’ as a legitimate ground entails four questions, which need to be explored in greater detail: (1) how can valid consent be obtained, (2) who needs to give this consent, (3) how will the consent be given/verified in practice and (4) what are the assessment criteria to give or withhold this consent?

QUESTION 1: HOW CAN CONSENT BE VALID?

Article 2 (h) of the Directive defines a valid consent as *free and informed*.⁴²⁵ This implies, in practice, that children, or legal their representatives, before even considering whether to consent, need to be fully informed about the collection and further processing of their personal data. We will have a closer look at the right to information below (section D.1).

QUESTION 2: WHO NEEDS TO GIVE CONSENT?

A second concern relates to the person who needs to give consent. When dealing with personal data of children, one could assume the need for representation by their parents or legal guardians. Although the concept of “parental consent” is not explicitly recognised in the Data Protection Directive, it is mentioned by various legal instruments interpreting the Directive.⁴²⁶ However, in view of children’s constant development, the exercise of their data protection rights must adapt to their level physical and psychological development.⁴²⁷ On the one hand, *legal representatives* may facilitate the data processing by giving their consent, led by the principle of ‘best interest’ of the child. They should take into consideration the ways in which the disclosure of such personal data could pose a threat to their child’s privacy and vital interests.⁴²⁸ This assessment is not always straightforward and can be sensitive and complex, in particular in relation to mobile apps and behavioural advertising, where by means of sophisticated technologies, such as cookies or other tracking mechanisms, a broad range of user information automatically stored on the device is captured, such as the user’s precise geolocation, phone number⁴²⁹, enhancing further use and/or sharing by advertisers, without even alerting the user. The Article 29 Working Party has stated that, in the best interest of the child, companies should not,

⁴²⁴ Article 29 Data Protection Working Party (2013). Working Document 02/2013 providing guidance on obtaining consent for cookies. WP 208, 3.

⁴²⁵ “(h) ‘the data subject’s consent’ shall mean 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.”

⁴²⁶ Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children’s personal data (General Guidelines and the special case of schools). WP 147, 7; Article 29 Data Protection Working Party (2009). Opinion on the protection of children’s personal data (General Guidelines and the special case of schools). WP 160, 8-9; Article 29 Data Protection Working Party (2010). Opinion 2/2010 on online behavioural advertising. WP 171, 17; Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices. WP 202, 26.

⁴²⁷ Article 29 Data Protection Working Party (2008). Working Document 1/2008 on the protection of children’s personal data (General Guidelines and the special case of schools). WP 147, 6.

⁴²⁸ Article 29 Data Protection Working Party (2009). Opinion on the protection of children’s personal data (General Guidelines and the special case of schools). WP 160, 26.

⁴²⁹ As well as list of contacts, call logs, unique device identifiers and other information stored on the mobile device and can share this data with a large number of possible recipients. Even very young children, who do not have the maturity and are not able to type sensitive personal information into the device, is impacted. An app may indeed collect and share information about the device and/or the child, such as the device’s location or phone number or other information stored on the device by the user. See Federal Trade Commission (2012). Mobile Apps for Kids: Current privacy Disclosures are Disappointing. Staff Report, 1, 10 footnote 38, 13 and 17; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2012). European Strategy for a Better Internet for Children. COM (2012), 196 final, 5.

directly nor indirectly, process these types of data for behavioural advertising aims⁴³⁰: this falls outside the scope of a child's understanding and therefore exceeds the boundaries of lawful processing.

On the other hand, there might be areas in which even **children** are allowed to decide **independently** from their legal representatives. Children should indeed be treated in accordance with their level of maturity. As of a certain age, they may be considered capable of understanding the impact on their privacy protection. Hence, consent becomes an evolving mechanism, moving from merely consulting the child⁴³¹, to joint consent of the child and the legal representative, and even to the sole consent of the child if he or she is already mature.⁴³² In certain cases, children may already conclude legal acts without the consent of their representatives and as such can also give valid consent to the processing of their personal data. In any event, instances where the best interest of the child limits or even prevails over the principle of representation should not be neglected, and need further consideration.⁴³³

QUESTION 3: HOW CAN CONSENT BE GIVEN/VERIFIED IN PRACTICE?

A third relevant question is how parental consent can be requested in practice and, more concrete, how 'parental' consent can be verified (i.e. how can it be guaranteed that the individual that consents or appears to be consenting is indeed the legal representative of the minor in question)? It can be imagined that for tech-savvy children, setting up a fake e-mail address to consent in lieu of their parents is very easy. Currently, the European legislative instrument does not provide any clarification in this regard. Also, Article 8 of the draft GDPR only introduces the notion of "verifiable consent" but remains vague on to obtain such consent. Indeed, it merely mentions that "reasonable" efforts shall be made to obtain this consent, "taking into consideration available technology".⁴³⁴ The US COPPA legislation on the other hand is much more advanced in this context. Not only does it recognise the concept of "verifiable parental consent", "taking into consideration available technology"⁴³⁵, but it also explicitly refers in detail to the methods through which this consent can be obtained in various situations. Examples include the 'e-mail plus' consent⁴³⁶, the 'print-and-sent' method,⁴³⁷ the use of government-issued identification⁴³⁸ and even newly recognised mechanisms such as electronic scans or even video verification methods⁴³⁹, taking also into account whether the personal data obtained is

⁴³⁰ Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 26.

⁴³¹ The duty of consultation consists of taking into account, though not necessarily submitting to, the child's own opinions. Recommendation No. R (97) 5 of the Council of Europe, the Committee of Ministers on the protection of medical data, 13 February 1997, 5.5. and 6.3.; Article 29 Data Protection Working Party (2011). Opinion 15/2011 on the definition of consent. WP 187, 27, 28 and 37..

⁴³² Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 6.

⁴³³ Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 9.

⁴³⁴ Article 8, par. 1 of the GDPR. Furthermore, para 3 and 4 foresee that the criteria and requirements for the methods to obtain this consent as well as the appropriate forms still are subject to further delegated acts.

⁴³⁵ Section §312.5 of the COPPA.

⁴³⁶ This consent method is used for the collection of personal information for internal purposes only. The verifiable parent consent is obtained through an e-mail completed with an additional step, such as obtaining a postal address or telephone number from the parent and confirming the parent's consent by letter or telephone call, or sending a delayed confirmation e-mail to the parent after receiving consent.

⁴³⁷ Providing a consent form to be signed by the parent and returned via U.S. mail, fax or electronic scan.

⁴³⁸ Verifying a parent's identity by checking a form of government issued identification against databases of such information, provided that the parent's identification is promptly deleted after completing the verification.

⁴³⁹ Federal Trade Commission (2013). Children's Online Privacy Protection Rule; Final Rule, Federal register vol. 78, no 12, part II, 3986-3992; 315.5; 5(b).

used for external or only internal⁴⁴⁰ purposes. It remains to be seen whether the European legislators, when implementing the proposed article 8, will take the US framework, with its detailed guidance, as an example.

QUESTION 4: WHAT ARE THE ASSESSMENT CRITERIA TO GIVE OR WITHHOLD THIS CONSENT?

Finally, parents or guardians are expected to make decisions vis-à-vis the protection of their child's personal data on the basis of the best interest of the child. Moreover, regard must be had to the ways in which the disclosure of such personal data could pose a threat to their child's privacy and vital interests⁴⁴¹. Such an assessment is not always straightforward and can be sensitive and complex, in particular in relation to mobile applications and behavioural advertising (see *infra* section E).

D. Data subject's rights

D.1 *Right to be informed*

NOTICE AND CONSENT. AS mentioned *supra*, for consent to be valid it should be given freely and in an informed manner. The consent requirement thus goes hand in hand with the data subject's right to be informed. According to Article 12 (a) of the Data Protection Directive, the data controller has a duty to provide the data subject with certain information (e.g. the purpose of processing, categories of data etc.). Ideally the data controller addresses every data subject, orally or in writing. However a more efficient way for the controller to comply with this requirement is to have appropriate information clauses on his/her homepage, like a privacy policy.⁴⁴² In practice, this implies that towards children or their legal representatives, information needs to be presented in a simple, concise, readable and educational language that can be easily understood and is adapted to the age of the individual in question.⁴⁴³ To achieve this, the Article 29 Working Party recommends the use of layered-notices⁴⁴⁴, offering a dual system consisting of (1) a shorter notice, containing the basic information to be provided when collecting personal data either directly from the data subject or from a third party, accompanied by a (2) more detailed notice, preferably via a hyperlink, where all relevant details are provided which are necessary to ensure a fair processing. Of course, the notice needs to be posted in the right place and at the right time – i.e. they should appear directly on the screen, prior to the collection of information. The use of layered notices may be even more appropriate in the case of mobile apps, given the size of the screen of mobile devices.

MOBILE APPLICATIONS. With regard to mobile apps, the Article 29 Working Party recommends to provide a clear overview of the collected data and, even further, request a granular consent for each type of data which is in particular accessed by mobile apps, at least for Location, Contacts, Unique Device

⁴⁴⁰ I.e. only for the internal use of the operator collecting it.

⁴⁴¹ Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 9.

⁴⁴² European Union Agency for Fundamental Rights (FRA) and Council of Europe (2014). *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 98.

⁴⁴³ Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 10.

⁴⁴⁴ *Ibid.* 10; Article 29 Data Protection Working Party (2004). Opinion 10/2004 on More Harmonised Information Provisions. WP 100, 8-9.

Identifier, Identity of the data subject, Identity of the phone, Credit card and payment data, Telephony and SMS, Browsing, history, Email, Social networks credentials and Biometrics.⁴⁴⁵

COOKIES. The use of cookies always requires additional text and consent. Users need to be able to access all necessary information about the different types or purposes of cookies being used by the website or app, the qualification as a first or third party cookie and the expiry date. This could be achieved for example, by prominently displaying a link to a designated location where all the types of cookies used by the website are presented.⁴⁴⁶

D.2 Right to access

RIGHT TO ACCESS. Aside from the right to be informed, data subjects also have the right to access their data.⁴⁴⁷ When it comes to children, depending on their maturity, the right of access can be exercised (1) solely by the representative, (2) both by the legal representative and the child or (3) solely by the child. Children are sometimes entitled to exercise their rights alone in relation to very sensitive personal matters, such as in relation to their health, where, upon an explicit requirement of the child in question, the information may not be further divulged to his or her legal representative. In particular in the latter situation, a careful balancing of interests of all parties involved need to be performed to assess whether the children's right to privacy prevails over the legal representatives' right to access.⁴⁴⁸ In this balancing exercise, the best interest of the child is of special importance.⁴⁴⁹

RIGHT TO RECTIFY, ERASE OR BLOCKING. Secondly, the right to access entails a right for the data subject to rectification if the data is inaccurate or to erasure or blocking. In any case, data subjects have the right to object to the processing of their data for direct marketing purposes.

LIMITATIONS. Important to note is that there are certain limits to the right to access. The obligation of the controller to respond to an access request may be restricted due to overriding legal interests of others.

4.2.2 E-Privacy Directive

GENERAL AND SPECIFIC RULES. Another important legal instrument at the European level is the e-Privacy Directive, which provides specific rules for the processing of personal data in the context of electronic communications and complements the European Data Protection Directive.⁴⁵⁰ Additionally, this

⁴⁴⁵ Article 29 Data Protection Working Party (2013). Opinion 02/2013 on apps on smart devices, 27.

⁴⁴⁶ *Ibid.* 3-4.

⁴⁴⁷ Article 12 Data Protection Directive.

⁴⁴⁸ In this regard, the Article 29 Working Party mentions that *"the criteria for the conditions of access will be not only the age of the child, but also whether or not the data concerned were provided by the parents or by the child – which is also an indication of the child's degree of maturity and autonomy."* Article 29 Data Protection Working Party (2009). Opinion on the protection of children's personal data (General Guidelines and the special case of schools). WP 160, 11.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) *Official Journal* L 201, 31 July 2002, 0037 – 0047, which was amended in 2009 by the 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

Directive also offers certain general rules on the use of location data or the storage of information on the devices of end-users (e.g. users of social media), which could be applicable when it comes to new advertising formats aimed at minors. The application of these general provision is not limited to electronic communication services and include for instance article 5 (3) on cookies and spyware and Article 13 on unsolicited communications.

CONFIDENTIALITY OF COMMUNICATIONS. One of the objectives of the E-Privacy Directive is to ensure confidentiality of communications. Accordingly, Article 5 contains a prohibition on intercepting or surveilling electronic communications as well as any storage of (or subsequent access to) information on the terminal equipment of end-users⁴⁵¹, unless (a) the users concerned have consented or (b) there exists an explicit legal authorisation.⁴⁵² The scope of application of this article is general and not limited to the electronic communications sector. Thus, this provision will apply to applications which run on mobile devices and on any other end-user devices and be relevant for most shall therefore be relevant for most online social network providers, website operators, application providers and trackers.⁴⁵³

USE OF LOCATION DATA. Location data are often processed in digital mobile networks to enable the transmission of communications. This category includes all data indicating the geographic position of the terminal equipment of a user, like the latitude, longitude or altitude of the terminal equipment; the direction of travel of the user; or the time the location information was recorded.⁴⁵⁴ Such data can be useful for advertisers who want to provide location-based direct marketing. The e-Privacy Directive contains specific requirements for the processing of location data (i.e. Article 9). However, according to the Article 29 Working Party, Article 9 of the e-Privacy Directive only applies to providers of communication services and as such will not be applicable to advertisers.⁴⁵⁵ Nevertheless, location data are generally regarded as personal data. Therefore, advertisers have to comply with the general requirements for the processing of personal under the European Data Protection Directive if they want to make use of location data.

4.2.3 General Data Protection Regulation

DATA PROTECTION REFORM. As mentioned, the data protection framework is currently under reform. Due to rapid technological innovations and the ever increasing sharing and collection of personal data, new risks in relation to the protection of personal data have emerged. Accordingly, in 2012, the European Commission released a proposal for a new data protection framework i.e. the General Data Protection Regulation (“GDPR”). Once adopted, the GDPR will replace the Data Protection Directive and will be directly applicable in the Member States. It will have a significant impact on businesses, as it imposes new compliance obligations and significant sanctions in case of non-compliance. Recently, the proposed GDPR has entered the trilogue phase.⁴⁵⁶ It is important to note that this is the final stage

Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws *OJ L 337*, 18 December 2009, 11–36 (hereafter the e-Privacy Directive).

⁴⁵¹ Article 5 (3) e-Privacy Directive.

⁴⁵² Article 5(1) e-Privacy Directive; See also B. Van Alsenoy (2014). Rights and obligations of actors in social networking sites. Spion Project, 33, www.spion.me accessed 5.10.2015.

⁴⁵³ B. Van Alsenoy (2014). Rights and obligations of actors in social networking sites. Spion Project, 34, www.spion.me accessed 5.10.2015.

⁴⁵⁴ Article 2 (c) e-Privacy Directive.

⁴⁵⁵ Article 29 Data Protection Working Party (2011). Opinion 13/2011 on Geolocation services on smart mobile devices. WP 185.

⁴⁵⁶ The trilogue between the European Commission, the European Parliament and the Council of the European Union is the final step of the legislative procedure. See press release of 15.6.2015 <http://www.europarl.europa.eu/news/en/news->

before the potential adoption of the Regulation.⁴⁵⁷ Thus, the key legislative provisions that could affect advertising aimed at children are of great significance and will be outlined briefly.

TERRITORIAL SCOPE. Before going into the provisions relevant for advertising and minors, it is significant to note that the territorial scope of European data protection legislation has broadened. According to the European Commission's proposal, the Regulation catches entities which are outside the EU but whose processing activities relate to the offering of goods in the EU and the monitoring of the behaviour of data subjects residing in the EU.

A. Consent as a legitimate ground for processing children's personal data

MINIMUM AGE REQUIREMENT. Currently, at the EU level there is no specific legislation in place regarding the 'appropriate' minimum age requirement for parental consent.⁴⁵⁸ However, the draft GDPR explicitly introduce a *minimum age of 13 years*⁴⁵⁹, as **Article 8** states that

*For the purposes of this Regulation, in relation to the offering of goods or services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorized by the child's parent or legal Representative.*⁴⁶⁰

This draft Article is in line with the COPPA legislation in the United States⁴⁶¹ (supra) and just 1 year below the minimum age under Spanish legislation (currently the only European country having an age requirement in place).⁴⁶² The question may rise whether this age is appropriate and to what extent it takes into account the physical and psychological development of children.

HOW TO GIVE CONSENT. As mentioned (supra 4.2.1, C.3), the draft GDPR does not provide any clarification regarding how consent should be given. Although Article 8 of the draft GDPR introduces the notion of

room/content/20150615IPR66464/html/Data-protection-Parliament%E2%80%99s-negotiators-welcome-Council-negotiating-brief.

⁴⁵⁷ Nevertheless, the amendments might still change during the trilogue phase and if in the end the European Parliament and the Council of the EU do not find a compromise, the Act might not get through in the end. For a good overview of the EU legislative process see http://www.europarl.europa.eu/code/information/guide_en.pdf.

⁴⁵⁸ The age in Europe spans from 12 to 18 years. Various countries issued guidelines, such as Belgium, which uses a span of 12-14 years, see an opinion of the Belgian Privacy Commission (2002). Opinion concerning the protection of the personal life of minors on the internet,

http://www.privacycommission.be/sites/privacycommission/files/documents/advies_38_2002_0.pdf; see also Advertising Education Forum (2013). Children's data protection and parental consent. A best practice analysis to inform the EU data protection reform, 10.

⁴⁵⁹ According to Article 8, the controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.

⁴⁶⁰ European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). COM(2012).

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN> accessed 5.10.2015.

⁴⁶¹ Article §312.2 of the COPPA, which reads as follows 'Child means an individual under the age of 13'.

⁴⁶² Article 13 of the Royal Decree 1720/2007 of 21 December which approves the regulation implementing organic law 15/1999, of 13 December on the protection of personal data, https://www.agpd.es/portalwebAGPD/english_resources/regulations/common/pdfs/reglamentolopd_en.pdf accessed 14.10.2014.

“verifiable consent”, it remains vague when it comes to obtain such consent. Indeed, it merely mentions that “reasonable” efforts shall be made to obtain this consent.⁴⁶³

The controller shall make reasonable efforts to verify such consent, taking into consideration available technology without causing otherwise unnecessary processing of personal data.

B. Data subject's rights

RIGHT TO BE INFORMED. Finally, another interesting element made explicit in the GDPR relates to the data subject's right to information, the draft GDPR stresses that children deserve specific protection. In particular, **Recital 46** states that

*“any information and communication, where processing is addressed specifically to a child, should be in such a **clear and plain language** that the child can easily understand”*

This is definitely a provision to keep in mind, when thinking of the lengthy and complex privacy notices companies use nowadays to inform their consumers of their data processing activities.⁴⁶⁴

C. Concluding remarks

It seems that the draft GDPR has to some extent paid attention to the concerns related to the processing of children's personal data. However, it remains to be seen how this will work in practice as the Regulation does not provide much clarification of key concepts such as “verifiable consent”. Moreover, it will be interesting to see whether the European legislators, when implementing the proposed article 8, will take the US framework with its detailed guidance, as an example.

4.2.4 Conclusion

In sum, when advertisers want to collect personal data of children they will need to ensure that the manner in which they obtain consent is well-considered and takes into account the vulnerability of the child and its capacity to understand the consequences of the consent that is given. Furthermore, when the child has not reached a satisfactory level of understanding of such consequences, parents will need to be involved in this decision. In practice, the increasing use of personal devices by children, such as tablets and smart phone, will undoubtedly complicate this parental consent.

⁴⁶³ Furthermore, para 3 and 4 foresee that the criteria and requirements for the methods to obtain this consent as well as the appropriate forms still are subject to further delegated acts.

⁴⁶⁴ E. Wauters, V. Donoso and E. Lievens (2014). Optimizing transparency for users in social networking sites. *info*, Vol.16 Issue 6, 8 – 23.

5. Product-specific legislation

PRODUCT-SPECIFIC PROVISIONS. The final section of Chapter 2 provides a selection of other provisions related to specific products in both European legislation as well as national laws. The provisions were selected on the basis of their potential relevance for commercial communication reaching children.

ROADMAP. This section offers an overview of certain provisions dealing with advertising rules specific to a certain product. These include provisions regulating the advertising of products that present risks to children's health, such as fatty foods, alcoholic beverages, tobacco and medication. Finally, restrictions on toy advertisements can be found in certain EU Member states.

5.1.1 Food

FOOD ADVERTISING AND CHILDREN'S HEALTH. At present, child obesity is becoming a global trend, as almost a quarter of all children in the developed economies is affected by excess body weight.⁴⁶⁵ Among the potential candidates causing this trend is one particularly widespread cultural phenomenon, namely the commercially-led promotion of energy-dense foods directed towards children.⁴⁶⁶ Indeed, advertising techniques count on children's pester power and drive children's food requests. In turn, children play an important role in which products their parents purchase in the supermarket and which restaurants they frequent.⁴⁶⁷ In this regard, several regulatory initiatives have been taken dealing specifically with food advertising, both at an EU and national level. This section will focus on the relevant provisions of the AVMSD and the specific Regulation on nutrition and health claims. Furthermore, this section provides two examples at a national level, i.e. Norway and Ireland.

A. Europe

AVMSD. The AVMSD acknowledges the potential risk in relation to food advertising, in particular food and beverages containing fat, trans-fatty acids, salt/sodium and sugars. It therefore explicitly requires Member States and the European Commission to encourage media service providers to develop **codes of conduct** *"regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended"*.⁴⁶⁸ However, the AVMSD does not contain any specific restrictions for food advertising targeted at children.

CLAIMS REGULATION. Aside from the AVMSD, the European Claims Regulation harmonises certain rules in relation to nutrition and health claims.⁴⁶⁹ The objective of this Regulation is to ensure the effective

⁴⁶⁵ Y. Wang and T. Lobstein (2006). Worldwide trends in childhood overweight and obesity. *Int J Pediatr Obes.* 1:11-25 as cited by T. Lobstein et al. (2010). Policies on Marketing food and beverages to children. The PolMark Project. http://www.worldobesity.org/site_media/uploads/The_PolMark_Project_Final_Report_Annex_1_FINAL.pdf accessed 5.10.2015.

⁴⁶⁶ C. Hawkes and T. Lobstein (2011). Regulating the commercial promotion of food to children: A survey of actions worldwide. *International Journal of Pediatric Obesity*, Vol. 6 Issue 2, 83-94.

⁴⁶⁷ Federal Trade Commission (2012). A Review of Food Marketing to Children and Adolescents. Follow-Up Report, ES-1.

⁴⁶⁸ Article 9 2 AVMSD.

⁴⁶⁹ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods. *O.J. L* 404.

functioning of the internal market, while also safeguarding a high level of consumer protection. According to Article 1, the Regulation is applicable to “*nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer*”. In recent years, an increasing number of foods that are labelled and advertised in bear nutrition and health claims. In order to adequately protect consumers and facilitate their choice, products should be safe and adequately labelled. The Regulation takes the same benchmark as the Unfair Commercial Practices Directive, i.e. the average consumer. Moreover, if a claim is targeted specifically at a particular group of consumers, like children, the claim should be assessed from the perspective of the average member of that group.⁴⁷⁰

CLAIMS REGARDING CHILDREN’S HEALTH AND DEVELOPMENT. Specifically in relation to children, the Claims Regulation requires that claims referring to children’s health and development first need to be authorised by the national competent authority of a Member State.⁴⁷¹ This national authority will have five months after the application for authorisation to verify whether the health claim is substantiated by scientific evidence and that the wording of the claim complies with the criteria laid down in this Regulation.⁴⁷²

B. Norway

BAN ON MARKETING UNHEALTHY FOOD AIMED AT CHILDREN. In 2013, Norway introduced a ban on the marketing of unhealthy food and drink products directed at children less than 16 years.⁴⁷³ Significant to note is that only the marketing of these products is banned, not the sale of these products.

C. Ireland

BAN ON MARKETING UNHEALTHY FOOD AIMED AT CHILDREN. Similar provisions are to be found in Ireland, where the Broadcasting Authority of Ireland (“BAI”) issued on 4th of June 2013 a revised version of its General and Children’s Commercial Communications Codes, introducing restrictions to the promotion of high fat, salt and sugar (“HFSS”) food to children.⁴⁷⁴ The rules apply to commercial communications (including advertising, sponsorship and other forms of commercial announcements) and apply to radio and television broadcasters regulated in the Republic of Ireland. In essence, commercial communications for HFSS food (including drinks) shall not be permitted in children’s programmes. In addition, there are content rules which are applicable to commercial communications for HFSS food broadcast outside of children’s programmes but which are directed at children. Such commercial communications shall, for example, not include celebrities or sport stars or promotional offers.⁴⁷⁵

⁴⁷⁰ Recital 16 Claims Regulation.

⁴⁷¹ Article 14 and 15 Claims Regulation.

⁴⁷² Article 16 Claims Regulation.

⁴⁷³ J. Ryland (2013). Bans unhealthy food ads directed at children. *The Norway Post*, <http://www.norwaypost.no/index.php/news/latest-news/28602-bans-unhealthy-food-ads-directed-at-children> accessed 5.10.2015.

⁴⁷⁴ In effect as of 2 September 2013.

⁴⁷⁵ Article 11, 4-7 of the BAI Children’s Commercial Communications Code, <http://www.bai.ie/index.php/revised-general-and-childrens-communications-codes-june2013/> accessed 30.09.2015; As well as include programme characters, include licensed characters e.g. characters and personalities from cinema releases and contain health or nutrition claims. No more than 25% of sold advertising time and only one in four advertisements for HFSS food are permissible across the broadcast day on radio and television services; T. Heffernan (2013). BAI Issues Rules on Food Advertising to Children. <http://www.bai.ie/index.php/2013/06/bai-issues-rules-on-food-advertising-to-children/> accessed 29.09.2015.

5.1.2 Alcohol

MINORS' ALCOHOL CONSUMPTION. Another widespread problem is the increasing consumption of alcoholic beverages by children and teenagers.⁴⁷⁶ Alcohol advertising is ubiquitous, ranging from product placement in film and television (e.g. Batman Begins, Spider Man, Dodgeball, Ace Ventura: Pet Detective) to popular music, particularly rap and hip-hop.⁴⁷⁷ Research has shown that alcohol advertising attracts new drinkers and increases alcohol consumption of others, and especially young people, as they are eager to learn and to experience and taste innovative products.⁴⁷⁸ Due to the potential impact of alcohol advertising, restrictions can be found in several legal frameworks. Indeed, a 2004 overview by the National Foundation for Alcohol Prevention (Netherlands) shows that there are a broad variety of provisions regulating alcohol advertising at the national level⁴⁷⁹:

Table 1 Number of regulations for alcohol marketing by country.

Country	Statutory	Non-statutory	Co-regulation*	Total
Austria	3	1	0	4
Belgium	6	1	0	7
Bulgaria	2	0	0	2
Czech Republic	3	2	0	5
Denmark	2	1	0	3
Estonia	1	1	0	2
Finland	1	0	0	1
France	1	3	0	4
Germany	2	1	0	3
Hungary	2	2	0	4
Ireland	1	3	0	4
Italy	4	2	0	6
Latvia	3	0	0	3
Lithuania	1	0	0	1
Netherlands	1	2	0	3
Norway*	2	0	0	2
Poland	1	1	0	2
Portugal	1	1	0	2
Romania	5	0	0	5
Slovak Republic	2	1	0	3
Slovenia	1	0	0	1
Spain	3	2	0	5
Sweden	1	1	0	2
United Kingdom	0	2	3	5
Total	49	27	3	79
Number of countries with this type of regulation	23	17	1	24

* In Norway there is a total ban on the advertising of alcohol.

Source: P. Anderson (2007). The Impact of Alcohol Advertising. ELSA project report on the evidence to strengthen regulation to protect young people.

⁴⁷⁶ P. Anderson (2007). The Impact of Alcohol Advertising. ELSA project report on the evidence to strengthen regulation to protect young people. http://ec.europa.eu/health/ph_projects/2004/action3/docs/2004_3_16_frep_a4_en.pdf accessed 5.10.2015.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ P. Anderson (2007). The Impact of Alcohol Advertising. ELSA project report on the evidence to strengthen regulation to protect young people. http://ec.europa.eu/health/ph_projects/2004/action3/docs/2004_3_16_frep_a4_en.pdf accessed 5.10.2015.

This section of the report will discuss on the AVMSD and the UCP Directive at the EU level. It will then continue with providing an overview of certain national provisions regulating alcohol advertising aimed at children, including Finland, France, Norway and the United Kingdom.

A. Europe

AVMSD. The AVMSD provides three types of provisions which are applicable to alcohol advertising: (1) clear provisions dealing with alcohol advertising aimed at children, (2) provisions in relation to commercial communication in general and (3) rules on specific types of advertising, such as television advertising and teleshopping. According to **Article 9.1 (e)**:

In general, audiovisual commercial communications for alcoholic beverages must not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages.⁴⁸⁰

This article is part of the general provisions applicable to all audiovisual media services and as such applies to both linear and non-linear⁴⁸¹ services. Similar provisions are set forth for television advertising and teleshopping in article 22 AVMSD, by explicitly mentioning that these types of advertising may not be aimed specifically at minors. Additionally, these types of advertising should ensure that advertisements for alcoholic beverages do not depict minors consuming these beverages.⁴⁸² Interesting to note is that, contrary to cigarettes and tobacco products (infra), the AVMSD does not foresee any specific requirements concerning product placement in relation to alcoholic beverages.

UNFAIR COMMERCIAL PRACTICES DIRECTIVE. The UCP Directive does not contain any specific prohibition on alcohol advertising. Indeed, it is left up to the Member States to decide whether or not to introduce restrictions and prohibitions of commercial practices in order to protect the health and safety of consumers in their territory. Recital 9 of the UCP Directive explicitly mentions alcohol as a potential example.

B. Finland

BAN ON OUTDOOR ADVERTISING. Finland introduced brand new legislation in relation to alcohol and advertising, effective on 1 January 2015. Whereas Finland already had an advertising ban on hard liquor for decades, the new measures apply to drinks with more than 1,2 % alcohol - 'the mild alcohol products' - and introduce a ban on outdoor advertisements of these products.⁴⁸³ The aim of the new rules is twofold: (1) reduce exposure of children and young people to alcohol advertising and sponsorship and (2) deal with new forms of communication such as games and social media.⁴⁸⁴ As such,

⁴⁸⁰ Article 9.1 (e) AVMSD.

⁴⁸¹ Chapter III of the AVMSD.

⁴⁸² Article 22 (a) AVMSD. Additionally, television advertising and teleshopping for alcoholic beverages shall not
(b) link the consumption of alcohol to enhanced physical performance or to driving;
(c) create the impression that the consumption of alcohol contributes towards social or sexual success
(d) claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts
(e) claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

⁴⁸³ S. English (2015). New alcohol advertising restrictions came to force in Finland. <http://nordan.org/new-alcohol-advertising-restrictions-came-to-force-in-finland/> accessed 5.10.2015.

⁴⁸⁴ I. Tuomonen (2013). Reform of the Alcohol Advertising Regulation in Finland. http://ec.europa.eu/health/alcohol/docs/ev_20130522_co03_en.pdf accessed 5.10.2015.

the new rules drastically reduce the number of alcohol adverts visible on the streets and in the media in Finland.⁴⁸⁵ The advertising ban applies to all indoor and outdoor public places - except restaurants, shops and public events. Radio and TV advertising of mild alcohol drinks is still allowed, but only if it's broadcast after 10 p.m. and before 7 a.m.⁴⁸⁶

NEWSPAPER AND INTERNET ADS. Although advertising in newspapers and on the internet continues to be admissible, there are certain specific restrictions. In particular, the following types of alcohol advertising will be banned⁴⁸⁷:

- (1) digital games and gaming apps in consoles, tablets and mobile phones;
- (2) product placement in video games;
- (3) all kinds of competitions and prizes (both online and offline), such as, for example, 'Like us and win tickets for the next match/concert';
- (4) allowing people sharing their stories, photos or videos in official company pages;
- (5) producing and making available viral marketing (videos) intended to be shared online.

Finally, Finnish companies maintaining alcohol-related websites must delete or block any customer praise of alcohol.

C. France

LOI EVIN. The Loi Evine⁴⁸⁸ was passed in France in 1991 to control the advertising of alcohol.⁴⁸⁹ Even though the law allows alcohol advertising, it introduces a partial ban, which was upheld in court.⁴⁹⁰ The main goal of the law is to protect youth and public health. In essence, two restrictions are introduced, one in relation to media, one in relation to content. Further, one obligation must be complied with, i.e. a display of a health warning⁴⁹¹. Alcohol advertising is prohibited (1) on television, (2) on radio between 5pm and midnight and on Wednesdays, (3) in printed media targeted at kids and teenagers. Alcohol sponsorship is also forbidden. On the other hand, alcohol advertising is allowed (1) in other printed media, on radio between midnight and 5pm, leaflets, posters, billboards, (2) fairs, delivery trucks, merchandising, (3) since 2009, on the Internet, except on websites targeting youth or related

⁴⁸⁵ S. English (2015). New alcohol advertising restrictions came to force in Finland. <http://nordan.org/new-alcohol-advertising-restrictions-came-to-force-in-finland/> accessed 5.10.2015.

⁴⁸⁶ Whereas currently it is set to 9p.m.

⁴⁸⁷ M. Capouet and M. Skar (2014). Réglementations belge et européenne relative à l'offre d'alcool: un comparatif. (Presented at Aanbod Alcohol en maatschappelijke gevolgen 26 September 2014, <http://www.health.belgium.be/eportal/Healthcare/Specialisedcare/drugs/AlcoholAndSocialConsequences/index.htm#.VRVd3U10zIW> accessed 5.10.2015).

⁴⁸⁸ Loi du 10 janvier 1991 relative à la lutte contre le tabagisme et l'alcoolisme, JORF n°10 du 12 janvier 1991, 615, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000344577&categorieLien=id> accessed 28.09.2015.

⁴⁸⁹ P. de Bruyn (2010). Alcohol advertising regulation in France : "la Loi Evine"; EGTA (2011). TV Advertising restrictions & alcohol consumption - Some European case studies. http://www.egta.com/alcohol/documents/tv_ad_restrictions_trends_in_alcohol_consumption_05_11.pdf accessed 28.09.2014.

⁴⁹⁰ I. Johansen (2009). Loi Evine – an advertising ban in the Homeland of Red Wine. Eucam report. Utrecht: EUCAM; CJEU [2004], Case C-262/02 *Commission of the European Communities v France (Loi Evine)* & Case C-429/02 *Bacardi France v Télévision Française TF1 and others*.

⁴⁹¹ P. de Bruyn (2010). Alcohol advertising regulation in France : "la Loi Evine".

to sports. Thus, although rather restrictive, there are significant gaps in the French legislation, for instance in relation to fighting illegal advertising practices on the internet.⁴⁹²

MINORS. Additionally, the French Code de la Santé foresees some restrictions in advertising towards minors. Article L-3323-5 of this Code⁴⁹³ amongst others explicitly forbids to distribute des prospectuses or other objects with the name of an alcoholic drink, brand or name of the producers of such an alcohol drink.

D. Norway

BAN ON ADVERTISING. In Norway, any form of publicity for alcohol on radio or television is prohibited⁴⁹⁴, whether in relation to direct or indirect marketing (such as advertorials). The complete ban on alcohol advertising was upheld in several court decisions in previous years.⁴⁹⁵

E. United Kingdom

OFCOM BROADCASTING CODE. In the United Kingdom, the Ofcom Broadcasting Code contains certain restrictions on the misuse of alcohol in programmes. First of all, the misuse of alcohol must not be featured in programmes made primarily for children unless there is strong editorial justification. Second, it must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification. Finally, alcohol misuse must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under-eighteens unless there is editorial justification.⁴⁹⁶

5.1.3 Tobacco

TOBACCO ADVERTISING. Another industry which spends millions of dollars on advertising is the tobacco industry. Tobacco companies try ever more innovative ways of promoting their products, especially via the internet. In Europe, two main legal instruments apply in relation to tobacco advertising, i.e. (1) the Tobacco Advertising Directive⁴⁹⁷ and (2) the AVMSD containing various clauses on tobacco advertising. Additionally, several countries have already implemented a total or partial ban on tobacco

⁴⁹² C. Drouin (2014). L'encadrement de la publicité alcool en France. Description et retour d'expérience (presented at Aanbod Alcohol en maatschappelijke gevolgen, 26 September 2014, <http://www.health.belgium.be/eportal/Healthcare/Specialisedcare/drugs/AlcoholAndSocialConsequences/index.htm#.VRVd3U10ziW> accessed 1.10.2015).

⁴⁹³ See http://legifrance.gouv.fr/affichCode.do;jsessionid=4E660D922D267924AAA9961A159F57A4.tpdila09v_2?idSectionTA=LEGI_SCTA000006171199&cidTexte=LEGITEXT000006072665&dateTexte=20150327 accessed 1.10.2015.

⁴⁹⁴ EGTA (2011). TV Advertising restrictions & alcohol consumption - Some European case studies. http://www.egta.com/alcohol/documents/tv_ad_restrictions_trends_in_alcohol_consumption_05_11.pdf accessed 28.09.2014; EUCAM (European Center for Monitoring Alcohol Marketing). Legal possibilities of a European wide ban on alcohol advertising'.

⁴⁹⁵ EUCAM (European Center for Monitoring Alcohol Marketing). Legal possibilities of a European wide ban on alcohol advertising. Contrary to Sweden, where the initial ban was mitigated over the years.

⁴⁹⁶ Article 1.10, Section One of the Ofcom Broadcasting Code.

⁴⁹⁷ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance), *OJ L 152*, 16–19. (hereafter Tobacco Advertising Directive).

advertising. This section will briefly touch upon the provisions of the United Kingdom's Ofcom Broadcasting Code dealing with tobacco advertising.

A. Europe

TOBACCO ADVERTISING DIRECTIVE. The Tobacco Advertising Directive regulates the advertising of tobacco products in (1) the media other than television, i.e. in the press and other printed publications, (2) radio broadcasting and (3) information society services. Furthermore, it regulates the sponsorship by tobacco companies of radio programmes and of events or activities involving, or taking place in, several Member States or otherwise having cross-border effects, including the free or discounted distribution of tobacco products. Other forms of advertising, such as indirect advertising, as well as the sponsorship of events or activities without cross-border effects, fall outside the scope of this Directive. Subject to the Treaty, Member States retain the competence to regulate these matters as they deem necessary to guarantee the protection of human health.⁴⁹⁸

In essence, tobacco advertising⁴⁹⁹ in the press and other printed publications⁵⁰⁰ as well as all forms of radio advertising for tobacco products⁵⁰¹ shall be prohibited.

Advertising which is not permitted in the press and other printed publications shall not be permitted in information society services⁵⁰² either.⁵⁰³

SPONSORSHIP. In addition, radio programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products.⁵⁰⁴ Further, sponsorship⁵⁰⁵ of events or activities involving or taking place in several Member States or otherwise having cross-border effects shall be prohibited⁵⁰⁶ as well as any free distribution of tobacco products in the context of the sponsorship of these events having the purpose or the direct or indirect effect of promoting such products.⁵⁰⁷

AVMSD. The AVMSD contains similar provisions on advertising for cigarettes and tobacco products, both in general as well as with regard to specific forms of advertising, such as product placement. Contrary to the provisions for alcoholic beverages, no specific requirements are set forth in the media legislation in relation to television advertising and teleshopping. In general, all forms of audiovisual

⁴⁹⁸ Recital 12 Tobacco Advertising Directive.

⁴⁹⁹ Advertising is defined as 'any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco product'; Article 2 (b) Tobacco Advertising Directive.

⁵⁰⁰ Article 3 (1) Tobacco Advertising Directive foresees an exception, reading as follows: "Advertising in the press and other printed publications shall be limited to publications intended exclusively for professionals in the tobacco trade and to publications which are printed and published in third countries, where those publications are not principally intended for the Community market."

⁵⁰¹ Article 4(1) Tobacco Advertising Directive; Tobacco products are all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco; Article 2 (a) Tobacco Advertising Directive.

⁵⁰² Defined in article 2(d) Tobacco Advertising Directive as follows "services within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services".

⁵⁰³ Article 3(2) Tobacco Advertising Directive

⁵⁰⁴ Article 4(2) Tobacco Advertising Directive.

⁵⁰⁵ 'Sponsorship' is defined as means any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product.

⁵⁰⁶ Article 5(1) Tobacco Advertising Directive.

⁵⁰⁷ Article 5(2) D Tobacco Advertising Directive.

commercial communications for cigarettes and other tobacco products shall be prohibited.⁵⁰⁸ As part of the general provisions for all audiovisual media services,⁵⁰⁹ it applies to all linear and non-linear services. Also, audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.⁵¹⁰ More specifically, programmes shall in any event not contain product placement of tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.⁵¹¹

B. United Kingdom

OFCOM BROADCASTING CODE. The Ofcom Broadcasting Code provides equally general provisions in relation to smoking and under-eighteens. Similarly to the provisions dealing with alcohol advertising, smoking (1) must not be featured in programmes made primarily for children unless there is strong editorial justification, (2) must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification and (3) must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under-eighteens unless there is editorial justification.⁵¹²

5.1.4 Medication

ADVERTISING RESTRICTIONS CONCERNING MEDICINAL PRODUCTS. In addition, there are specific provisions regulating commercial communication concerning medicinal products. More specifically in relation to audiovisual commercial communication, the AVMSD harmonises the rules for the Member states to a certain degree. Aside from the AVMSD, the Community Code at EU level contains certain restrictions which should be kept in mind.

A. Europe

AVMSD. In Europe, the AVMSD contains restrictions on the promotion of medication. First of all, the Directive prohibits audiovisual commercial communication concerning medicinal products and medical treatment, which would only be available on prescription in a certain Member State.⁵¹³ The sponsorship of audiovisual media services or programmes by undertakings that manufacture or sell medicinal products or medical treatment is not prohibited. As such, the name or the image of the undertaking may be used. Conversely, it may not promote specific medication or treatments which are only available on prescription.⁵¹⁴ Aside from rules on sponsorship, the AVMSD explicitly prohibits product placement of specific medicinal products or medical treatments available only on prescription.⁵¹⁵

⁵⁰⁸ Article 9.1. (d) AVMSD.

⁵⁰⁹ Chapter III of the AVMSD.

⁵¹⁰ Article 10, 2 AVMSD.

⁵¹¹ Article 11.4. (a) AVMSD.

⁵¹² Article 1.10. Section 1 Ofcom Broadcasting Code.

⁵¹³ Article 5 (f) AVMSD.

⁵¹⁴ Article 10, 3 AVMSD.

⁵¹⁵ Article 11, 4 (b) AVMSD.

COMMUNITY CODE. Aside from the AVMSD, Directive 2001/83/EC established a Community code relating to medicinal products for human use, which contains specific provisions on advertising of medicinal products. First of all, the Directive stresses that such advertising may not be misleading, but rather must encourage the rational use of the product. The Directive also prohibits the advertising to the general public of medication which (1) are available on prescription only, (2) contain psychotropic or narcotic substances (3) are not intended for use without the intervention of a medical practitioner. Finally, when it comes to children, the Directive contains the following ban:

*bans the inclusion in advertising of medicinal products to the general public of any information which is directed exclusively or principally at children.*⁵¹⁶

5.1.5 Toys

NO HARMONISED APPROACH. Finally, children are confronted daily with advertising concerning toys. At the EU level, there is currently no legislative instrument harmonising the rules concerning toys advertising. However, certain European countries have issued specific provisions defining restrictions for advertising concerning toys.

A. Greece

Greece, for example, prohibits advertising for toys on television between, 07:00 and 22:00 am. Furthermore, Greece has introduced a total ban on war toys (e.g. guns, tanks).⁵¹⁷

B. Sweden

As mentioned, Sweden has introduced a total ban on children's advertising, for children under 12 years of age. Accordingly, this prohibits toy advertising for children under 12.⁵¹⁸

5.1.6 Conclusion

The different national approaches to product-specific advertising aimed at children can lead to a situation where a specific advertisement would be allowed in one Member state, but banned in another. Examples such as commercial messages transmitted via satellite TV, internet-based TV channels, internet content, imported cinema movies, and imported games, videos and entertainment media may all undermine national policies and increase children's exposure to commercial messages.⁵¹⁹ To overcome the legal barriers limiting Member states' ability to restrict marketing from

⁵¹⁶ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l21230> accessed 29 August 2015.

⁵¹⁷ Law 2251/94, Article 14 (8); Peace Pledge Union. *Children and advertising, the European dimension*, http://www.ppu.org.uk/chidren/advertising_toys_eu.html accessed 31.08.2015.

⁵¹⁸ The same reasoning is valid for Norway.

⁵¹⁹ T. Lobstein et al. (2010). Policies on Marketing food and beverages to children. The PolMark Project. http://www.worldobesity.org/site_media/uploads/The_PolMark_Project_Final_Report_Annex_1_FINAL.pdf accessed 5.10.2015.

outside their national jurisdictions, GARDE suggests to reach a multilateral agreement to ensure consistent and adequate protection.⁵²⁰

⁵²⁰ A. Garde (2010). *EU law and obesity prevention*. Alphen aan den Rijn: Kluwer Law International.

CHAPTER 3 – COUNTRY REPORT

BELGIUM

1. Children's Human Rights Law

1.1 National implementation of international and European human rights instruments

INTERNATIONAL PROTECTION AND FUNDAMENTAL RIGHTS. Belgium is a signatory⁵²¹ to the UN Convention on the Rights of the Child and has ratified the Convention on 16 December 1991. As such the Convention is directly applicable in Belgium and is self-executing.⁵²² Furthermore, Belgium is a contracting state to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It ratified the Convention on 14 Jun 1955. As mentioned, with respect to commercial communication aimed at children, two (substantive) human rights are of utmost importance, i.e., the right to freedom of expression and the right to privacy. The right to privacy and more specifically data protection will also be discussed further in section 4 of this chapter.

NATIONAL PROTECTION. Belgium also has national provisions in place, in order to foster the effective protection of children's rights. More specifically, the Belgian Constitution dedicates since the year 2000 a specific provision on children's rights, **Article 22bis**, which explicitly stipulates that:

"every child has the right to respect of his or her moral, physical, mental and sexual integrity".

Furthermore, since December 2008 this article specifies that

*"Any child has the right to **express his opinion** in all matters of concern to him; this opinion will be taken into account in accordance with his age and judgment. Any child has the right to measures and services that advance his development. The **interest of the child** is the first consideration regarding any decision that concerns the child [...]"*

⁵²¹ Signed on 26 January 1990. University of Minnesota. Ratification of International Human Rights Treaties – Belgium, <http://www1.umn.edu/humanrts/research/ratification-belgium.html> accessed 29.08.2015.

⁵²² However, the Belgian courts are divided regarding the actual direct effect of the provisions of the Convention. For an overview of the different interpretations, see K. Herbots and J. Put (2010). De grondwettelijke verankering van kinderrechten. *TJK*, 13.

1.2 National authorities competent for the rights of the child

FEDERAL LEVEL. At the federal level, there is the National Commission on the Rights of the Child.⁵²³ This Commission serves as a platform for governmental and non-governmental organisations, where they can meet to discuss and find solutions for the realisation of children's rights in Belgium. In addition, the Commission advises Federal, Regional and Communities governments on children's rights issues and is responsible for monitoring the follow-up on the advises and observations of the UN Committee on the Rights of the Child (cfr. chapter 2 section 1.1.3).⁵²⁴

COMMUNITY LEVEL. At the Community level, there are two authorities competent for each of their respective communities, i.e. (1) the Children's Rights Commissioner competent for the Flemish Community⁵²⁵ and (2) the General Delegate for the Rights of the Child competent for the French Community⁵²⁶. The task of both authorities is to defend and promote the rights and interests of children.⁵²⁷ More specifically, they have the following competences:

1. to ensure the correct application of legislation concerning children;
2. to recommend to any competent authority in respect of all children related legislative proposals;
3. to receive information, complaints or requests for mediation relating to infringements of the rights of the child.⁵²⁸

In the context of advertising, the Children's Rights Commissioner, for instance, has offered its guidance and opinions already on a number of occasions.⁵²⁹

⁵²³ N. Meurens (2013). Country Report on Belgium for the Study on Member States' Policies for Children with Disabilities, 21.

⁵²⁴ *Ibid.*

⁵²⁵ Children's Rights Commissioner [Kinderrechtencommissaris] for more information see <http://www.kinderrechtencommissariaat.be> accessed 5.10.2015.

⁵²⁶ Delegate General for the Rights of the Child [Délégué Général aux droits de l'enfant] for more information see <http://www.dgde.cfwb.be/> accessed 5.10.2015.

⁵²⁷ N. Meurens (2013). Country Report on Belgium for the Study on Member States' Policies for Children with Disabilities, 21.

⁵²⁸ *Ibid.*

⁵²⁹ For instance Children's Rights Commissioner (2007). Opinion on Children's advertising on radio and television to the Commission for Culture, Youth and Media, http://www.kinderrechtencommissariaat.be/sites/default/files/bestanden/2006_2007_4_advies_reclame_voor_kinderen_op_radio_en_televisie.pdf accessed 5.10.2015; Children's Rights Commissioner (2000). Opinion on advertising and sponsoring in elementary and secondary education, <http://www.kinderrechtencommissariaat.be/advies/reclame-en-sponsoring-het-lager-en-secundair-onderwijs> accessed 5.10.2015.

2. Media Law

MEDIA LAW. The key legal instrument that has facilitated the cross-border circulation of both audiovisual programmes and media services in Europe is the Audiovisual Media Services Directive.⁵³⁰ This Directive requires, by its nature, that Member States implement the provisions into national law. As such, a variety of potentially conflicting rules exists across Europe. In Belgium, the Flemish and French Community Media Decrees⁵³¹ form the basis for the legislation concerning advertising towards children. Similar to the European provisions, these decrees first of all contain a set of more general provisions in relation to commercial communication and advertising. In addition, the decrees provide for product-specific requirements, for instance in relation to alcoholic beverages, toys and food. For this country report, we will focus on the provisions of the Flemish and French Community Media Decree.⁵³²

ROADMAP. This section of the deliverable provides an overview of the most important provisions of the national implementations of the European audiovisual media legislation. It focuses first on the general principles of the national legislation and then studies the provisions specifically aimed at the protection of minors. Finally, this section touches upon the specific provisions that regulate new advertising formats.

2.1 General principles for audiovisual commercial communication

TWO COMMUNITIES, TWO DECREES. In Belgium, the **identification and separation principles** of articles 9 and 19 AVMSD have been implemented in both the media decrees of the Flemish and French Community.⁵³³

⁵³⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ L 95*, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013> (hereinafter cited as the AVMSD).

⁵³¹ There is also a German Community Media Decree. For the present study, we will not go into detail on this decree.

⁵³² For more information on the European legislative instruments that have been implemented in the Belgian provisions contained in this country report, see V. Verdoodt, E. Lievens and L. Hellemans (2015). Mapping and analysis of the current legal framework of advertising aimed at minors. A report in the framework of the AdLit research project. Document accessible at www.AdLit.be.

⁵³³ For more information on the EU legislation, see chapter 2, section 2.1.2 *Ibid*.

2.1.1 The Flemish Community Media Decree

A. The principle of identification

THE PRINCIPLE OF IDENTIFICATION. In Flanders, the Decree of 27 March 2009 of the Flemish Community on radio and television (*Decreet betreffende radio-omroep en televisie*) has translated the provisions of articles 9 AVMSD rather literally in [article 53](#)⁵³⁴ stating that

*Commercial communication and public service announcements must be **easy to identify** as such.*

Furthermore, specifically in relation to television advertising, [article 79](#) of the Flemish Media Decree determines that Television advertising, excluding self-promotion, and teleshopping should be clearly identifiable and should be easy to differentiate from editorial content.

B. The principle of separation

THE PRINCIPLE OF SEPARATION. Specifically for television advertising and teleshopping⁵³⁵ [article 79](#) of the Flemish Media Decree (implementing article 19 AVMSD) further specifies that:

*Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be **kept quite distinct** from other parts of the programme by visual and/or acoustic and/or spatial means.*

The goal of this principle is to guarantee the editorial integrity of television programmes and to keep television advertising and teleshopping separate from other parts of the programme service.⁵³⁶

C. The Flemish Community Regulator

THE FLEMISH COMMUNITY AND ITS REGULATOR. In the Flemish Community, the Flemish Regulator for the Media (Vlaamse Regulator voor de Media, hereafter “VRM”) supervises compliance with the provisions of the Flemish Community Media Decree.⁵³⁷ Within the VRM, a specific chamber composed of experts

⁵³⁴ Article 53 of the Belgian Decree of 27 March 2009 of the Flemish Community on radio and television, *BS.*, 30 April 2009 (hereafter “Media Decree of the Flemish Community”); as follows “*Commerciële communicatie en boodschappen van algemeen nut moeten gemakkelijk als zodanig herkenbaar zijn*” en article 79 states “*§ 1. Televisiereclame, zelfpromotie uitgezonderd, en telewinkelen moeten duidelijk herkenbaar zijn en moeten kunnen worden onderscheiden van redactionele inhoud. Zonder afbreuk te doen aan het gebruik van nieuwe reclametechnieken, moeten reclame en telewinkelen met visuele en/of akoestische en/of ruimtelijke middelen van andere onderdelen van het programma worden gescheiden*”, <http://www.vlaamseregulatormedia.be/sites/default/files/mediadecreet.pdf> accessed 5.10.2015.

⁵³⁵ It is only applicable to linear audiovisual media services, there is no corresponding provision for on-demand services.

⁵³⁶ L. Hellemans, E. Lievens, P. Valcke (2015). Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats. *info*, Vol. 17 Iss 6, 19 – 34.

⁵³⁷ Article 215 et seq. Media Decree of the Flemish Community.

in child-related matters oversees impartiality and the protection of minors⁵³⁸ and is subject to a set of specific procedural rules.⁵³⁹

RULINGS RELATED TO TRADITIONAL TELEVISION ADVERTISING. Rulings of the VRM concerning the identification and separation principles are often related to traditional television advertising.⁵⁴⁰ In those cases, the VRM considered *inter alia* the following practices to be insufficient to comply with the obligation of distinguishing between commercial and editorial content:

- using bumpers that are too short (less than 2 s);
- not mentioning the word “RECLAME” (“ADVERTISING”) on the bumper;
- visually interweaving bumpers with a subsequent advertising spot
- not showing end bumpers or using a countdown clock in the margin of the screen including an announcement of the next programme.⁵⁴¹

Moreover, in March 2015, the VRM issued an opinion on the implementation of the principle related to the distinction between editorial and commercial content.⁵⁴² After consulting with the Flemish television broadcasters, the VRM established a number of concrete guidelines. Regarding the “**start bumper**”, two options are identified: (1) either the “start bumper” is shown for a minimum duration of 5 s, or (2) the “start bumper” is shown for a minimum duration of 2 s accompanied by the word “RECLAME” (“ADVERTISING”) in a size which is easily readable for an average viewer. In both cases the bumper must be shown in a “screen-filling” manner, meaning that the screen is completely filled, without using “wipes” within the duration of 5 or 2 s. Furthermore, the VRM clarifies that there is no clear distinction between editorial and commercial content in case the start bumper is incorporated in the editorial content or the advertising spot, or in case the start bumper contains a sponsor message.⁵⁴³ The “**end bumper**” must be shown for a minimum duration of 2 s, also in a screen-filling manner, without using wipes. It is not required to mention the word “RECLAME” (“ADVERTISING”), but if the end bumper is incorporated in the editorial content or the advertising spot, or if it contains a sponsor message, it will not comply with the distinction principle.

RULINGS RELATED TO HYBRID ADVERTISING FORMATS. A number of rulings, however, relate to hybrid advertising formats, such as the so-called “editorially camouflaged advertisements”, **infomercials** or “publireportages”. To the extent infomercials are qualified as television advertising, according to the VRM, they need to be broadcasted within the regularly announced advertising blocks, and the appropriate bumpers need to be foreseen.⁵⁴⁴ The use of a preceding bumper mentioning

⁵³⁸ Article 216 §3, 1° and 2° Media Decree of the Flemish Community; ° two experts with at least five years of professional experience in the fields of child psychology, child psychiatry or education; 2° two experts who are involved in the interests of families and children.

⁵³⁹ Article 216 §2 Media Decree of the Flemish Community

⁵⁴⁰ L. Hellemans, E. Lievens, P. Valcke (2015). Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats. *info*, Vol. 17 Iss 6, 19 – 34

⁵⁴¹ *VRM v. SBS Belgium*, 2015/038, 11 May 2015; *VRM v. Mediaaan*, 2015/039, 11 May 2015.

⁵⁴² Vlaamse Regulator voor de Media (2015). Opinion VRM: Distinction advertising – editorial content [Standpunt VRM: Onderscheid reclame – redactionele inhoud] <http://www.vlaamseregulatormedia.be/nl/nieuws/2015/standpunt-vrm-onderscheid-reclame-redactionele-inhoud> accessed 6.10.2015.

⁵⁴³ L. Hellemans, E. Lievens, P. Valcke (2015). Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats. *info*, Vol. 17 Iss 6, 19 – 34

⁵⁴⁴ *VRM v. VZW Niet-openbare televisievereniging Brussel*, 2014/136, 12 May 2014; *VRM v. NV SBS Belgium*, decision 2014/005, 24 February 2014; *VRM v. BVBA Actua TV*, decision 2011/031, 21 November 2011; *VRM v. VZW Antwerpse Televisie*, decision 2011/022, 17 October 2011; *VRM v. VZW Niet-openbare televisievereniging Brussel*, 2014/136, 12 May 2014.

‘publireportage’⁵⁴⁵ or ‘infomercial’⁵⁴⁶ is not sufficient to ensure their readily recognisable and distinctive character. It indeed may confuse the viewer, given the clear promotional intent of the “reportage”. The viewer may also be confused if various advertising bumpers are broadcast, suspending the advertising block.⁵⁴⁷ To the extent the word “publireportage” is used to indicate the nature of the spot, this indication needs to be clear and recognisable.⁵⁴⁸ Another case concerned a presenter who verbally invited viewers to surf to a website. The URL was visually displayed on the screen, directing the viewer to a website which offers softcore and hardcore erotic content in return for payment.⁵⁴⁹ According to the VRM, this should be considered advertising, and, hence, this should be indicated by visual, acoustic or spatial means, which was not the case. In case of non-compliance, the VRM imposed a warning⁵⁵⁰ or a financial penalty.⁵⁵¹

2.1.2 The French Community Media Decree

A. The identification and separation principles

TWO PRINCIPLES, ONE ARTICLE. The Decree of the French Community does not foresee a specific clause in relation to television advertising, but bundles both the identification and separation principle in one and the same article on commercial communication. More specifically, [article 14](#) defines that

*La communication commerciale doit être **aisément identifiable** comme telle. Elle doit être nettement **distincte** des autres programmes ou séquences de programme grâce à des moyens optiques ou acoustiques clairement identifiables.*

SPLIT-SCREEN ADVERTISING. In addition, it provides for a repetition of the identification principle in relation to a specific new form of commercial communication, namely split-screen advertising. According to [article 27 quarter, 5°](#) of this Decree, commercial communication by means of split-advertising needs to be easily identifiable as such by a spatial separation with the programme by means of the appropriate optical means.⁵⁵² Also, the space used for this commercial communication needs to be reasonable and enable the viewer to continue viewing the programme.⁵⁵³

⁵⁴⁵ VRM v. NV SBS Belgium, decision 2014/005; 24 February 2014; VRM v. NV Vlaamse Media Maatschappij, decision 2013/106-109, 28 October 2013; VRM v. NV Media Ad Infinitum, decision 2013/13, 16 September 2013.

⁵⁴⁶ VRM v. NV Medialaan, decision 2014/036, 14 July 2014.

⁵⁴⁷ VRM v. NV Media Ad Infinitum, decision 2013/13, 16 September 2013; VRM v. NV Vlaamse Media Maatschappij, decision 2013/106, 28 October 2013.

⁵⁴⁸ VRM v. NV Vlamex, 2014/028, 16 June 2014.

⁵⁴⁹ VRM v. VZW Antwerpse Televisie, decision 2011/022, 17 October 2011; VRM v. NV Vlamex, decision 2014/028, 16 June 2014.

⁵⁵⁰ VRM v. NV Medialaan, decision 2014/036, 14 July 2014; VRM v. VZW Niet-openbare televisievereniging Brussel, 2014/136, 12 May 2014; ; VRM v. NV SBS Belgium, decision 2014/005, 24 February 2014; VRM v. NV Vlaamse Media MAATSCHAPPIJ, decision 2013/106, 28 October 2013; VRM v. NV Media Ad Infinitum, decision 2013/13, 16 September 2013; VRM v. NV Life! TV Broadcasting Company, decision 2013/07, 22 April 2013; VRM v. BVBA Actua TV, decision 2011/031, 21 November 2011.

⁵⁵¹ VRM v. VZW Antwerpse Televisie, decision 2011/022, 17 October 2011; VRM v. NV Vlamex, decision 2014/028, 16 June 2014.

⁵⁵² Article 27 quarter, 4° Media Decree of the French Community.

⁵⁵³ Article 27 quarter, 5° Media Decree of the French Community.

B. The French Community Regulator

THE FRENCH COMMUNITY AND ITS REGULATOR. In the French Community, the Conseil Supérieur de l'Audiovisuel ("CSA") carries the responsibility to oversee compliance with the French Community Media Decree.⁵⁵⁴

2.2 Protection of minors in Belgian media law

2.2.1 Protection of minors from unsuitable and harmful audiovisual content

LINEAR SERVICES. Similar to article 27 AVMSD, a specific provision is foreseen in the Flemish media decree in relation to television broadcasting to children.⁵⁵⁵

In essence, linear television broadcasters may not broadcast any programmes⁵⁵⁶ which could cause serious detriment to the physical, mental or moral development of minors, in particular, programmes containing pornographic scenes or unnecessary violence.

This provision shall extend to other programmes⁵⁵⁷ or series of programmes,⁵⁵⁸ in particular the announcements⁵⁵⁹, which are likely to cause detriment to the physical, mental or moral development of minors. In respect to linear-services, it needs to be ensured, by selecting the time of the broadcast or by any technical measure⁵⁶⁰, such as an access code⁵⁶¹ that minors in the service area will not normally hear or see such broadcasts. The French Community Media Decree additionally requires this type of programmes to be identified by a visual symbol in the electronic programme guide to the extent such a programme guide exists and, to the extent there is no access code, that this programme is preceded by an acoustic warning or identified by the presence of a visual symbol emitted throughout the broadcasting.⁵⁶² Should such programmes be broadcasted unencrypted, they need to be preceded by an acoustic warning or must be recognisable for the duration of the broadcast with a visual symbol.

ON-DEMAND SERVICES. Non-linear television broadcasters will make the on-demand services that they provide, which may be seriously detrimental to the physical, mental or moral development of minors available in such a way that minors will not usually hear or see such on-demand television services.⁵⁶³ Similar to linear services, the French Community Decree requires an **access code** as well as the identification by a visual symbol in the electronic programme guide.⁵⁶⁴

⁵⁵⁴ <http://www.csa.be>; articles 130 et seq. Media Decree of the French Community.

⁵⁵⁵ Article 42 Media Decree of the Flemish Community.

⁵⁵⁶ The same applies to the announcements of programmes which are broadcast by linear television broadcasters.

⁵⁵⁷ Article 42 Flemish Media Decree.

⁵⁵⁸ Article 9 Decree of the French Community; Het Besluit van de Regering van de Franse Gemeenschap van 26 maart 2009 houdende coördinatie van het decreet betreffende de audiovisuele mediadiensten en het decreet van de Franse Gemeenschap van 30 april 2009 houdende bekrachtiging van het besluit van de Regering van de Franse Gemeenschap van 26 maart 2009, *BS*, 24 juli 2009.

⁵⁵⁹ Article 9 Media Decree of the French Community; Article 42 Flemish Media Decree.

⁵⁶⁰ Article 9 (a) Media Decree of the French Community; Article 42 Flemish Media Decree.

⁵⁶¹ Article 9 Media Decree of the French Community.

⁵⁶² Article 9 (a) Media Decree of the French Community.

⁵⁶³ Article 45 AVMSD.

⁵⁶⁴ Article 9 (2) Media Decree of the French Community.

EXCEPTIONS. The two Communities can further determine the modalities in relation to these exceptions, i.e. as regards the use of certain images and signals when showing programmes that can be detrimental to children and young people, designating for which age category they are suited⁵⁶⁵ or, to the extent use is made of an access code, the obligations to which the service providers are subject to ensure the effectivity of the mentioned exceptions.⁵⁶⁶

2.2.2 Protection of minors in relation to audiovisual commercial communication

A. Protections common to both Media Decrees

RULES GOVERNING COMMERCIAL COMMUNICATION AIMED AT MINORS. The legislators reserved a specific section for commercial communication aimed at minors, young people and children in both decrees⁵⁶⁷, applicable to commercial communication broadcast on television, including teletext.⁵⁶⁸ These provisions contain certain general rules but also refer to values such as minors' dignity and social responsibility. In principle,

*commercial communication aimed at children and young people has to be **clearly recognisable** as such to them.*⁵⁶⁹

Furthermore, these commercial communications may not cause any physical or moral detriment to minors. More specifically, such communications may not do the following⁵⁷⁰:

ARTICLE	RESTRICTIONS FOR COMMERCIAL COMMUNICATION AIMED AT MINORS
Article 72, 1° Flemish Decree; Article 13, 1° Decree of the French Community	directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity;
Article 72, 2° Flemish Decree; Article 13, 3° Decree of the French Community	directly encourage them to persuade their parents or others to purchase the goods or services being advertised;
Article 72, 3° Flemish Decree; Article 13, 4° Decree of the French Community	unreasonably show minors in dangerous situations;
Article 72, 4° Flemish Decree; Article 13, 3° Decree of the French Community	exploit the special trust minors place in parents, teachers or other persons;
Article 72, 5° Flemish Decree	contain pornographic content or scenes of unnecessary violence.

Table 8: Restrictions for commercial communication aimed at minors in the Communities' Media Decrees.

⁵⁶⁵ The Flemish government; Article 43 AVMSD.

⁵⁶⁶ Article 9, last paragraph Media Decree of the French Community.

⁵⁶⁷ Section IV Media Decree of the Flemish Community;

⁵⁶⁸ Article 70 Media Decree of the Flemish Community.

⁵⁶⁹ Article 71 Media Decree of the Flemish Community.

⁵⁷⁰ Article 72 Media Decree of the Flemish Community.

B. Additional protection provided by the Flemish Community Media Decree

SENSE OF SOCIAL RESPONSIBILITY. Moreover, commercial communication for children and young people has to be created with the necessary sense of social responsibility so that it does not undermine positive social behaviour, lifestyles and attitudes.⁵⁷¹ It may not represent violence, trivialise, tolerate, idealise or encourage or show antisocial or reprehensible behaviour or encourage it.⁵⁷² Furthermore, it may not undermine the authority, responsibility or judgment of parents and educators, taking into account social and cultural values.⁵⁷³

RESPECT FOR CHILDREN'S DIGNITY. Commercial communication for children and young people also has to respect children and young people's dignity and may not portray them in such a way that their physical or moral integrity is violated or endangered.⁵⁷⁴ Feelings of fear or unease may not be elicited from children and young people.⁵⁷⁵ Furthermore, it may not contain texts or visual representations, which could cause mental, moral or physical detriment to children and young people or which could incite them to act dangerously or find themselves in dangerous situations, which can seriously endanger their health or safety or condone this type of behaviour.⁵⁷⁶

RESPECT FOR SAFETY RULES. Aside from the rules mentioned above, commercial communication may not discourage children and young people from following the established safety rules. Special attention in this regard should be paid to: (1) traffic safety with children and young people as pedestrians, cyclists or passengers, (2) domestic situations, (3) medicinal products and chemical products, (4) dangerous equipment, fire, matches, (5) playing in or near water.⁵⁷⁷

NO DECEPTION. In addition, the Flemish Media Decree stresses that commercial communication for children has to correctly represent the possibilities and characteristics of the product portrayed in the commercial communication, so that children can certainly not be misled as to any of these attributes.⁵⁷⁸ More specifically, commercial communication may not mislead children regarding (1) the attributes, the dimensions, the value, the nature, the lifecycle or performance of the product; (2) the results that can be achieved with the product; (3) the effects on health; (4) the degree of dexterity or the age required for the use of the product.⁵⁷⁹ When it comes to the use of fantasy, including animation, such practice would be allowed in commercial communication for children, as long as it does not mislead children about the real attributes of the product concerned.

NO CLAIMED BENEFITS. Finally, commercial communication for children may not pretend that the ownership or use of a given product will give them a benefit compared to other children, nor that the fact that they do not own a given product will result in the opposite. Indeed, it may not state that children who do not own the product are inferior or less popular. Furthermore, it may not minimise

⁵⁷¹ Article 73 § 1 Media Decree of the Flemish Community.

⁵⁷² Article 73 § 2 Media Decree of the Flemish Community.

⁵⁷³ Article 73 § 3 Media Decree of the Flemish Community.

⁵⁷⁴ Article 74 §1 Media Decree of the Flemish Community.

⁵⁷⁵ Article 74 §2 Media Decree of the Flemish Community.

⁵⁷⁶ Article 74 §3 Media Decree of the Flemish Community.

⁵⁷⁷ Article 74 § 4 Media Decree of the Flemish Community.

⁵⁷⁸ Article 75 §1 Media Decree of the Flemish Community.

⁵⁷⁹ Article 75 §2 Media Decree of the Flemish Community.

the price of the product offered, nor may it suggest that the product offered is within range of every family budget.⁵⁸⁰

C. Additional protection provided by the French Community Media Decree

PROVISIONS REGULATING NEW ADVERTISING FORMATS. Whereas the Flemish Media Decree remains silent on new advertising formats, the Media Decree of the French Community has introduced new **articles 27 bis, ter and quater** explicitly handling interactive communication, virtual advertising techniques and split screen advertising. These articles form part of a new section, grouping rules on new forms of ‘commercial communication’, as such being applicable on linear and non-linear services.⁵⁸¹ The main provisions can be summarised as follows:

- 1) To the extent the editor⁵⁸² makes use of **interactive commercial communication**, the user needs to be informed on the transition to the interactive commercial environment by optic and acoustic means to ensure he can decide freely and with knowledge.
- 2) **Virtual advertising** is forbidden, except in case of direct or extend transmission of sporting competitions and under specific conditions.⁵⁸³ The service provider needs, a.o. to inform the viewers on the use of such virtual publicity⁵⁸⁴, ensure that the publicity does not alter the quality of the programme⁵⁸⁵ and only insert this publicity on surfaces which are usually used for advertising.⁵⁸⁶ Also, virtual advertising may not be inserted in television journals.⁵⁸⁷
- 3) **Split-screen advertising** is explicitly forbidden in children’s programmes.⁵⁸⁸ Aside from this, it is allowed under certain conditions⁵⁸⁹, such as it may (1) only contain advertising or self-promotion,⁵⁹⁰ (2) not be used during television journals, actuality programmes, the broadcasting of religious or secular services, religious or moral non confessional programmes and children’s programmes⁵⁹¹ and (3) needs to be inserted in a specific manner, i.e. in the end title and in the natural breaks of sport events when repeated (direct or extended).⁵⁹² The identification principle is explicitly inserted by mentioning that the commercial communication by means of split-advertising needs to be easily identifiable as such by a spatial separation with the programme by means of the appropriate optical means.⁵⁹³ Also, the space used for this commercial communication needs to be reasonable and enable the viewer to continue viewing the programme.⁵⁹⁴ For interactive, virtual and split-screen advertising, there could be limits to the amount and duration of showing these messages.⁵⁹⁵

⁵⁸⁰ Article 76 Media Decree of the Flemish Community.

⁵⁸¹ Section IV bis.

⁵⁸² Éditeur de service.

⁵⁸³ Article 27 ter Media Decree of the French Community.

⁵⁸⁴ Article 27 ter, 10° Media Decree of the French Community.

⁵⁸⁵ Article 27, ter, 1° Media Decree of the French Community.

⁵⁸⁶ Article 27 ter, 2° Media Decree of the French Community.

⁵⁸⁷ Article 27 ter, 9° Media Decree of the French Community.

⁵⁸⁸ Article 27 quater, 2° Media Decree of the French Community.

⁵⁸⁹ Article 27 quater Media Decree of the French Community.

⁵⁹⁰ Article 27 quater, 1° Media Decree of the French Community.

⁵⁹¹ Article 27, 2° quater Media Decree of the French Community.

⁵⁹² Article 27 quater, 3° Media Decree of the French Community.

⁵⁹³ Article 27 quater, 4° Media Decree of the French Community.

⁵⁹⁴ Article 27 quater, 5° Media Decree of the French Community.

⁵⁹⁵ By the Government of the French Community Article 27 bis, article 27 ter, in fine and article 27 quater in fine Media Decree of the French Community.

2.2.3 Specific provisions limiting the amount of marketing to children

RESTRICTIONS ON COMMERCIAL COMMUNICATION IN CHILDREN'S PROGRAMMES. Besides the more general provisions on the protection of minors, both media decrees contain certain specific restrictions on commercial communication. First of all, when it comes to children's programmes, no teleshopping, self-promotion or advertising may be inserted.⁵⁹⁶ Also prohibited in such programmes are product placement⁵⁹⁷ and sponsoring⁵⁹⁸. Finally, the French Community Media Decree explicitly forbids split screen advertising during children's programmes.⁵⁹⁹

2.3 Concluding remark

SELF-REGULATORY BODY FOR ADVERTISING. Finally, it is noteworthy that Belgium also has a self-regulatory body for advertising, i.e. the Jury for Ethical Practice in Advertising ("JEP"). This enforcement mechanism will be discussed in detail in the second legal deliverable of the AdLit Project, which deals with self- and co-regulation, minors and advertising.

⁵⁹⁶ Article 18 § Media Decree of the French Community.

⁵⁹⁷ Article 21 Media Decree of the French Community.

⁵⁹⁸ Article 24, 10° Media Decree of the French Community (in the RTBF and on the local televisions).

⁵⁹⁹ Article 27 quater Media Decree of the French Community.

3. Consumer Protection Law

IN LINE WITH EUROPEAN LEGISLATION. The Belgian consumer protection rules can be mainly found in Title VI of the Code of Economic Law, i.e. Market practices and consumer protection.⁶⁰⁰ Title VI of the Code of Economic Law sets out key principles in relation to consumer protection, in line with European consumer protection legislation, to be followed by vendors, merchants and marketers.⁶⁰¹ These principles generally do not make any distinction between the age of the consumer and as such, apply to adults as well as children. Furthermore, the Code provides certain provisions specifically applicable to children, in particular in relation to aggressive trade practices. Aside from this, the rules in relation to information society services (e-commerce law) can be found in Title XII of the Code of Economic Law.

FOCUS OF THIS SECTION. The provisions in relation to consumer practices are extensive. For this report, we only focus on the provisions relevant for our study, which relate to (1) comparative advertising, (2) unfair commercial practices towards consumers⁶⁰² and (3) the e-commerce legislation. We also pay attention to the sanctions in case of non-compliance of the described provisions.

3.1 Comparative advertising

DEFINITION. Comparative advertising is each advertisement in which a competitor or the products or services the latter offers are explicitly or implicitly mentioned. The internet opens up significant possibilities for comparative advertising. For instance, by means of a hyperlink, a seller can easily compare its products or services and the related prices with these offered by a competitor, inciting consumers to choose for his products or services.⁶⁰³

CONDITIONS. In general, comparative advertising is allowed under strict conditions which aim at safeguarding the following (1) advertisers need to make sure that their advertising complies with the principles of fairness towards consumers and (2) commercial messages may not mislead the consumer.⁶⁰⁴ Article VI 17 of the Belgian Code of Economic Law ("BCEL") sums up eight conditions, which need to be strictly adhered to. As such, comparative advertising:

ARTICLE	CONDITION
Article VI. 17 §1, 1° BCEL	may not mislead ⁶⁰⁵
Article VI. 17 §1, 2° BCEL	compares products or services that serve similar needs or have the same goal

⁶⁰⁰ Boek VI, Wetboek van Economisch Recht, inserted on 21 december 2013, in effect 31 May 2014

http://economie.fgov.be/nl/binaries/WER_Boek_6_tcm325-256636.pdf; the original law is the Wet op de Handelspraktijken van 14 juli 1971, BS, 30 July 1971, in effect since 29 February 1992, modified by the law of 5 July 2007 incorporating the European Directive on unfair commercial practices in Belgian law and modified by the Wet betreffende marktpraktijken en consumentenbescherming, BS, 12 april 2010;

⁶⁰¹ Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 155.

⁶⁰² For this study, we do not go into detail on the section unfair commercial practices towards non-consumers.

⁶⁰³ E. Montero (2007). La publicité sur l'internet: principes juridiques et applications. Les pratiques du commerce électronique. *Cahiers du CRID*. Brussel: Bruylant, 23.

⁶⁰⁴ Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 156.

⁶⁰⁵ Reference is made to articles VI. 97 to VI. 100 and article VI.105, 1° of the code of Economic Law, as mentioned below.

Article VI. 17 §1, 3° BCEL	compares in an objective manner one or more substantial, relevant, measurable ad representative characteristics of such products or services, including the price
Article VI. 17 §1, 4° BCEL	does not lead to the fact that, amongst companies, the advertisers or its brands, trade names or other distinctive characteristics, products or services, are confused with these of a competitor
Article VI. 17 §1, 5° BCEL	does not damage the good name or speaks derogatory on the brands, trade names and other distinctive characteristics , products, services, activities or circumstances of a competitor
Article VI. 17 §1, 6° BCEL	for products with a denomination of origin in each case relates to products with a similar denomination
Article VI. 17 §1, 7° BCEL	for products with a denomination of origin in each case relates to products with a similar denomination
Article VI. 17 §1, 8° BCEL	does not present products or services as an imitation or fake of products or services with a protected trade mark or trade name

Table 9: Conditions for comparative advertising in Belgian law

To the extent these conditions are not fulfilled simultaneously, comparative advertising is forbidden.⁶⁰⁶ However, it is important to note that these conditions only need to be fulfilled between competitors. To the extent reference is made to products or services of a company not being qualified as a competitor, these conditions do not need to be fulfilled, since this type of advertising does not qualify as comparative advertising.⁶⁰⁷

3.2 Unfair commercial practices towards consumers

NATIONAL IMPLEMENTATION. Similar to European legislation, under Belgian law, unfair⁶⁰⁸ commercial practices are forbidden.⁶⁰⁹ Unfair commercial practices towards consumers can be grouped in three categories, depending on the extent they breach consumer rights: (1) unfair⁶¹⁰ commercial practices, (2) misleading commercial practices⁶¹¹ and (3) aggressive⁶¹² commercial practices. In general, the provisions are a mere copy of the provisions set forth in the European Unfair Commercial Practices Directive.⁶¹³

DEFINITIONS. Before continuing our analysis, two definitions under the Belgian law are relevant: (1) a commercial practice and (2) advertising. First of all, a commercial practice can be any act, omission, course of conduct or commercial communication, including advertising and marketing, of a company,

⁶⁰⁶ Article VI. 17 §2 Code of Economic Law.

⁶⁰⁷ Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 158.

⁶⁰⁸ Article VI.95 Code of Economic Law.

⁶⁰⁹ Article VI.94 Code of Economic Law.

⁶¹⁰ Article VI.93 Code of Economic Law.

⁶¹¹ Article VI.97 Code of Economic Law.

⁶¹² Article VI.101 Code of Economic Law.

⁶¹³ For more information on the EU legislation, see chapter 2, section 3.1.2 V. Verdoodt, E. Lievens and L. Hellemans (2015). Mapping and analysis of the current legal framework of advertising aimed at minors. A report in the framework of the AdLit research project. Document accessible at www.AdLit.be.
Ibid.

that directly relates to the promotion, sale or delivery of a product.⁶¹⁴ Thus, commercial practices relate - amongst others - to commercial communication or advertising. Furthermore, advertising is defined broadly as any communication which directly or indirectly aims at improving the sale of products, regardless of the place or means of communication.⁶¹⁵

2.2.1 Unfair commercial practices

UNFAIR COMMERCIAL PRACTICE. A commercial practice is an unfair practice if it (1) is contrary to the requirements of professional diligence⁶¹⁶ and (2) materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.⁶¹⁷ As such, two conditions need to be fulfilled simultaneously. Firstly, **professional diligence** means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.⁶¹⁸ Secondly, to **materially distort the economic behaviour of consumers** means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. The latter implies only these commercial practices that have a significant influence on the consumer's decision. As such, more general advertising practices, aiming at influencing the consumer's perception of a product or a service but not change his purchasing behaviour, are not subject to this provision.⁶¹⁹

AVERAGE CONSUMER. A consumer is an average, reasonable informed consumer, in line with jurisprudence. In relation to advertising indeed, one needs to take into account the 'overall impression of a consumer'. The consumer does not analyse the commercial message as an autonomous element, disconnected of each social context, but situates it in the overall picture of information which, to the extent known to him, relates to the promoted product. The observance of the advertising is thus connected with the common view on the product in question.⁶²⁰

LEVEL OF DISCERNMENT. However, the critical view and the 'level of discernment' of a consumer need to be taken into account.⁶²¹ Specific attention is paid to commercial practices likely to materially distort the economic behaviour only of vulnerable consumers, i.e. a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. These practices shall be assessed from the perspective of the average member of that group.⁶²²

⁶¹⁴ Article I.8, 23° Code of Economic Law.

⁶¹⁵ Article I.8, 23° Code of Economic Law.

⁶¹⁶ Article VI.93 (a) Code of Economic Law.

⁶¹⁷ Article VI.93 (b) Code of Economic Law.

⁶¹⁸ As defined in article 2°23 Code of Economic Law.

⁶¹⁹ *Parl. St. Kamer*, 2006-2007, nr. 2983/001, p. 14; Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 161.

⁶²⁰ Brussels, 9 May 1989, *R.D.C.*, 1990, 240.

⁶²¹ Kh. Luik (voorz.), 9 November 1992, *Ing. Cons.*, 1994, 380.

⁶²² Article VI.93 (b) second sentence, Code of Economic Law.

Nevertheless, even for vulnerable groups it is allowed to make use of exaggerations or declarations that do not have to be interpreted literally.⁶²³

2.2.2 Misleading commercial practices

DEFINITION. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to a set of elements⁶²⁴ (such as the nature of the product⁶²⁵ the price of the product⁶²⁶ and the most important characteristics of the products⁶²⁷) and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.⁶²⁸

ASSESSMENT CRITERIA. As such, the assessment criteria to qualify a commercial practice as misleading are much stricter than those to qualify as an unfair commercial practice, since it uses the words ‘causes or is likely to cause him to take a transactional decision’. Rather than focusing on the economic behaviour, the end result is stressed.⁶²⁹

BLACKLIST. Although article VI.97 provides an extensive overview of misleading practices, we only withhold two for our study, i.e.

- 1) Practices using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (**misleading commercial practices**)⁶³⁰
- 2) An invitation for purchase⁶³¹ to the extent certain crucial information is missing, such as for the main characteristics of the product, the geographical address of the company, the price, the delivery method and the right to revoke or annul the purchase.⁶³² In this case, the practice is to be considered as a **misleading omission**, which is also forbidden.⁶³³ The latter is in particular important given the new technologies. The use of hyperlinks leave the possibility to surf from an ordinary advertising message to a full-fledged on-line catalogue and place orders and as such, the advertising message may be considered as an invitation to purchase with the obligation to mention certain crucial information.⁶³⁴

⁶²³ Such as ‘the best, the most beautiful, whiter than white’ Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 162.

⁶²⁴ Article VI. 97 Code of Economic Law.

⁶²⁵ Article VI. 97, 1° Code of Economic Law.

⁶²⁶ Article VI. 97, 4° Code of Economic Law.

⁶²⁷ Article VI. 97, 2° Code of Economic Law.

⁶²⁸ Article VI.97 Code of Economic Law.

⁶²⁹ Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 163.

⁶³⁰ Article VI.100, 11°, Similar to Annex 1, point 11 of the Unfair Commercial Trade Practices Directive.

⁶³¹ Which is defined as means 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

⁶³² Article VI. 99 § 4 Code of Economic Law; Annex 1 to the Code foresees ‘Modelinstructies voor herroeping, annex 2 a ‘Modelformulier voor herroeping’.

⁶³³ Article VI. 99 Code of Economic Law.

⁶³⁴ *Parl. St. Kamer* 2006-2007, nr. 2983/001, 16; Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 165-166.

2.2.3 Aggressive commercial practices

DEFINITION. A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise⁶³⁵

BLACKLIST. For the relevance of this study, we withhold one aggressive practice, explicitly listed in the Code, i.e. practices which include in an advertisement a **direct exhortation to children** to buy advertised products or persuade their parents or other adults to buy advertised products for (aggressive commercial practices).⁶³⁶

2.2.4 Enforcement

TWO ENFORCEMENT MECHANISMS. In Belgium, there are two different enforcement mechanisms, (1) filing a complaint before an administrative body and (2) bringing a claim before the courts. The Directorate General Control and Mediation (ADCB)⁶³⁷ is the administrative body competent for receiving administrative complaints, which can be filed by every natural or legal person without the need to prove a legitimate interest. Secondly, there is the possibility of a specific cease-and-desist procedure before the President of the Commercial Court for infringements on any commercial practices.⁶³⁸ In addition, a claim for civil damages could be filed before the competent civil court. In this regard, the applicant will have to provide evidence of a direct and legitimate interest.

POTENTIAL OUTCOMES OF A CIVIL PROCEDURE. There are several potential outcomes of a civil procedure. First of all, the court can order the cessation of the alleged infringement. Second, the president of the commercial court can take **preventive measures**, i.e. before the practice was made public. Third, the consumer may request the reimbursement of the sum paid by him, without restitution of the delivered product in case of certain unfair commercial practices. In case of an unsolicited delivery of products, this sanction must be applied automatically (hence, without the consumer being required to request this sanction). Aside from this, the competent civil court can award **damages**.⁶³⁹ These damages, however, should rather be interpreted as indemnifying measure than as sanctions. As is the case for most civil procedures under Belgian law, the Court can also order coercive civil fines, in order to ensure compliance.

⁶³⁵ Article VI.101 Code of Economic Law.

⁶³⁶ Article VI.103. 5°, Similar to Annex 1, point 28 of the Unfair Commercial Trade Practices Directive

⁶³⁷ in Dutch: "Algemene Directie Controle en Bemiddeling"; in French: "Direction Générale du Contrôle et de la Médiation"), which is part of the Federal Public Service of Economy, SMEs, Self-employed and Energy (FPS Economy) <http://economie.fgov.be>

⁶³⁸ Wet houdende invoeging van boek XVII "Bijzondere rechtsprocedures" in het Wetboek van economisch recht, en houdende invoeging van een aan boek XVII eigen definitie en sanctiebepalingen in hetzelfde Wetboek, *BS*, 26 December 2013, retrieved from http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2013122637 on 28 August 2015.

⁶³⁹ In the framework of a claim for civil damages based on the article 1382 of the Belgian Civil Code.

CRIMINAL PROCEDURE. Finally, infringements on the Market Practices provisions are punishable with **criminal sanctions**, i.e. imprisonment from 1 month to 5 years and a series of criminal fines, ranging from 250 EUR to 20.000 EUR (augmented by surcharge).⁶⁴⁰

3.3 E-Commerce Law

NATIONAL IMPLEMENTATION E-COMMERCE DIRECTIVE. The European e-Commerce Directive has been implemented in Belgium by the Information Society Act of 11 March 2003⁶⁴¹ and later replaced by the Law of 15 December 2013 on the Right of the electronic economy, which forms part of the Belgian Code of Economic Law.⁶⁴² In line with the Directive, the law applies to information society services and contains provisions that regulate advertising, as well as liability exemptions for online intermediaries like hosting service providers.

INFORMATION REQUIREMENTS. The Belgian law establishes certain obligations for advertisers concerning the information to be provided together with advertisements which form part of or constitute an **information society service**. More specifically, **Article XII.12** determines the following conditions:

- (a) the advertisement shall be **clearly identifiable** as such and if this is not the case it has to **mention “advertisement”** in a readable, visible and unambiguous manner;*
- (b) the natural or legal person on whose behalf the advertisement is made shall be clearly identifiable;*
- (c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;*
- (d) promotional competitions or **games**, like announcements of price reductions and related deals shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.*

REQUIREMENTS FOR UNSOLICITED COMMERCIAL COMMUNICATION. Furthermore, the Belgian e-Commerce law prohibits the use of electronic mail for commercial communications without the prior, free, specific and informed consent (**Article XII.13**). Service providers who make use of unsolicited commercial communications, must provide clear and understandable information regarding the right to object to receiving such communications in the future. Moreover, they have to offer their recipients an appropriate electronic means to exercise their rights in an efficient manner.⁶⁴³

EXEMPTION FOR HOSTING PROVIDERS. Finally, as social network sites are often used to spread commercial messages (e.g. by sponsored bloggers), questions may rise regarding the potential liability of the social network provider for harmful or illegal commercial messages. In this regard, the Belgian law contains a liability exemption for providers of hosting services for illegal web content uploaded by the users of

⁶⁴⁰ Art. 124 Market Practices Act.

⁶⁴¹ Information Society Act of 11 March 2003, B.S. 17.03.2003.

⁶⁴² Book XII, Right of the electronic economy, Code of Economic Law, retrieved from http://economie.fgov.be/nl/binaries/Wetboek_van_economisch_recht_tcm325-232243.pdf on 1 September 2015.

⁶⁴³ Art. XII.13 §2 Code of Economic Law.

the service.⁶⁴⁴ Similar to the European e-Commerce Directive, hosting providers can only benefit from the liability exemption if three conditions are fulfilled: (1) absence of knowledge of the illegal web content, (2) absence of control and (3) expeditious action upon obtaining awareness over the illegal activity or web content.⁶⁴⁵ Furthermore, the Belgian Code has stipulated one additional condition in relation to the hosting exemption. According to [Article XII.19 §3](#), the service provider shall only remain exempted from liability if it notifies the District Attorney (“Procureur des Konings”) as soon as it obtains actual knowledge of the illegal activity or behaviour.⁶⁴⁶ As long as the District Attorney has not taken a formal decision regarding the allegedly illegal web content or activity, the hosting service provider may not delete the information it may only disable access to it.⁶⁴⁷

⁶⁴⁴Art. XII.19. § 1 Code of Economic Law.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ See also B. Van Alsenoy and V. Verdoodt (2014). Liability and accountability of actors in social networking sites. SPION Project, 26.

⁶⁴⁷ Art. XII.19 Final sentence, Code of Economic Law.

4. Data Protection Law

BACKGROUND. The collection of children's personal data needs to comply with various conditions posed by data protection legislation. Even though Belgium had signed the data protection treaty of the Council of Europe⁶⁴⁸, which obliged its parties to implement national laws necessary to protect the privacy of citizens before 1982, a Belgian data protection law was only introduced in 1992 ("**Data Protection Act**").⁶⁴⁹ The data protection Act was amended by the law of 11 December 1998 to implement the provisions established by the European Data Protection Directive. In addition to the Data Protection Act, a number of specific laws and rules also contain certain provisions on the protection of personal data and privacy, such as the Camera Surveillance Law of 21 March 2007, Collective Bargaining Agreement No. 81 concerning the monitoring of electronic communications of employees of 26 April 2002 and the Patient Rights Law of 22 August 2002. However, these specific laws remain outside the scope of this report. Finally, privacy is also protected by **Article 22 of the Belgian Constitution** which states that everyone has the right of respect for his private and family life, unless in the cases and under the conditions determined by an Act of Parliament.

4.1 Belgian Data Protection Act

4.1.1 Scope and actors

MATERIAL SCOPE. The Act applies to any fully or partly automated **processing of personal data**.⁶⁵⁰ The key concepts, processing and personal data, should be interpreted broadly. More specifically, personal data is "*any information relating to an identified or identifiable natural person*".⁶⁵¹ Acts of processing on the other hand include the collection of personal data, the recording, organisation, storage, etc.

PERSONAL SCOPE. Like the European Directive, the Data Protection Act contains obligations for so-called **data controllers**, i.e. "*any natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes of, and means for, processing personal data*".⁶⁵² Furthermore, certain provisions⁶⁵³ are applicable to **data processors** i.e. "*natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller, except for the persons who, under the direct authority of the controller or the processor, are authorised to process the data*".⁶⁵⁴ Finally the person to whom the data relate is the **data subject**, who is attributed certain rights under the Act.

⁶⁴⁸ Convention nr. 108 of 28 January 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ratified in Belgium by the Law of 17 June 1991 to approve Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, B.S. 30 December 1993, 29023.

⁶⁴⁹ The Act of 8 December 1992 Law on the protection of privacy in relation to the processing of personal data (hereafter "**Data Protection Act**"), Article 3 §1 Data Protection Act.

⁶⁵⁰ By means of a computer system, as well as to any non-automated processing of personal data included or intended to be included in a filing system.

⁶⁵¹ Article 1 §1 Data Protection Act. 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.

⁶⁵² Article 1 §4 Data Protection Act.

⁶⁵³ E.g. Article 16 Data Protection Act.

⁶⁵⁴ Article 1 §5 Data Protection Act.

TERRITORIAL SCOPE. The Data Protection Act is first of all applicable to processing carried out in the context of a controller's permanent establishment in Belgium.⁶⁵⁵ Having an establishment in Belgium implies that a controller has real and effective activities in the form of stable arrangements on the territory. Besides this, in situations where the controller is not established in Belgium, but the processing is carried out using equipment located within the Belgian territory, the Data Protection Act will also apply, unless such equipment is merely used for transit through the territory of the Community.⁶⁵⁶

EXEMPTIONS. The Data Protection Act does not apply to certain processing operations. The Act contains both full exemptions and partial exemptions and more specifically does not apply to:

ARTICLE	EXEMPTION
Article 3 §1 DPA ⁶⁵⁷	non-automated data processing, if the personal data being processed is not included or is not intended to be included in a filing system;
Article 3 §2 DPA	data processing by a natural person in the course of a purely personal or household activity;
Articles 3 §4 and §5 DPA	processing operations by or on behalf of, among others, the state security or general intelligence and security service of the armed forces, or for the purposes of implementing police tasks;
Article 3 §5 4° DPA	processing personal data for the purposes of implementing money laundering legislation;
Article 3 §3 DPA	processing personal data solely for journalistic, artistic or literary purposes (but only exempted under certain conditions and in relation to certain provisions);
Article 3 §7 DPA	processing personal data of individuals subject to a control or an examination undertaken by or on behalf of the Federal Public Service on Finance.

Table 10: Exemptions under the Belgian Data Protection Act.

4.1.2 Conditions for the lawful processing of children's personal data

NO SPECIFIC PROVISIONS ON CHILDREN. The Privacy Commission (infra section 4.1.4) has stressed that children are more vulnerable, less sceptical and probably unaware of their rights. However, the Personal Data Act does not contain any specific provisions regulating the processing of children's personal data and it does not distinguish between adults and children.⁶⁵⁸ Nevertheless, certain provisions of the Act leave room for interpretation for the data controller. Therefore, when a data controller wants to process the personal data of children, those provisions should be **interpreted strictly**. More specifically it relates to the following: the transparency of the information provided to the child, the legitimacy of the collection of data and the strict limitation of collected data.⁶⁵⁹

⁶⁵⁵ Or in a place where Belgian law is applicable under public international law. Article 3bis 1° Data Protection Act.

⁶⁵⁶ Article 3bis 2° Data Protection Act.

⁶⁵⁷ Data Protection Act.

⁶⁵⁸ Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors' privacy on the internet, 2, http://www.privacycommission.be/sites/privacycommission/files/documents/advies_38_2002_0.pdf accessed 31.08.2015.

⁶⁵⁹ *Ibid.*

A. Data quality principles

DATA QUALITY PRINCIPLES. Furthermore, the processing of personal data has to comply with the principles related to data quality.⁶⁶⁰ In addition, the Privacy Commission has provided certain guidelines for implementing the Data Protection Act, **in particular for websites that are aimed at children**⁶⁶¹:

PRINCIPLE	GUIDELINE PRIVACY COMMISSION
Transparency	The compulsory information data controllers need to provide to children concerning their privacy rights needs to be <i>simple and accessible</i> .
Fair and lawful processing ⁶⁶²	In general, any collection for <i>marketing purposes</i> of personal data of minors under the age of discernment is unlawful. Also, any information collected via a game or gift would also be unlawful. Finally, collecting information via a minor of his or her family or friends (e.g. interests or consumption patterns) is also illegal. ⁶⁶³
Purpose limitation	The data that have been collected in a specific context, can under no circumstances be reused for other purposes than those for the initial collection which have been shared with the data subject. In view of the protection of minors, such data cannot be shared with third parties.
Proportionality	Personal data should only be collected in a strict number of cases and only when this collection is <i>strictly necessary</i> for the purpose. In this regard, the Commission believes that the distinction which usually made for adults between “required” and “optional” cannot be applied to the collection of minors’ personal data. ⁶⁶⁴ When minors are asked for their email address, they should be recommended to use an address that does not identify them per se (i.e. pseudonym).

Table 11: Implementation Guidelines Belgian Privacy Commission

Source: Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors’ privacy on the internet, 3-6.

⁶⁶⁰ Article 4 Data Protection Act. For more information on the European Data Protection Directive see the table under Chapter 2, section 4 C2, V. Verdoodt, E. Lievens and L. Hellemans (2015). Mapping and analysis of the current legal framework of advertising aimed at minors. A report in the framework of the AdLit research project. Document accessible at www.AdLit.be.

⁶⁶¹ Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors’ privacy on the internet, 3-6.

⁶⁶² 4 (1) §1-2 Data Protection Act.

⁶⁶³ *Ibid.*

⁶⁶⁴ Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors’ privacy on the internet, 4.

B. Legitimate purpose

LEGITIMATE PURPOSES. The Data Protection Act also requires a legitimate purpose for the processing of personal data, in line with the European Directive. More specifically, Article 5 mentions the following grounds: (1) consent⁶⁶⁵, (2) the existence of a contract⁶⁶⁶, (3) the legal obligation of the controller⁶⁶⁷, (4) the protection of vital interests of the data subject⁶⁶⁸, (5) the performance of a task of public interest⁶⁶⁹ and (6) purposes of legitimate interest of the controller or a third party.⁶⁷⁰

CONSENT FOR MINORS. Consent requires some further exploration when it comes to minors. According to the Belgian Privacy Commission, it is accepted more and more that a minor who is above the “age of discernment” can consent to the processing of his or her personal data. Indeed, the Privacy Commission believes that parental consent should not be required systematically and cannot be a mechanism that would go against the child’s will.⁶⁷¹ This age limit depends on the factual circumstances of each case, but in current case law it is held that minors usually obtain the required understanding between the age of 12 and 14.⁶⁷² On the other hand, minors that have not reached the “**age of discernment**” can only consent to the processing of their personal data through their legal representative. This consent can be withdrawn on the minor’s behalf at any time.⁶⁷³ Furthermore, the Privacy Commission stresses the need for parental consent in the following situations: (1) sensitive data are processed, (2) the purpose for data processing is not in the direct interest of the minor (e.g. marketing or passing on data to third parties) and (3) if the data is meant to be made public (e.g. spread via a discussion forum or on a school website).⁶⁷⁴

4.1.3 Data subject’s rights

RIGHTS. The Belgian Data Protection Act has implemented the data subject’s rights mentioned by the European Data Protection Directive. These include the **right to access** any personal data processed related to him or her (Article 10), the right to demand the **rectification or erasure** of his or her personal data (Article 12 §1) and right to **object** to further processing for direct marketing purposes (Article 12 §1 third sentence).

⁶⁶⁵ Article 5 (a) DPA: member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent.

⁶⁶⁶ Article 5 (b) DPA: Member States shall provide that personal data may be processed only if processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

⁶⁶⁷ Article 5 (c) DPA: Member States shall provide that personal data may be processed only if processing is necessary for compliance with a legal obligation to which the controller is subject.

⁶⁶⁸ Article 5 (d) DPA: Member States shall provide that personal data may be processed only if processing is necessary in order to protect the vital interests of the data subject.

⁶⁶⁹ Article 5 (e) DPA: Member States shall provide that personal data may be processed only if processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed

⁶⁷⁰ Article 5 (f) DPA: Member States shall provide that personal data may be processed only if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.

⁶⁷¹ Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors’ privacy on the internet, 6.

⁶⁷² Privacy Commission. Wat bij minderjarigen? <http://www.privacycommission.be/nl/recht-op-afbeelding-wat-bij-minderjarigen> accessed 31.08.2015.

⁶⁷³ See Article 1 §8 Data Protection Act.

⁶⁷⁴ Privacy Commission (2002). Opinion Nr 38/2002 regarding the protection of minors’ privacy on the internet, 6.

4.1.4 Enforcement

PRIVACY COMMISSION. The authority overseeing and enforcing the Data Protection Act is the Belgian Privacy Commission.⁶⁷⁵ The Privacy Commission can issue non-binding recommendations on the application of the Data Protection Act, which are an important tool of interpretation. Currently, the Privacy Commission cannot issue fines to infringers of the Data Protection Act. However, this may change soon as a Bill has been introduced in the Federal Parliament which explicitly foresees in such a possibility.⁶⁷⁶

PRIOR NOTIFICATION. In principle, every data controller that wants to process personal data by automatic means, has to notify the Privacy Commission prior to the act of processing.⁶⁷⁷ Such a notification needs to contain information regarding the processing, for instance the name and address of the data controller, the purposes for processing, retention period of the data, etc.⁶⁷⁸

AWARENESS-RAISING CAMPAIGNS. Aside from the enforcement of the data protection rules, the Belgian Privacy Commission also plays an important role in raising awareness of citizens. In particular in relation to children and adolescents, the Commission launched an informational campaign and website in order to educate them regarding their personal data.⁶⁷⁹

4.2 Electronic Communications Act of 13 June 2005

THE ACT. The Electronic Communications Act⁶⁸⁰ of 2005 contains rather detailed rules on data processing and the protection of privacy, as well as rules on the confidentiality of communications. It implements the provisions of the European e-Privacy Directive.

TRAFFIC AND LOCATION DATA. In case traffic data are processed or stored for marketing purposes, the end-users to which the data relate must be informed⁶⁸¹ and they must consent prior to such processing. Moreover, their consent can be withdrawn at any point in time, without any charges. When it comes to location data, prior notice and consent are also required.⁶⁸²

COOKIE RULE. With regard to cookies or other mechanisms used to store or gain access to information stored in the terminal equipment of an end-user, the Act provides for specific rules (like the e-Privacy Directive). More specifically, there must be clear and precise information regarding the purpose for processing and end-users must be informed about this. Additionally, end-users may refuse this kind of

⁶⁷⁵ "Commissie voor de Bescherming van de Persoonlijke Levenssfeer".

⁶⁷⁶ For more information see V. Verdoodt (2015). Belgium's New Privacy Bill May Be Adopted Soon. *EDPL*, 125-126.

⁶⁷⁷ Article 17 §1 Data Protection Act.

⁶⁷⁸ The Privacy Commission may also request additional information, such as the security measures taken, info regarding the origin of the personal data, etc.

⁶⁷⁹ See www.ikbeslis.be.

⁶⁸⁰ The Electronic Communications Act of 13 June 2005,

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2005061332 accessed 31.08.2015.

⁶⁸¹ Article 122 §2 1° e-Communications Act.

⁶⁸² Article 123 e-Communications Act.

processing, unless the sole purpose of the data collection is to facilitate transmission or if the end-user explicitly requested a service.⁶⁸³

5. Criminal Law

GENERAL PROVISION. This section of the analysis focuses on the relevant provisions relating to advertising aimed at minors in Belgian criminal law. First of all, it is significant to note that Belgian Criminal Code prohibits the exhibition, sale or distribution of songs, pamphlets or other writings, whether or not printed, images or prints, which are not compliant with the **public order and morality**.⁶⁸⁴

PROTECTION OF MINORS. Secondly, the Belgian Criminal Code contains specific bans on certain types of advertising, in order to protect minors. These types of advertising can be divided in two categories:

- (1) advertising, whether or not addressed at minors, concerning a sexual related service involving a minor⁶⁸⁵ and*
- (2) advertising specifically addressing minors concerning a sexual related service, irrespective whether the service itself implies minors.⁶⁸⁶*

The second category thus relates to minors as spectators. The scope of application of the article is broad. It relates to the mere fact, irrespective of the means used, to make or have made, issue, distribute or spread commercial messages for a sexual related services, whether directly or indirectly and even when the nature of the service is concealed verbally.⁶⁸⁷ This type of advertising is forbidden when specifically addressed to minors. An example can be found in e-mails sent in discussion for a on the internet, primarily visited by minors, to entice the latter to sexual related services. Sanctions are strict and range from imprisonment for two months to three years, with penalties up to 3000 EUR. Sanctions are even higher when the advertising is made by means of telecommunication.⁶⁸⁸ Finally the Criminal Code also punishes he or she who sells or distributes to minors lewd prints, images or objects that could incite their imagination or exhibits these publically.⁶⁸⁹

⁶⁸³ Article 129 e-Communications Act, which implements Article 5(3) of the e-Privacy Directive.

⁶⁸⁴ Article 383 of the Belgian Criminal Code.

⁶⁸⁵ Article 390 ter § 3 of the Belgian Criminal Code; [*'hij die door enig reclamemiddel aanzet, door de toespeling die erop wordt gemaakt, tot de seksuele exploitatie van minderjarigen of meerderjarigen, of van zulke reclame gebruik maakt naar aanleiding van een aanbod van diensten'*].

⁶⁸⁶ Article 390 ter § 1 of the Belgian Criminal Code; Opinion nr. 7 of the Observatory of Rights on the Internet regarding e-Marketing and Minors. Part II, e-Marketing aimed at minors from a legal perspective, 253-254.

⁶⁸⁷ *Ibidem*.

⁶⁸⁸ Article 390 ter § 2 of the Belgian Criminal Code.

⁶⁸⁹ Article 387 of the Belgian Criminal Code; sanctions ranges from imprisonment between 6 months and 2 years and a penalty between 1000 and 5000 EUR

6. Product-specific legislation

PRODUCT-SPECIFIC PROVISIONS. This section offers a selection of provisions that contain advertising rules specific to a certain category of products. The provisions were selected on the basis of their potential relevance for commercial communication reaching children.

CATEGORIES. The selected categories include provisions regulating the advertising of products that present risks to children's health, such as fatty foods, alcoholic beverages, tobacco and medication as well as a specific provision on toys advertising.

5.3.1 Food

RESTRICTIONS ON FOOD ADVERTISING. The legal requirements for food advertising are quite diverse and present can be found at the international, European and Belgian level. In Belgium, the Flemish Media Decree sets the standard for audiovisual media.

In general, commercial communication towards children and young people may not encourage or trivialise the excessive intake of food and beverages containing nutrients of which immoderate use is not recommended, such as fats, transfatty acids, salt or sodium or sugars.

In addition, Article 69 of the Flemish Media Decree sets a more detailed standard, as commercial communication relating to candy which contains sugar has to display a stylised image of a toothbrush in a clear and contrasting manner for the duration of the commercial communication, respecting a size limitation of one tenth of the height of the film image, as shown below.⁶⁹⁰

5.3.2 Alcohol

RESTRICTIONS ON THE SALE OF ALCOHOL. In Belgium, the legal requirements around alcohol and advertising are spread across a variety of laws and one important self-regulative instrument. The main provisions are to be found in the Flemish and French media Decree and the Law of 24 January 1977 concerning the protection of the consumers of food and other products.⁶⁹¹ In general, it is forbidden to sell, pour or offer beverages with an alcohol percentage of more than 0,5 % (such as beer or wine) to consumers below 16 years of age.⁶⁹² For hard liquors,⁶⁹³ the minimum age is 18 years and the consumer may be asked to prove his age.

⁶⁹⁰ Recently, the Flemish Regulator for the Media issued several decisions with regard to infringements of this requirement. More specifically through the monitoring of several commercial television broadcasting organisations, the Regulator found that a variety of advertising spots for sugary confectionary (e.g. chocolate waffles and cookies) sometimes did not display the toothbrush image. In this regard, the Flemish Regulator stated that broadcasting organisations remain responsible for the broadcasting services they offer. As such, they must ensure compliance with the Flemish Media Decree. For more information see E. Lievens (2015). Five broadcasters warned for non-compliance with rules on commercial communication on sugary confectionery. *IRIS: Legal Observations of the European Audiovisual Observatory* 2015 (6),1-7.

⁶⁹¹ Article 6 §6 24 January 1977, law concerning the protection of the health of users regarding food and other products [wet betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere produkten] *B.S.*, 8 April 1977.

⁶⁹² Article 6 § 6 *ibidem*.

⁶⁹³ 'sterke drank'.

RESTRICTIONS ON ALCOHOL ADVERTISING. In Belgium, the Flemish Media Decree contains important clauses on alcohol advertising towards children, which can also be found in the French Community Decree. Both general and more specific provisions in relation to minors are provided.

*Commercial communication on alcoholic beverages may not be specifically aimed at minors and specifically does not show minors consuming this type of beverage.*⁶⁹⁴

Furthermore, according to the Flemish Media Decree, commercial communication for alcoholic beverages needs in general to comply with the following **criteria**:

ARTICLE	CRITERION
Article 68, 2° Flemish Media Decree	it does not relate the consumption of alcoholic beverages with improved physical performance or motorised driving;
Article 68, 3° Flemish Media Decree	it does not give the impression that alcohol consumption contributes to social or sexual success;
Article 68, 4° Flemish Media Decree	it does not suggest that alcoholic beverages have therapeutic qualities or have a stimulating, soothing or stress-reducing effect
Article 68, 5° Flemish Media Decree	it does not encourage immoderate alcohol consumption or does not portray abstention or moderate alcohol consumption in a negative manner;
Article 68, 6° Flemish Media Decree	it does not emphasise the high alcohol percentages of beverages as a positive characteristic.

Table 12: Criteria for commercial communication for alcoholic beverages in the Flemish Media Decree

RESTRICTIONS FOR CHILDREN'S PROGRAMMES. Furthermore, children's programmes may not be sponsored by undertakings of which the most important activity exists in the production or sale of alcoholic beverages.⁶⁹⁵ The Decrees even specify particular requirements in relation to the schedule time of alcohol advertising. Advertising for alcohol beverages may not be broadcasted in the advertising block immediately before or after children's programmes, whether this is a television broadcast⁶⁹⁶ or a radio broadcast.⁶⁹⁷

FRENCH COMMUNITY. Finally, in accordance with the French Community Media Decree, the service providers broadcasting alcohol related advertising need to offer Government free publicity space for broadcasting health education campaigns, as well as space used for advertising the products.⁶⁹⁸

⁶⁹⁴ Article 68, 1° Media Decree of the Flemish Community.

⁶⁹⁵ Article 94 Media Decree of the Flemish Community.

⁶⁹⁶ Article 83 Media Decree of the Flemish Community.

⁶⁹⁷ Article 89 Media Decree of the Flemish Community.

⁶⁹⁸ Article 16 Media Decree of the French Community.

5.3.3 Tobacco

Similar to the provisions dealing with alcohol, the provisions dealing with the sale and advertising of tobacco can be found in media and consumer protection legislation. In general, it is prohibited to sell tobacco products to youngsters below 16 years.⁶⁹⁹ Furthermore,

*commercial communication concerning cigarettes and other tobacco products is prohibited.*⁷⁰⁰

Relevant provisions can be found in the Communities' Media Decrees but also in the related consumer protection legislation.⁷⁰¹

5.3.4 Medication

RESTRICTIONS. Both the Flemish and French Community Media Decrees have implemented the prohibition as stipulated by Article 5 (f) of the AVMSD. More specifically, it constitutes a ban on commercial communications of medicinal products and medical treatment, which would only be available on prescription.⁷⁰² Furthermore, specifically in relation to the protection of children, the Belgian Royal Decree of 7 April 1995 concerning the information and advertising relating to medicinal products for human use contains a ban on the publication of advertising for medication in children's magazines.⁷⁰³

5.3.5 Toys

RESTRICTIONS ON TOYS ADVERTISING. In Belgium, specific toys related advertising regulation is scarce. The Communities' Media Decrees only mention one specific provision, i.e. in relation to fire arms:

*commercial communication about toys that resemble fire arms is prohibited.*⁷⁰⁴

For the remainder, commercial communication of toys is subject to the general provisions relating to commercial communications and television advertising as well as self-regulation. Self-regulatory initiatives exist in relation to the limitation in time of commercial communication around specific events (such as Sinterklaas), but will be discussed more in detail in the report on self-regulation and co-regulation, advertising and minors.

⁶⁹⁹ Article 6 §4 of the law of 24 January 1977 concerning the protection of the health of users regarding food and other products [wet betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere produkten] B.S., 8 April 1977, B.S., 8 april 1977.

⁷⁰⁰ Article 65 Flemish Community Media Decree.

⁷⁰¹ Article 7 §2 of the law of 24 January 1977, concerning the protection of the health of users regarding food and other products [wet betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere produkten] B.S., 8 April 1977, B.S., 8 april 1977. Some exceptions are mentioned in article 7, §2 bis.

⁷⁰² Article 66 Flemish Community Media Decree.

⁷⁰³ Article 5 Royal Decree of 7 April 1995 concerning the information and advertising relating to medicinal products for human use, http://www.fagg-afmps.be/nl/binaries/AR-KB-1995-04-07-COORD-COR_tcm290-27183.pdf accessed 5.10.2015.

⁷⁰⁴ Article 73, § 4; more general, article 66 Flemish Community Media Decree.

CONCLUSION

This report offers a mapping of the relevant provisions concerning commercial communication reaching children. From the analysis conducted in this report, it can be concluded that at the moment there is extensive and detailed regulation on commercial communications reaching children, especially at the EU level. However, the framework is fragmented into a myriad of provisions which may result in overlaps, making it quite difficult to comprehend how all these provisions interrelate in practice. Moreover, there has been a long tradition of self-regulation with regard to advertising and minors, which needs to be mapped in a second report to assess their implementation and complementarity with the legal framework.

Another next step will be a thorough assessment of how this current legal (and self- and co-regulatory) framework relates to new advertising formats. The applicability of the current framework to new advertising formats will be unravelled in the third legal report of the AdLit project.

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