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THE FACTORS INFLUENCING LEGAL AND ETHICAL DIGITAL MARKETING COMMUNICATION

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Abstract. The scientific literature has extensively covered digital marketing communication and the advantages brought by it – interactivity, intelligence, individualisation, integration, independence of location etc. However, in the context of sustainable development, a key aspect in marketing communication is collective social responsibility, more specifically – legal and ethical digital marketing communication, one that does not pose threat to health, safety etc. or otherwise harm the society or its individual members. The increasing role of digitalised processes in the daily life of businesses, including the management of digital marketing and marketing communication, and the lack of legislation governing the digital commercial environment highlight several negative trends and risks for both businesses and the public. The goal of the study is to identify the factors that influence the use of legal and ethical digital marketing in entrepreneurship based on an analysis of the regulatory framework governing digital marketing and expert survey.

The study implements a cross-disciplinary approach by incorporating research methods characteristic of law, economics and management sciences in the methodology. The methods used in the research are the monographic method, expert survey, regulation and case law analysis, secondary data analysis. The main results show that important factors in putting the digital commercial environment in order and mitigating risks are the lack of competence and knowledge in digital marketing practice, responsibility sharing between the company and the communication stakeholders, conflicts of interest, the focus on immediate sales, the lack of awareness and knowledge of collective social responsibility, ethicality in the digital environment – marketing communication, and the lack of regulatory framework, especially in the fields of privacy protection, intellectual property, data and personal information security, influencer activity, and in the context of sustainability policy in the European Union.

Key words: business law, digital marketing, influencer marketing, marketing communication, sustainable business, sustainable development goals, risk factors.

JEL code: K20, M31

Introduction

With digital marketing playing an increasing role in economy, it is important for legislators to work towards eliminating legal uncertainties in this domain to ensure sustainable development. It matters not only nationally but also internationally in light of the development of technologies, international trade, and border-free services. In the European Union, one of the policy areas where changes should be made to stimulate transition to sustainable development is trade as a global facilitator of sustainable development. Given the rapid development of technologies, a key role in this context is also played by the legal and ethical management of digital marketing. Specifically, the new technologies implemented by enterprises in the digital environment increasingly affect both the choice of business models and online activities (incl. selling).

When it comes to regulatory framework in the European Union, it is important to highlight the Digital Markets Act and the Digital Services Act which represent a major step towards a fair development of digital economy and directly affect the development of digital marketing as well.

In order to attain the goal of the study – identify the factors that influence the use of legal and ethical digital marketing in entrepreneurship, a cross-disciplinary approach was pursued where the research methodology includes methods characteristic of law, economy and management sciences: regulation and case law analysis, secondary data analysis. In order to assess the identified risk factors that would affect the legal and ethical management of digital marketing, the maintenance of fair commercial practice, and the observance of the principles of collective social responsibility, the authors have been conducting an

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expert survey since January 2023. The participants of the expert survey are representatives of the academic environment, business and supervisory public authorities, organisations of marketing, advertising and legal service providers. The article covers only the risk factors associated with such risks as data protection and unfair commercial practice.

Research results and discussion

In the context of the European Union regulatory framework, it is important to highlight the Digital Markets Act and the Digital Services Act which represent a major step towards a fair development of digital economy and also directly affect the development of digital marketing in the European Union. For instance, the purpose of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 or the Digital Markets Act (Regulation 2022/1925, 2022) includes a call to observe fair practices in the digital market. The new regulation will put an end to unfair practices by companies that act as gatekeepers in online platforms (such as Google). According to the European Commission, the *Digital Markets Act* will ensure a fairer digital commercial environment for those commercial users who depend on access controllers in offering their services in the digital single market and will enable start-ups to compete more effectively and roll out new features in online platforms without unfair restrictions. Consumers, too, will benefit from the Digital Markets Act, as they will be provided with a broader selection of services at fairer prices. This does not mean that access controllers, or gatekeepers, may not roll out new services but they, too, are under an obligation to observe fair practices without unjustified advantages.

An equally important role is played by the *Digital Services Act* (Proposal, 2020) which envisages the protection of consumer rights online and a requirement of safe and transparent content for online platforms to promote innovations and competitiveness in the common market. Importantly in the context of digital marketing, the Digital Services Act also prohibits advertisements targeted at minors, also providing for a simplified procedure of reporting harmful content online. The Digital Services Act covers intermediary services offering network infrastructure: Internet access providers, domain name registrars; hosting services (cloud computing infrastructure and web hosting services) and online platforms bringing together sellers and consumers (online marketplaces, app stores, collaborative economy platforms and social media platforms). When it comes to managing digital marketing, just as important is the Unfair Commercial Practices Directive (Directive 2005/29/EC, 2005). It is this directive that underlies the EU Court of Justice judgment in C 371/20 (Peek & Cloppenburg KG, 2021), which ruled an obligation for digital content creators to clearly indicate advertising when creating digital content.

It is the capabilities of online platforms in implementing digital marketing activities and communication that enhance the role of neuromarketing – for enterprises to gain a better understanding of their online users, improve their messages and communication, and facilitate the accomplishment of sustainable development goals (Saura, J., R., Palos-Sanchez, P., Rodríguez-Herráez, B., 2020). Measuring physiological and neuron signals to gain an insight into, for instance, online users' motivation, wishes and decisions can help inform about creative advertising, product development, pricing and other areas of marketing and represents the most widespread measurement method. The process consists of: 1) brain activity scanning, measuring nervous activity; and 2) physiological tracking, measuring eye movement to determine the effect of digital marketing activities and communication.

It is believed that by 2026, 25 % of the world's population will devote at least one hour per day to digital activities – shopping, social interaction, or entertainment (Crespo-Pereira, V., Sánchez-Amboage, E., Membiela-Pollán, M., 2023). The research done so far shows that an effective control or supervision is part of ensuring justice. The development of the legal environment of influencers, as a whole, requires a comprehensive cooperation and an extensive social dialogue among stakeholders (Bormane, S., Urbane M., 2022).

The regulatory framework governing digital marketing in the European Union has been significantly influenced by the case-law of the EU Court of Justice. A review of the case-law of the EU Court of Justice in the aspect of digital marketing shows that judgments have mostly been delivered in preliminary ruling proceedings. This means that there have been situations of national courts requiring an interpretation of EU legal provisions as it falls under the competence of the EU Court of Justice. The prime case that spurred discussion over personal data protection in the digital environment is C-131/12 or the GoogleSpain case (Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, 2014) where the EU Court of Justice ruled that the search engine constitutes a controller in respect of personal data "processing" through its information finding, indexing, storage and distribution. The court added that, in order to guarantee privacy rights and personal data protection, search engine operators may be obliged to erase the personal information published by third party websites. This judgment has substantially affected the development of regulatory framework as regards digital marketing in the EU digital market and has been frequently quoted in cases dealing with personal privacy rights in the digital environment.

The case-law of the EU Court of Justice can have a very direct impact on digital marketing. For instance, already back in 2013, in C-657/11 (Belgian Electronic Sorting Technology NV v Bert Peelaers and Visys NV, 2013), the EU Court of Justice looked into whether domain name registration constitutes advertising. The court found that the concept of advertising as defined in Directive 2006/114/EC of the European Parliament and of the Council (Directive 2006/114/EC, 2006) concerning misleading and comparative advertising, based on the actual situation of the case, covers the use of the domain name and metatags in the website metadata. However, this concept does not include domain name registration in itself.

On November 26, 2021, in C-102/20 (StWL Städtische Werke Lauf a.d. Pegnitz GmbH v eprimo GmbH, 2021), the EU Court of Justice found that displaying advertising messages in an electronic inbox similar to an actual e-mail constitutes direct marketing and is subject to an appropriate regulatory framework. In this case, the advertisement was shown in the user's private inbox and resembled an e-mail message even though marked with the word "advertisement". The EU Court of Justice argued that Directive 2002/58/EC (Directive 2002/58/EC, 2002) protects personal privacy in the aspect of unwanted communication in the form of direct marketing, especially using automated messages, regardless of technology used for communication. At the same time, the EU Court of Justice stressed that the use of e-mails in direct marketing is allowed if the recipient has consented to it beforehand.

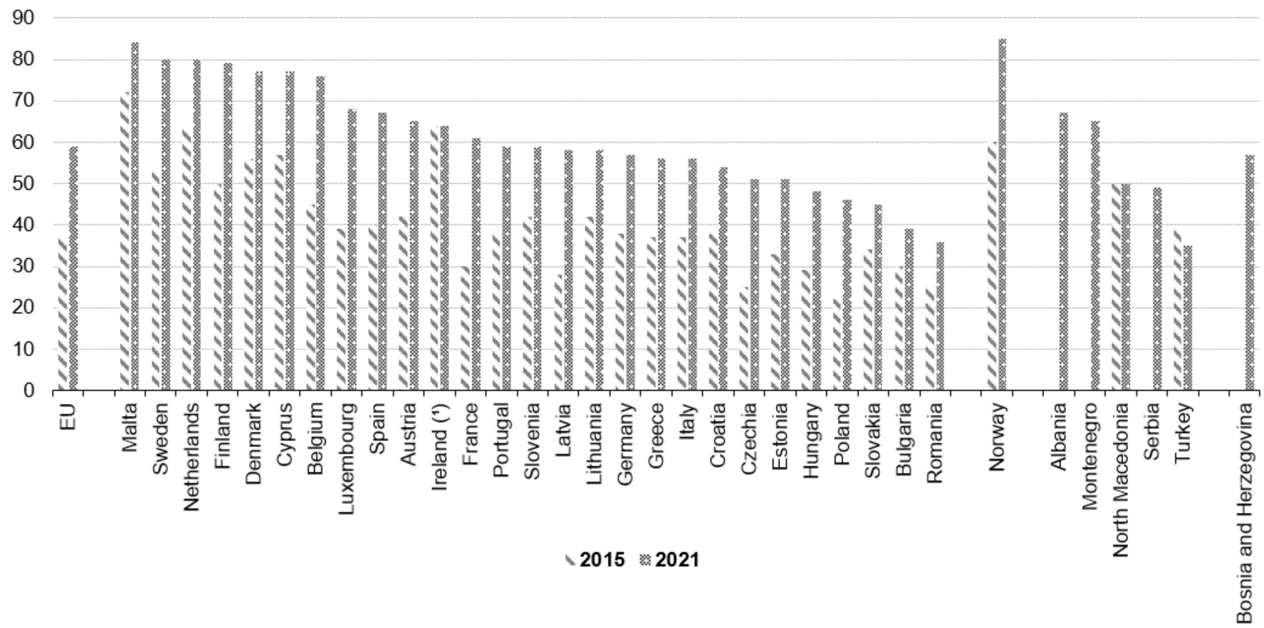
The digital marketing strategy of an enterprise can also be affected by judgments of the EU Court of Justice delivered, for instance, in the context of competition or fundamental freedoms of common market. In the EU Court of Justice judgment in C-649/18 (A v Daniel B and Others, 2020) dated October 1, 2020, the factual circumstances deal with the digital marketing strategy for non-prescription medicinal products outside the company's country of registration. In this case, a company registered in the Netherlands ran an advertising campaign for online trading of non-prescription medicinal products targeted at consumers in France. The company published on its website promotional offers whereby discounts were applied to the total price of an order of medicinal products once a certain amount was exceeded, and purchased paid search engine referencing. The EU Court of Justice confirmed that such commercial practice is subject to the provisions of the Electronic Commerce Directive (Directive 2000/31/EC, 2001). The EU Court of Justice ruled that an EU Member State may not restrict a provider of online trading of non-prescription medicinal products registered in a different Member State by prohibiting the use of paid search engine referencing and price comparison websites, unless such regulatory framework has been applied to ensure that the objective of public health protection be accomplished and does not exceed what is required for this purpose. This means that the restriction has to be proportionate. In the court's view, such restriction by the French regulatory framework prevents the company from advertising itself and its online services. Having regard to the case-law of the EU Court of Justice, the authors conclude that EU Member States may not restrict marketing activities of such kind unless public health is under threat. For comparison, in Switzerland, which is not an EU Member State, online advertising of pharmacies is allowed but it is prohibited to run online advertising of pharmacy products targeted at Swiss consumers without permission from the national advertising supervisory authority.

In August 2022, in C-184/20 (OT v.Vyriausioji tarnybinės etikos komisija, 2022), the EU Court of Justice expanded the definition of sensitive personal data, ruling that personal data that implicitly disclose the special category of a natural person in the context of Article 9 of this directive constitutes special category personal data within the meaning of the General Data Protection Regulation (hereinafter – the GDPR) (Regulation 2016/679, 2016). In the authors' view, the EU Court of Justice has defined data protection rather broadly prior to that as well and this judgment was a predictable continuation of the previous case-law. This judgment will certainly affect companies that process data that may implicitly disclose the special category denoted in Article 9 of the GDPR, including digital marketing (online advertising), dating apps etc.

Brand safety in digital marketing refers to measures taken to ensure that information or an ad related to the brand not appear alongside content that might harm its reputation. As digital advertising increases, brand safety concerns become increasingly valid, especially in the digital single market of the European Union. Also applicable to brand safety in the EU digital space is the General Data Protection Regulation and Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communication sector (the Privacy and Electronic Communications Directive). These pieces of legislation lay down the data protection standard in the EU. Considering the scale of digitalisation, the Audiovisual Media Services Directive (Directive 2010/13/EU, 2010), too, is relevant to brand safety in the digital environment. Overall, when it comes to brand safety, the regulatory framework promotes responsible advertising in the digital environment.

The development of regulatory framework at the EU level means that EU Member States need to pay more attention in their national legislation to fair, transparent and predictable regulatory framework in the aspect of digital marketing because marketing activities and communication, if done correctly, have to essentially turn potential buyers into long-term (perpetual) consumers. In an ideal environment, marketing increases awareness of the product of service, thus leading to a mutually beneficial situation. However, the use of digital marketing increases adverse risks which are mostly triggered by lack of knowledge in digital marketing practice, responsibility sharing between the company and the communication stakeholders, conflicts of interest, focus on immediate sales, lack of awareness and knowledge of collective social responsibility (Bormane, S., Urbane, M., 2022). In this regard, the goal of the European Commission is to foster an environment where the use of online platforms in the business environment flourishes, with particular focus on the entrepreneurs' conduct that promotes fairness towards users to limit the spread of illegal content. This is because more than 1 million EU companies already sell goods and services using online platforms, and more than 50% of small and medium enterprises sell them on online markets (The European Commission, 2022). Figure 1 demonstrates the increased use of social media in entrepreneurship in the EU (Note: 2015 data for Albania, Montenegro, Serbia and Bosnia and Herzegovina: not available).

It follows from Figure 1 that the four most widely known categories of social media are: 1) social networks such as Facebook, LinkedIn, Xing, and others; 2) corporate blogs or microblogs such as Twitter and others; 3) multimedia content-sharing websites such as YouTube, Instagram, Flickr, SlideShare, and others; and 4) wiki-based knowledge-sharing tools. In 2021, 59 % of EU enterprises used at least one of these types of social media, an increase by 22 percentage points compared to 2015. Percentages do vary widely from country to country, ranging from 80 % and more in Malta (84 %), Sweden (80 %) and in the Netherlands (80 %) to less than 40 % in Bulgaria (39 %) and Romania (36 %). Between 2015 and 2021, the share of EU enterprises using social networks increased from 34 % to 56 %. Among the Member States, the highest increases were reported in Belgium and France (32 %), followed by Latvia (31 %) and Luxembourg (30 %) (the European Commission, 2022).



Source: Eurostat (isoc_cismt)

Fig. 1. **Enterprises using social media, 2015 and 2021, % of enterprises**

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However, the increasing use of social media in entrepreneurship can bring both positive and negative consequences. For instance, in the context of sustainable development, literature increasingly mentions ethical marketing which includes the principle of fairness (Chaffey, D., Ellis-Chadwick, F., 2019). In this respect, scholars highlight the role and influence of social exclusion on customer participation in innovation (Hui, Z., Yupeng, M. et al., 2021) and that social exclusion can cause negative changes on human beings in both the physiological and psychological aspect (Zong, L., Wu, S., Duan, S., 2022). The Use of Digitalization in Achieving Sustainable Development Goals 1, 2, 3, 4 and 5 is linked to social dimensions whereby more than 2 billion people are failing to enjoy digital services due to poverty and lack of education, knowledge and skills etc. In addition, this may affect smooth communication between institutions and individuals etc. (Vyas Doorgapersad, S., 2022).

Based on regulation and case law analysis, a number of data protection and unfair commercial practice risk factors were identified that influence the use of legal and ethical digital marketing in entrepreneurship (Table 1).

Based on the expert survey, a mid-term assessment of risk factors was conducted in respect of whether within the next 3 years their impact would increase / reduce the risks, thus also affecting the legal and ethical management of digital marketing, the provision of fair commercial practices, and the observance of the principles of collective social responsibility. Overall, the experts rated the risk factors associated with minor data processing and use for promotional purposes without parents' consent and the free market economy where an uncontrolled cross-border transfer and use of consumer data can take place as having the biggest impact on the materialisation of unfair commercial practice and data protection risks.

Although some countries have a regulatory framework in place, it is local. For global (incl. international) business activities, the regulatory framework varies. In respect of unfair commercial practice risk, the experts single out the absence (incl. disproportionality) of effective penal sanctions where the requirements of the Data Protection Regulation are not met in business or the regulatory framework preventing unfair commercial practices as regards publishing inappropriate content, spam etc. is violated. In such cases, lack of anonymity, conduct after establishing violation (incl. actions and process) are mentioned as a major problem. Although the Latvian regulatory framework envisages consequences for such violations, there are still no clear regulations regarding the enforcement of consumer rights, or the procedural framework of rights protection.

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Table 1

Main risk factors in managing legal and ethical digital marketing, ensuring fair commercial practices, and adhering to the principles of collective social responsibility

No.	Risk factor	Information source
1.	**Data protection risk**	
1.1.	Data processing, aggregation and publication, implicitly disclosing an individual's belonging to a category (gender, age, race, political affiliation etc.)	EU Court of Justice judgment in C-184/20
1.2.	Right to be forgotten (request to erase data on individuals accumulated by third parties)	EU Court of Justice judgment in C-131/12 General Data Protection Regulation
1.3.	Ineffective, intransparent and insufficient cookie restrictions (formal consumer consent, or service use prohibition in the event of non-consent)	General Data Protection Regulation
1.4.	Minor data processing and use for promotional purposes (without parents' consent)	General Data Protection Regulation
1.5.	Cross-border transfer and use of consumer data (local regulations but global business, regulatory misalignments)	General Data Protection Regulation EU-US Privacy Shield
2.	**Unfair commercial practice risk**	
2.1.	Absence or disproportionality of penal sanctions (enforcement and/or upgrade) (unwanted communication – spam, inappropriate content etc.)	Directive 2010/13/EU General Data Protection Regulation
2.2.	Lack of option for consumers to opt out of marketing communication	Directive 2010/13/EU
2.3.	Misleading product or service information (appearance, design, functionality, price, ingredients, origin, use and disposal)	Directive 2005/29/EC
2.4.	Leaving false reviews and lack of supervision (non-existent, poor service and/or, with influencers, unproven service)	Directive 2005/29/EC
2.5.	Data manipulation (false number of followers, false reactions on social media platforms etc.)	EU Court of Justice judgment in C-371/20
2.6.	Conduct after establishing violation (by consumers, entrepreneurs, incl. competitors etc., and anonymity guarantee where the state is supervisor)	Directive 2005/29/EC General Data Protection Regulation
2.7.	Lack of transparency in influencer activity (in the content of cooperation – lack of control (incl. certification), oral agreement, risk of responsibility refusal and/or sharing)	Directive 2005/29/EC
2.8.	Absence of written agreement (form of cooperation – service or employment, tax amount to be transferred to state budget)	Directive 2005/29/EC

Source: identified by the authors based on a regulatory framework analysis

In addition to the risk factors listed in Table 1, the results of both the regulatory framework and case-law analysis and the expert survey pointed at the issues associated with implementing network marketing activities. Specifically, there is insufficient regulatory framework in this field as regards the fairness and transparency of such practices. The experience of EU Member States hints at the need to regulate network marketing. In Germany, for instance, considering the broad application of network marketing, there are regulations providing control over such activities. However, both theoreticians and practitioners are still looking for the ethics boundary in defining legal network marketing activities. As concerns EU Member States, the authors find that network marketing activities are mostly regulated within the legal framework governing advertising.

Overall, the legal and ethical angle of digital marketing plays a role in social, economic and environmental dimensions alike towards achieving the necessary political coordination for sustainable development.

The main results show that important factors in putting the digital commercial environment in order and mitigating risks are the lack of competence and knowledge in digital marketing practice, responsibility sharing between the company and the communication stakeholders. In order to mitigate data protection and unfair commercial practice risks, the following dissuasive actions should be taken: raising the entrepreneurs' awareness of the core principles of fair commercial practice, social responsibility and its public impact etc. Natural person, in turn, should develop their digital skills and critical thinking (in using various tools, comparing information in the context of buying, protecting their data, secure shopping and communication on the Internet). Furthermore, study and life-long learning programmes should offer more opportunities of learning the digital skills necessary for essential needs, such as healthcare etc.

Latvian Prohibition of Unfair Trading Practices Law (Prohibition of Unfair Trading Practices Law, 2007) is based on the Unfair Commercial Practices Directive (2005/29/EC, 2005), which states that the penalties laid down by the Member States in application of this directive have to be effective, proportionate and dissuasive (Article 13)). The authors conclude that it is necessary to focus not only on the amount of penalty but also on developing criteria by which to determine in what cases a natural and/or legal person may be punished. This would make it easier to monitor, control, educate and advise the responsible institutions (the Consumer Rights Protection Centre and the Health Inspectorate) and help enhance legitimate expectations and transparency.

Conclusions, proposals, recommendations

1) The important factors in putting the digital commercial environment in order and mitigating risks are the lack of competence and knowledge in digital marketing practice, responsibility sharing between the company and the communication stakeholders, conflicts of interest, the focus on immediate sales, the lack of awareness and knowledge of collective social responsibility, ethicality in the digital environment – marketing communication, and the lack of regulatory framework, especially in the fields of privacy protection, intellectual property, data and personal information security, influencer activity, and in the context of sustainability policy in the European Union.
2) The regulation of legal and ethical digital marketing is not only subject to EU and national law, but also heavily influenced by the jurisprudence of the European Court of Justice. A thorough analysis of this jurisprudence indicates a rather strict interpretation of legal issues related to digital marketing in order to protect consumer rights and data privacy.
3) The absence of fairness and transparency in affiliate marketing is indicative of insufficient regulation. Experiences from EU Member States point to the necessity of regulating network marketing to guarantee company equity and consumer protection. To balance the interests of all stakeholders, future study should prioritize the creation of efficient regulations for affiliate marketing.

Author contributions:

Conceptualization and methodology, S.B.; regulatory framework analysis M.U.; investigation, S.B. and M.U.; data curation and visualization, S.B.; expert survey preparation, S.B.; risk assessment matrix and scale development S.B.; writing—original draft preparation, S.B. and M.U.; writing—review and editing, S.B. and M.U.; All authors have read and agreed to the published version of the manuscript.

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