

## European Law

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### ABSTRACT

The Internet and digitalization make easier to find information, learn, work, or even entertain, however, it can also give platform to harmful contents and bad practices. The latter two takes many forms, from strong language and unethical marketing strategies to child pornography and bullying. The European Union tries to protect its citizens, especially youth, from cybercrime, and prepare them for the challenges evolving in the online world. This chapter gathers the measures, soft law means and regulations the European Union created to prevent children becoming online victims, and shows not only the related international conventions but the relevant legal cases as well, giving a more complex and comprehensible account of the risks and dangers everybody, especially minors, have to face on the Internet.

### KEYWORDS

protection of minors, internet regulation, cyberbullying, child pornography, harmful content

## 1. Introduction

In addition to the many benefits of digitalisation, there are also many security risks, which can pose threats to children. Therefore, defending against them is of paramount importance in the digital space, which several international and European Union (EU) documents aim to ensure. These documents can be divided into three categories: soft law, legislation, and court judgments:

- soft law material includes documents adopted by international organisations and the EU that are not legally binding (e.g. strategies, action plans, and guidelines);
- legislation includes international conventions that have been transposed into national law by the States Parties, as well as EU acts;
- court judgments are final decisions of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

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Most soft law documents and legislation explicitly provide for children’s rights in the context of digitalisation. Some documents are not about digitalisation, but the nature of the protection they contain can also apply to the protection of children in the digital space. For example, the United Nations (UN) Convention on the Rights of the Child, which predates the mass use of the Internet. Most of the EU documents are soft law, but some legal acts also contain provisions that regulate children’s rights in the context of the digital space. At the international level, the UN Convention on the Rights of the Child and the Council of Europe’s Lanzarote Convention on the protection of children against sexual exploitation are the most comprehensive relevant documents, while at the EU level, the EU Strategy on the Rights of the Child should be highlighted. As regards the relevant case law at both international and EU levels, most of the judgments are only partially relevant to children’s rights in the context of digitalisation.

## 2. International Rules and Case Law

### 2.1. *Soft Law Documents*

Under the auspices of the UN, there are several documents that are not legally binding, but which refer to or can be linked to the need to protect children in the digital space. The following are brief summaries of relevant guidelines, roadmaps, and reports produced by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children’s Fund (UNICEF), and the United Nations Human Rights Council.

The UNESCO roadmap Education for Sustainable Development 2020–2030 (ESD)<sup>1</sup> refers to the benefits and challenges of digitalisation. As examples of the former, it cites the expected improvement in quality of life; and of the latter, the following relevant security risks: artificial intelligence (AI) applications can strongly influence human behaviour in consumption or social interactions, and the unequal sharing of the benefits of technological progress can increase the gap between the “haves” and the “have-nots”. To meet these challenges, the ESD must also prepare future generations. In comparison, the Guidance for generative AI in education and research (2023)<sup>2</sup> aims to support countries in implementing immediate actions, designing long-term policies, and building human capacity for a human-centred vision of AI. The Guidance provides concrete recommendations for policymakers and educational institutions on how to design the use of generative AI tools to truly benefit students, teachers, and researchers. Both UNESCO’s World Youth Skills Day 2023: Empowering youth for a sustainable future<sup>3</sup> report and the Transforming Technical and Vocational

1 UNESCO, 2020.

2 Fengcun and Wayne, 2023.

3 UNESCO, 2023.

Education and Training for successful and just transitions (2022–2029)<sup>4</sup> strategy have similar objectives. The former is aimed at enabling young people to adapt effectively to changing labour market conditions because of technological progress. The document includes a specific chapter on the need to strengthen digital and AI-related skills in education. The latter, pointing to the changes in the labour market brought about by digitalisation, similarly states that young people’s training must adapt to these new conditions. The aim is to strengthen skills in education that will enable young people to be competitive in the labour market.

Among UNICEF’s documents, the Education Strategy (2019–2030),<sup>5</sup> which, under the heading “Goals”, mentions the development of children’s digital skills and knowledge, including the ability to search and manage information, communicate, collaborate, create and share content digitally, and solve problems safely, critically, and ethically, should be highlighted. Worthy of mention are the Guidelines for journalists reporting on children,<sup>6</sup> which aim to ensure that children’s rights and safety are also guaranteed when reporting on children or covering children’s issues. The rules are not just limited to the digital space, but the flow of information revolutionised by digitalisation means that content about children can also reach huge audiences. As such, with the development of digitalisation, the guide is particularly relevant to the protection of children in the digital space.

Finally, of the international sources that are not legally binding, the Annual reports of the UN Human Rights Council should be highlighted.<sup>7</sup> Every year, the Council issues such documents, which also place a strong emphasis on child protection and are available on its website going back to 2006. On the protection of children in the digital space, child pornography appears in all reports, whereas cyberbullying has been a common theme in reports since 2014.

## ***2.2. International Conventions Enacted in Law***

In addition to soft law instruments, several legally binding international conventions have been concluded in recent decades that either explicitly aim to protect children’s rights or contain child protection provisions. The following are the provisions that are intended to provide protection in the digital space or may be relevant for this type of protection.

The UN Convention on the Rights of the Child (1991)<sup>8</sup> does not contain an explicit provision on the protection of children in the digital space, one obvious reason being that it was adopted before the widespread use of the Internet. However, some of its articles are clearly applicable to this protection. According to Article 16, no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, or to unlawful attacks on their honour and reputation.

4 UNESCO, 2022.

5 UNICEF, 2019.

6 UNICEF, n.d.

7 United Nations, n.d.

8 United Nations General Assembly, 1989.

This provision also provides protection in cases where the child is subjected to such abuse in the online space. Article 17 states, in relation to the right to access information from the mass media, that States Parties should encourage the development of appropriate guidelines for the protection of the child from information and material injurious to their well-being. Article 18 emphasises that both parents have common responsibilities for the upbringing and development of the child. The provision can also be interpreted as a responsibility for the child's presence in the digital space. Article 34, which aims to protect the child from all forms of sexual exploitation and pornography, can also apply to the digital space.

Like the Convention, the Optional Protocol to the Convention on the Rights of the Child (2009)<sup>9</sup> does not contain a specific provision aimed at protection in the digital space, but in its Article 1, it requires States Parties to prohibit, *inter alia*, child pornography, and in Article 3, it obliges States Parties to ensure that child pornography is fully covered under their criminal law. In its Preamble, the Protocol warns of the growing availability of child pornography on the Internet and other evolving technologies. It also refers to recalling the International Conference on Combating Child Pornography on the Internet (Vienna, 1999) and its conclusion calling for the worldwide criminalisation of the production, distribution, exportation, transmission, importation, intentional possession, and advertising of child pornography.

Several relevant provisions are contained in the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention', 2015),<sup>10</sup> which aims, in general, to prevent and combat sexual exploitation and sexual abuse of children, to promote national and international cooperation to this end, and to protect the victims' rights. The document contains provisions specifically aimed at protecting against sexual exploitation and abuse in the digital space.

Article 6 obliges States Parties to ensure that children, during their education, receive adequate information on the risks of sexual exploitation and sexual abuse, as well as on the means of protecting themselves. Special attention must be paid to situations of risk involving the use of new information and communication technologies (ICT). Article 9 also requires the ICT sector to participate in drawing up and implementing policies to prevent sexual exploitation and sexual abuse of children. The same article states that each Party shall encourage the media to provide appropriate information concerning all aspects of sexual exploitation and sexual abuse of children. Article 20 commits Parties to take the necessary legislative or other measures to ensure that the intentional offences of child pornography, when committed without right, are criminalised. However, under the Convention, Parties may reserve the right not to consider as the production of child pornography, or knowingly accessing child pornography through ICT technologies, the production and possession of pornographic material consisting exclusively of simulated representations or

9 United Nations General Assembly, 2000.

10 Council of Europe, 2007.

realistic images of a non-existent child, involving children who have reached the age below which it is prohibited to engage in sexual activities with a child, where these images are produced and possessed by them with their consent and solely for their own private use.

Pursuant to Article 30, the Parties shall take the necessary measures to enable the investigative services to identify the victims of the offences established in accordance with Article 20, by analysing child pornography material, such as photographs and audiovisual recordings. Article 21 obliges Parties to take the necessary measures to ensure that intentional pornographic conduct involving children is criminalised. Article 22 provides for the criminalisation of the corruption of children. Accordingly, the Parties shall take the necessary legislative or other measures to criminalise intentionally causing, for sexual purposes, a child who has not reached the age above which they may be allowed to engage in sexual activities, to witness sexual abuse or sexual activities, even without having to participate. Article 23 requires Parties to criminalise the solicitation of children for sexual purposes. This is when an adult makes an intentional proposal, through information and communication technologies, to meet a child who has not reached the age above which they may be allowed to engage in sexual activities, for the purpose of engaging in sexual activity or producing child pornography. It is a condition that the proposal has been followed by material acts leading to such a meeting.

The implementation of the Lanzarote Convention is monitored by the Lanzarote Committee of the Council of Europe. On 17 June 2015, the Committee adopted an opinion on Article 23 of the Convention, inviting States Parties to consider the possibility of criminalising sexual abuse in cases where it is not the result of a face-to-face encounter but takes place online.<sup>11</sup>

Another important source of international law of the Council of Europe is the Budapest Convention on Cybercrime (2001),<sup>12</sup> Article 9 of which obliges Contracting Parties to take all legislative and other measures to establish, as a criminal offence, the production, offering, making available, transmitting, distributing, procuring, or possessing child pornography through a computer system, when committed intentionally and without right.

Although facilitating the cross-border transmission of television programmes is the fundamental objective of the European Convention on Transfrontier Television (1989),<sup>13</sup> with the advent of digital television, certain provisions of this document may also apply to the protection of children in the digital space. Under Article 7, all items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. They shall not be indecent, contain pornography, or give undue prominence to violence or be likely to incite racial hatred. Any parts of programme services that are likely to impair

11 European Union Agency for Fundamental Rights, Council of Europe, 2015, p. 141.

12 Council of Europe, 2001.

13 Council of Europe, 1989.

the physical, mental, or moral development of children and adolescents may not be scheduled for when, because of the time of transmission and reception, they are likely to watch them. In relation to advertising, Article 11(3) states that advertising and tele-shopping addressed to or using children must avoid anything likely to harm their interests and shall have regard to their special susceptibilities.

### **2.3. Case Law of the European Court of Human Rights**

Of relevance to the protection of children's rights in the digital space are Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees respect for private and family life, and Article 10, which guarantees freedom of expression. The provisions of the Convention may be enforced through proceedings initiated before the ECtHR. Hence, if a private individual considers that a State Party has violated a Convention right, they may, after exhausting their remedies at the national level, apply to the ECtHR, the judgment of which the State is obliged to implement.

Under Article 8, everyone has the right to respect for their private and family life, their home, and their correspondence. However, the ECHR also specifies the cases in which the State may interfere with the exercise of this right. These include the prevention of crime and the protection of public health, morals, and the rights and freedoms of others. Article 10 states that everyone has the right to freedom of expression, adding that States may require the licensing of broadcasting, television, or cinema enterprises. In this case, too, the text lays down specific cases of restriction of the right, particularly the prevention of crime, the protection of health, morals, the reputation or rights of others, and the prevention of the disclosure of confidential information.

From the above, it can be seen that the ECHR requires, above all, a kind of abstention from States in the exercise of these rights. However, if a listed interest justifies it, the State must take an active approach. Therefore, where a child user in the digital space is threatened by a crime or a risk to their health or moral well-being, or where it is necessary to protect their reputation or rights, the State is expected to act to take measures to protect the child. The cases listed below are closely related to the issue of protecting children in the digital space.

In the *K.U. v. Finland*<sup>14</sup> case, an advertisement was published on behalf of a 12-year-old boy on an online dating site without his knowledge, which included his age, telephone number, and a detailed description of his physical characteristics, along with a link to his website, which included his picture. It also suggested that the child was seeking an intimate relationship with a boy of his age or older. The legislation in force did not allow the identity of the advertiser to be obtained from the Internet service provider (ISP). In the case, the ECtHR ruled that the boy's physical and moral well-being was endangered, as he was exposed as a target for paedophiliac

14 *K.U. v. Finland*, No. 2872/02.

approaches. This violated his right to respect for private and family life, as enshrined in Article 8 of the ECHR.<sup>15</sup>

In *Rothe v. Austria*,<sup>16</sup> the applicant, Wolfgang Rothe, was the head of a Catholic seminary and was the subject of a newspaper article in 2004 alleging that he had a homosexual relationship with one of his students. The police had searched the seminary on suspicion of someone having downloaded child pornography from the Internet. Rothe brought proceedings against the newspaper for defamation and invasion of privacy, but the national court rejected his case. Rothe appealed to the ECtHR, which argued that the public had an interest in knowing about the situation at the seminary regarding the downloading of child pornography. The panel compared the applicant's right to respect for private life under Article 8 of the Convention with the right to freedom of expression under Article 10 and decided that Article 8 had not been violated.<sup>17</sup>

The main case of *Benedik v. Slovenia*<sup>18</sup> dates to 2006, when the Swiss police informed the Slovenian law enforcement authorities of the identification of a dynamic internet protocol(IP) address linked to sharing material containing the sexual abuse of children. The Slovenian police ordered the Slovenian ISP to disclose the user data linked to the IP address without a preliminary court order. In response to the request, the ISP provided the police with the name and address of the subscriber to the Internet service associated with the IP address, but the case was charged against the subscriber's son. The applicant argued that he was not aware of the content of the online material in question but was nevertheless convicted of manufacturing, possessing, and distributing child sexual abuse material. The applicant exhausted all remedies available in Slovenia, arguing that evidence of his identity was acquired unlawfully because the authorities did not have a prior court order to obtain subscriber information related to the IP address. The case was referred to the ECtHR, which upheld the applicant's claim that his right to respect for private and family life under Article 8 of the Convention had been violated.<sup>19</sup>

The case of *Kharitonov v. Russia*<sup>20</sup> also relates to the legal assessment of online activity. The applicant was a person living in Moscow, who owned a website called Electronic Publishing News, founded in 2008. The website was hosted by a U.S. web hosting service provider together with other websites sharing the same IP address. In 2012, the Russian telecommunications regulator ordered all websites associated with the IP address to be blocked because of the availability of content promoting drugs, which is dangerous for children, on one website, rastaman.tales.ru. The applicant initiated legal proceedings against the Authority's decision, claiming that it also rendered inaccessible websites associated with the same IP address, but not

15 European Union Agency for Fundamental Rights, Council of Europe, 2015, p. 72.

16 *Rothe v. Austria*, No. 6490/07.

17 Human Rights Guide, 2012.

18 *Benedik v. Slovenia*, No. 62357/14.

19 Chatzinikolaou, 2018.

20 *Vladimir Kharitonov v. Russia*, No. 10795/14.

publishing infringing content. The case was referred to the ECtHR, which found that the applicant's right to freedom of expression under Article 10 of the Convention, and to an effective remedy under Article 13, had been violated.<sup>21</sup>

In *X and Others v. Bulgaria*,<sup>22</sup> an Italian couple adopted three children from an orphanage in Bulgaria in 2012. The couple subjected the children to a psychological assessment, which led to the conclusion that they had allegedly been subjected to constant sexual abuse in the orphanage, of which pornographic recordings had been made. The Bulgarian authorities opened an investigation into the case, which was later closed as there was no evidence of a crime. The case was eventually referred to the ECtHR on the grounds that the Bulgarian authorities had breached the Convention by failing to fulfil their obligations to protect the children and to investigate. The Court ruled that the authorities' action was insufficient to ensure the purpose of Article 3, which prohibits torture.<sup>23</sup>

The case of *Macatė v. Lithuania*<sup>24</sup> is relevant in the context of the legal assessment of the online publication of books. The main case reports that, in Lithuania, a children's fairy-tale book containing stories about same-sex marriage was published in 2013 by the Lithuanian University of Educational Sciences and made available online several times without restrictions. The book was widely disliked and, following a critical letter from eight members of Parliament, the university rector ordered the suspension of its distribution. The case was referred to the ECtHR, which found that the suspension violated the author's right to freedom of expression under Article 10 of the Convention.<sup>25</sup>

### 3. European Union Regulations and Case Law

#### 3.1. Soft Law Documents

The EU places a strong emphasis on both child protection and digital security, as reflected in the many strategic documents on these issues. The following list contains relevant, non-normative strategies, action plans, and recommendations that call for greater protection of children in the digital space.

One of the most important general child protection documents is the EU Strategy on the Rights of the Child (2021).<sup>26</sup> The Strategy states that digital technologies offer children a wide range of opportunities for learning, entertainment, and future employment. However, access to the Internet remains a challenge for many children in the EU. The Strategy also draws attention to the impact of AI on children's rights and child safety. It promotes the development of accessible ICT technologies for children

21 Ibid.

22 *X and Others v. Bulgaria*, No. 22457/16.

23 EU Law Live, 2023.

24 *Macatė v. Lithuania*, No. 61435/19.

25 Milkaitė, 2023.

26 European Commission, 2021a.



with disabilities. It will also step up the fight against all forms of online sexual abuse of children, for example, by proposing legislation to require online service providers to detect and report child sexual abuse material. The document also sets out concrete actions for Member States to improve access to digital tools, the Internet, digital literacy, and media literacy. The Strategy also calls for ICT companies to take measures to ensure children's rights, to prevent Internet addiction and harmful and illegal content on the Internet, to detect such content, and to use effective age verification tools.

The communication on Europe's Digital Decade sets ambitious connectivity targets for European households and aims to ensure child protection. It highlights that children can be victims, witnesses, and perpetrators of violence online. The communication makes it clear that children's mental health problems can be linked to the persistent use of digital devices. Its goals also include the digital and information society: an EU where children can safely use and benefit from the digital environment.

The 2030 Digital Compass<sup>27</sup> sets out the European way for the digital decade, which includes a focus on child protection as well. The document points out that broad-based digital skills must also build a society in which children learn how to understand and navigate through the myriad of information to which they are exposed online. In addition, a human-centred, secure, and open digital environment must also enable children's rights to be enforced. It is important to develop a comprehensive set of digital principles, such as the protection and empowerment of children in the online space.

The new strategy for a better internet for kids (BIK+)<sup>28</sup> aims to ensure that children are protected, respected, and empowered online in the new digital decade. The document also sets out specific measures for Member States and the industry. Examples include Member States supporting effective age verification methods, and digital education for adults by children; industry working with trusted flaggers to assess and remove illegal content quickly and developing products and services that promote children's right to express themselves, and that facilitate their participation in public life.

The European Union's Strategy for a more effective fight against child sexual abuse<sup>29</sup> aims to provide a comprehensive response to the growing threat of child sexual abuse online and offline. This document constitutes the EU's reference framework for action to combat child sexual abuse for the period 2020–2025. In the Strategy, the Commission has expressed its intention to cooperate with businesses, civil society organisations, higher education institutions, professionals, researchers, law enforcement, other public authorities, and stakeholders to ensure the implementation of the eight initiatives outlined in the Strategy (for example, strengthening industry efforts to ensure the protection of children in their products).

27 European Commission, 2021b.

28 European Commission, 2022.

29 European Commission, 2020a.

In its Resolution on consumer protection in online video games (2023),<sup>30</sup> the European Parliament refers to the protection of minors in several places: for example, it calls on video game developers and distributors to ensure that games aimed at minors respect children's rights, including privacy, targeted advertising, and manipulative practices. Children need to have the same level of protection when playing video games as they have under the digital services legislation.

The Digital Education Action Plan (2021–2027)<sup>31</sup> sets out a shared vision for high-quality, inclusive, and accessible digital education in Europe, with the aim of supporting the adaptation of Member States' education and training systems to the digital age. The document underlines that, among other things, a reliable digital education ecosystem requires secure platforms that ensure continuous data protection and comply with ethical standards. In addition, everyone needs to have a basic understanding of new technologies, including AI, to participate safely in their use and to be aware of issues related to data protection, privacy, and children's rights.

The European Media Action Plan<sup>32</sup> focuses on the news media sector, audiovisual entertainment, video games, and innovative solutions such as virtual reality experiences. It points out that the latest European legislation contributes to ensuring greater responsibility of all media players, including online platforms, to protect minors, among others, to use media services responsibly and better equip them to deal with the dangers of online violence and disinformation.

The European Union's Security Union Strategy<sup>33</sup> warns that continued steps are needed to combat illegal content online. Fundamental threats to citizens, such as child sexual abuse, are increasingly taking place in digital environments, with the proliferation of child sexual abuse material on the Internet. This calls for concrete action. Companies must be able to continue their work to detect and remove child pornography online, and the damage caused by this kind of material calls for a framework setting out clear and permanent obligations to tackle the problem. The Commission will also start preparing sector-specific legislation to better tackle online child sexual abuse.

The European Union's Action Plan on Human Rights and Democracy (2020–2024)<sup>34</sup> has a specific heading on promoting human rights and democracy using digital technologies. It stresses the importance of capacity building and other support to enable national authorities to develop and implement relevant international legislation effectively, including for the protection of children online.

The Recommendation on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (2014)<sup>35</sup> sets out measures to keep minors away from online gambling. The document

30 European Parliament, 2023.

31 European Commission, 2020b.

32 European Commission, 2020c.

33 European Commission, 2020d.

34 European Parliament and the Council, 2020.

35 European Commission, 2014.

states that minors may not be given the opportunity to play on gambling sites. To prevent access to such sites, Member States must promote the inclusion of links to parental control programs. They must also ensure that commercial communications for online gambling services do not induce minors to view gambling as a natural element of their leisure time activities. Commercial communications should also carry a clear “no underage gambling” message indicating the minimum age below which gambling is not permissible.

The European Union’s Youth Strategy (2019–2027)<sup>36</sup> recognises that there are young people who do not have access to the Internet and digital technologies, or the skills to use them. The document aims to ensure that parents, carers, and teachers are equipped with media and digital literacy skills. Young people also have problems in checking the accuracy and reliability of information. They need training to navigate the media, and to recognise and report online hate speech and discrimination. It must be ensured that young people are able to engage in tolerant and non-violent online dialogue.

### ***3.2. Acts of the European Union***

The EU has recently been quite active in the legislative field to regulate the digital space, in particular, the Internet and social media. Given that the extraordinary pace of ICT technological development can have a significant impact on the physical and mental health of minors, child protection rules are also often included in these legal acts. Accordingly, the Digital Services Act (DSA) of 19 October 2022,<sup>37</sup> which is one of the most comprehensive EU-level legal instruments on the subject, also contains child protection provisions, including stipulations in the Recitals. The DSA also includes rules that are not specifically child protection-focused, but which also protect children.

Recital 64 of the DSA states in general terms that, under certain conditions, providers of online platforms should temporarily suspend their relevant activities in respect of the person engaged in abusive behaviour. However, service providers can also take stricter measures for child sexual abuse content, among other things. The protection of children is specifically addressed in Recital 71 and Article 28, which require platform providers to take appropriate and proportionate measures to protect minors. Furthermore, they may not present advertisements based on profiling using the recipient of the service’s personal data if the service’s recipient is a minor. According to Recital 80, large online platforms are required to assess four categories of systemic risks. Among these, the DSA mentions the dissemination of child sexual abuse material and the risks to their rights. Article 34 requires service providers to identify, analyse, and assess systemic risks related to their services, such as their design, operation, and use, with care. For the systemic risks identified, they must

36 Council of the European Union and the Representatives of the Governments of the Member States, 2018.

37 European Parliament and the Council, 2022.

put in place risk mitigation measures in accordance with Article 35. These include measures to protect children's rights, such as age verification, parental control, and other tools that allow minors to flag abuse.

Among the legal provisions that protect children as well as other users – given the importance of the protection to be provided – it is worth mentioning Recital 22 of the DSA, which requires the service provider to act without delay to remove any unlawful activity or content upon becoming aware of it. Service providers may become aware of the illegal nature of content through own-initiative investigations and notifications, among other things. In the latter context, Article 16 also explicitly requires service providers to supply a means of reporting illegal content in an easily accessible, user-friendly, and electronic way. The removal of content must respect the right of the recipient of the service to freedom of expression and information. Consequently, if the service provider detects, for example, content that is harmful to minors, it must remove it while notifying the user, and must give reasons for its decision, in accordance with Article 17. In addition, under Article 20, users must be given the right to appeal against the decision and the possibility of out-of-court dispute settlement under Article 21. Article 18 obliges the provider to report suspected offences to the law enforcement authorities of the Member State concerned if it has information that gives rise to a suspicion that a criminal offence has been, is being, or is likely to be committed that threatens the life or safety of a person or persons.

The Audiovisual Media Services Directive (AVMS Directive),<sup>38</sup> amended in 2018, strengthens the protection of children from harmful content and inappropriate commercial communications. Under Paragraph 1 of Article 6a, Member States shall ensure that audiovisual media services that are likely to impair the physical, mental, or moral development of minors are accessed only in such a way that minors cannot normally hear or see them. This can be ensured, for example, by measures such as the choice of broadcasting time or the use of age verification devices, proportionate to the harm the programme may cause. The most harmful content must be subject to the strictest measures. Similar rules are set out in Article 28b for video-sharing platform providers. Accordingly, Member States shall ensure that these service providers respond appropriately to protect minors from programmes, user-generated videos, and audiovisual commercial communications that could harm their physical, mental, or moral development. The Article also protects the public in general from content that is a criminal offence to distribute, among other things, with child pornography as an example.

Article 9 of the AVMS is intended to ensure that audiovisual commercial communications accompanying children's programmes do not emphasise the benefits of foods and drinks that are harmful to children. In general, audiovisual commercial communications must not cause physical, mental, or moral harm to minors, must not encourage minors to buy or hire products or services by exploiting their inexperience or credulity, must not directly encourage minors to persuade their parents or others

38 European Parliament and the Council, 2010.

to buy the advertised product or service, must not exploit the special trust minors place in their parents, teachers, or other persons, and must not unreasonably show minors in dangerous situations. In addition, audiovisual commercial communications relating to alcoholic beverages must not specifically target minors. Article 22 prohibits television advertising and teleshopping for alcoholic beverages specifically aimed at minors and stipulates that it must not depict minors consuming alcohol. In relation to audiovisual media services or programmes that are sponsored, Article 10 states that the sponsorship of children's programmes, or the showing of the sponsorship logo during children's programmes, may be prohibited. Article 11 of the AVMS also prohibits product placement in children's programmes. Under Article 20, the transmission of children's programmes may be interrupted by television advertising once for each scheduled period of at least 30 minutes. The transmission of teleshopping is prohibited during children's programmes.

Article 1 of the Directive on combating the sexual abuse and sexual exploitation of children, adopted in 2011,<sup>39</sup> establishes minimum rules concerning the definition of criminal offences and sanctions in sexual abuse and sexual exploitation of children, child pornography, and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of their victims.

Recital 38 of the General Data Protection Regulation (GDPR),<sup>40</sup> adopted in 2016, which has set the standard for the security of the digital space, states that children's personal data deserve special protection. This specific protection applies to the use of data for marketing purposes or for the creation of personality or user profiles. According to Recital 65, the data subject should have the right to have their personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed, where a data subject has withdrawn their consent, or objects to the processing of personal data concerning them, or where the processing of their personal data does not otherwise comply with the GDPR. That right is relevant where the data subject has given their consent as a child and later wants to remove such personal data, especially on the Internet. The Regulation also lays down specific provisions for children in relation to information society services. According to Article 8, the processing of personal data in relation to such services offered directly to children shall only be lawful with the consent of the parent in the case of a child under the age of 16.

A relatively recent piece of EU legislation is the General Product Safety Regulation, adopted by the Council in April 2023,<sup>41</sup> which states that children also have the right to safe products. Importantly, online sales are also covered by the Regulation.

39 European Parliament and the Council, 2011.

40 European Parliament and the Council, 2016.

41 European Parliament and the Council, 2012.

The Unfair Commercial Practices Directive<sup>42</sup> sets out specific provisions for children in relation to advertising. Its Recital 18 states that it is appropriate to include in the list of unfair practices a provision protecting children from direct exhortations to purchase. According to Point 28 of Annex I to the Directive, the inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them shall qualify – among others – as a misleading commercial practice. The Commission has published guidelines for the interpretation and application of the Directive in a communication in 2021.<sup>43</sup>

### 3.3. Case Law of the Court of Justice of the European Union

The CJEU plays a central role in the development of European integration. It ensures that EU laws are interpreted and applied in the same way in all Member States, and that both Member States and institutions respect EU law. Its case law has a fundamental impact on the legal systems of the Member States, and its judgments are a source of law. Previous CJEU decisions on the subject can therefore also be of great help in interpreting the legal issues that arise in the digital space, which is incompletely codified due to the constant and rapid technological changes. In the context of the protection of children in the digital space, the following judgments can be highlighted.

The case of *Dynamic Medien v. Avides Media*<sup>44</sup> concerns the legality of German labelling restrictions on imported DVDs and video cassettes that had already been subject to such inspections in the UK, then an EU Member State. To ensure the free movement of goods within the EU, double regulation of goods is generally prohibited. However, the CJEU concluded in the case that German controls on age-limit labelling lawfully restrict the free movement of goods within the EU, given that they are aimed at protecting children. The CJEU referred to the Convention on the Rights of the Child, which encourages States Parties to protect children from harmful information in the media.<sup>45</sup>

A significant decision was made in relation to IP addresses in the *La Quadrature du Net and Others v. Premier ministre and Others*<sup>46</sup> case. In its judgment, the CJEU pointed out that the analysis of the IP address constitutes a serious interference with the user's right to respect for privacy under Article 7 of the Charter of Fundamental Rights, and their right to the protection of personal data under Article 8. However, it adds that account must be taken of the fact that, where an offence is committed online, the IP address might be the only means of investigation, enabling the person to whom that address was assigned at the time of the commission of the offence to be identified. This

42 European Parliament and the Council, 2005.

43 European Commission, 2021c.

44 ECJ, C-244/06 *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, judgment of the Court (Third Chamber) of 14 February 2008.

45 European Union Agency for Fundamental Rights, Council of Europe, 2015, p. 30.

46 ECJ, joined Cases of C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v. Premier ministre and Others*, judgment of the Court of Justice (Grand Chamber) of 6 October 2020.

finding was cited by the CJEU two years later in *G.D. v. The Commissioner of the Garda Síochána and Others*,<sup>47</sup> and in the *SpaceNet case*,<sup>48</sup> in relation to child pornography.

According to the GDPR, one of the cases of lawful processing of personal data is when it is necessary for the purposes of the legitimate interests pursued by the controller or a third party. However, processing is unlawful where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require the protection of personal data, where the data subject is a child. The CJEU interpreted this exception in *Meta Platforms and Others v. Bundeskartellamt*<sup>49</sup> as follows. The GDPR requires a balancing of conflicting rights and interests, depending on the specific circumstances of the case. It is for the referring (national) court to make this assessment. It is apparent from the very wording of Article 6 of the GDPR that it is necessary, in such a balancing exercise, to pay particular attention to the situation where the data subject is a child. According to Recital 38, children merit specific protection regarding the processing of their personal data. Such specific protection must apply to the processing of personal data of children for the purposes of marketing, or creating personality or user profiles, or offering services aimed directly at children.

In the main proceedings of *Booky.fi Oy v. Kansallinen audiovisuaalinen instituutti*,<sup>50</sup> a Finnish online store distributed audiovisual programmes on physical media without an indication of the age limit and content information required by the applicable Finnish law. The Finnish National Audiovisual Institute ordered the company to remedy the omission. However, the company did not comply, claiming that the classification had already been conducted in another Member State. The case was eventually referred to the Finnish Supreme Administrative Court. The Court referred the case to the CJEU for an interpretation of whether the obligation to classify and label programmes in accordance with the age limits set out in the Act goes beyond what is necessary to achieve the aim pursued by the Act, of protecting children.

The CJEU has ruled as follows. The fundamental treaties do not preclude the legislation of a Member State which, with the objective of protecting minors, requires that audiovisual programmes recorded on a physical medium and marketed via an online store have previously been the subject of an inspection procedure and classification, according to age limits, and corresponding labelling in accordance with the law of that Member State, including where those programmes have already been the subject of a comparable procedure and of comparable classification and labelling in application of the law of another Member State, provided that the legislation is appropriate

47 ECJ, C-140/20, *G. D. v. the Commissioner of A Garda Síochána and Others*, judgment of the Court (Grand Chamber) of 5 April 2022.

48 ECJ, joined Cases of C-793/19 and C-794/19, *Bundesrepublik Deutschland v. SpaceNet AG, Telekom Deutschland GmbH*, judgment of the Court (Grand Chamber) of 20 September 2022.

49 ECJ, C-252/21, *Meta Platforms and Others v. Bundeskartellamt*, judgment of the Court (Grand Chamber) of 4 July 2023.

50 ECJ, C-662/21, *Booky.fi Oy v. Kansallinen audiovisuaalinen instituutti*, judgment of the Court (Tenth Chamber) of 23 March 2023.

for securing the attainment of that objective and does not go beyond what is necessary to attain it.

#### 4. Conclusions

There are several documents dealing with the protection of children in the digital space at both international and EU level. These include soft law material (strategies, reports, action plans, guidelines, etc.), international conventions promulgated by law, EU legal acts, and judgments of the ECtHR and the CJEU.

At the international level, the activities of UNESCO, UNICEF, and the UN Human Rights Council are prominent in the adoption of soft law documents, which provide useful guidance in the field of child protection. The international conventions that have been transposed into the legal systems of the States Parties have a more significant impact. This category includes, among others, the UN Convention on the Rights of the Child, which provides general protection for children, the Lanzarote Convention on the protection of children against sexual exploitation, and the Convention on Cybercrime, which criminalises child pornography.

The EU has produced many soft law documents on child protection. In particular, these include the EU Strategy on the Rights of the Child, which also focuses strongly on digital safety, the Digital Compass 2030, the new strategy for a better internet for kids, and the EU Security Union Strategy, which can contribute to protecting children online in the coming years.

However, the EU documents adopted as legal acts already provide protection on a normative basis. According to the DSA, very large online platforms must implement risk mitigation measures (such as age verification) to address risks to children's rights. The Directive on combating sexual abuse, sexual exploitation of children, and child pornography sets minimum rules concerning the definition of criminal offences and sanctions. Additionally, the GDPR states that children merit specific protection concerning the processing of their personal data.

In the context of international court practice, in most relevant cases, the decisions are not explicitly aimed at establishing a violation of the rights of the child in the digital space. However, the connection of the act to the digital space is part of the (offline) violation of the rights of the child(ren). Most decisions in EU case law do not contain findings on the protection of children in the digital space in the substantive part but rather in other parts of the judgments.



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