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Comparative Analysis of the Legal Regulation of the Digital Platform's Responsibility for the Distribution of Internet Advertising¹

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Abstract: Digital platforms serve as an effective ground for trade in goods and services, which stimulates the development of advertising on the Internet. Platforms provide advertising spaces, connect advertising distributors and advertisers as operators of advertising networks, and collect data to provide personalized advertising and to enhance marketing efficiency.

This article analyzes three aspects of the digital platform's responsibility in the distribution of advertising on the Internet.

In the first aspect, the article compares approaches in Russia to those in foreign countries regarding the responsibility of digital platforms distributing advertisement in their capacity as advertiser or information intermediaries. In Russia (as in China), the platforms are held responsible for placing unfair advertising, because the platforms moderate such advertising. At the same time other countries (the U.S, those of the European Union (EU)) implement the principle of limited of information intermediary by publishing advertising, if the platform does not impact on the content of such advertising and does not know about the distribution of illegal advertising.

In the second aspect, the article surveys the obligations of platforms for ensuring the traceability of advertising, maintaining registries with information about advertising, and ensuring compliance and organizing a risk analysis system to prevent anti-competitive and other illegal behaviour.

The third aspect of the study considers the compliance of digital platforms with the regime of personal data by providing personalized advertising services.

The research methods used in the work include comparative analysis of legal acts and law enforcement practice in Russia and in foreign countries, as well as analysis of recommendations of international organizations, in particular the Organisation for Economic Co-operation and Development (OECD).

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Key words: digital platforms, Internet advertising, responsibility of the distributor advertising, personalized advertising, OECD

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INTRODUCTION

Digital platforms create online channels for buying goods and services [Spartak, 2022]. This is driving the growth of online advertising compared to other types of advertising (e.g. television and outdoor advertising, etc.): global digital advertising revenue in 2021 was \$189 billion, up 35.4% compared to 2020 [IAB, PwC, 2022]. In Russia, in 2021, the volume of advertising on the Internet reached 313.8 billion rubles, which is 24% higher than in 2020 [ACAR, 2022].

Online advertising is a form of advertising that is used on the Internet to deliver promotional marketing messages to consumers [OECD, 2019]. It should be noted that in Russia there is no legislative definition of online advertising. Therefore, this type of advertising is covered by the general concept of advertising (paragraph 2, article 3 of the Federal Law of 13.03.2006 'On advertising')².

The online advertising is driven by digital platforms, including social networks, audiovisual services, search engines and other platforms - aggregators of goods, services, content. For example, digital video advertising revenue from video streaming services, including audiovisual services, increased in 2021, with revenue growth up 50.8% compared to 2020 [IAB, PwC, 2022] Advertising also saw growth on social media: revenue was \$57.7 billion, up 39.3% from 2020 [IAB, PwC, 2022].

Digital platforms provide advertisers with advertising space, with ad blocking services in case of fraud risks, with ad delivery optimization services to achieve the greatest consumer interest in advertised products, as well as with services for collecting information about users conduct, such as clicking on advertising links, etc. [OECD, 2020a]. Platforms play an important role in the dissemination of advertising on the Internet, therefore, platforms have responsibilities in terms of advertising fairness control, informing consumers about the commercial character of the message (so that the consumer can distinguish between advertising and non-advertising), labeling, providing information about advertisers, etc. In addition, platforms can be advertising publishers (and be responsible for advertising), as well as be advertising services providers. Platforms are also responsible for the use of personal data, in particular by targeting the personalized advertisements. It should be taken into account that many countries, including Russia, have made a number of legislative amendments to the regulation of advertising services provided by digital platforms over the past few years. Therefore this research work is aimed at identifying particularities of the legal regulation of the digital platforms obligations by providing advertising services in Russia and in foreign countries (EU, USA, China) on the basis of comparative analysis. The research work covers the issues of competition law application, personal data protection, child protection online in relation to digital platforms exclusively in the context of regulation of advertising on the Internet.

The first part of the article compares the Russian and foreign approaches to regulation of the responsibility of digital platforms by publishing advertisement. In particular, the jurisdictions differ in solving the following question. How platforms should be held liable for dissemination of

² Federal Law No. 38-FZ of 13 March 2006 "On Advertising" // Collection of Legislation of the Russian Federation of 2006, No. 12, Art. 1232

advertisement that does not comply with the law - as information intermediaries with limited liability or as advertising publishers with full liability. The second part of the article examines some aspects of workload of digital platforms related to online advertising transparency, reporting and advertising risk management. The third part of the article discusses the specifics of regulation in regard to use of personal data by platforms for advertising.

The regulation of digital platforms as advertising distributors: the Russian and foreign approaches

In Russia, digital platforms can not only be advertisers (promoting their own goods and services), but also offer advertising distribution services on their own resources (website, platform), or be operators of advertising systems for advertising publishing on information resources owned by third parties (within the meaning of the Federal Law on Advertising).

Since digital platforms often provide only technical means for placing advertisements, as well as moderate advertisements placed by third parties (e.g. advertisers), a question arises in which cases the platform should be recognized as an advertising publisher and be liable for unfair advertising, and in which cases it should be recognized as an information intermediary and benefit from the regime of limited liability for advertisements placed by third parties on the platform? It is worth noting that Russia has not been implemented the concept of “limited liability of an information intermediary” within the advertising legislation. The concept is realized only in the context of Article 1253.1 of the Civil Code in regard of liability for violation of intellectual property rights.

The 2018 Council of Europe Recommendation on the roles and responsibilities of internet intermediaries recommends, that states should not establish liability of intermediaries (including platforms) for content of third parties which they simply provide access to, transmit or store (including advertisement) [Council of Europe, 2018]. Intermediaries should assume full liability if they do not take prompt action to restrict access to content that is known to be illegal or unfair. At the same time, the intermediary cannot be directly or indirectly obliged to monitor the content to which it provides access, transmits or stores.

In Russia, the Federal Antitrust Authority (hereafter – the FAS) most often recognizes platforms as advertising publishers and imposes fines on both the platform and the advertiser for unfair advertising. In this article, "unfair advertising" means the dissemination of any unreliable, illegal and other kinds of advertising that does not comply with the requirements of the law. In the EU and the US, the approach differs from the Russian one, since in these jurisdictions the concept of “limited liability of the information intermediary” is applicable to advertising platforms. It means that the platform offers only technical means for placement of content (including advertising) and does not interact with the content, then most often such a platform is recognized as an “information intermediary” and enjoys a limited liability regime. Thus, if an advertiser publishes an advertisement using the platform's tools, and the platform does not influence the advertising message (ad moderation is not recognized as "participation in the ad preparation"), then the advertiser, not the platform, is responsible for the publication of unfair advertising.

If the platform does influence the advertising message, then the platform is considered as an advertising publisher. And if the platform knew about the illegal nature of advertising and continued to distribute it, then the platform does not fall under the criteria for application of the concept of limited liability, and consequently becomes liable for the misleading statements in advertisement.

In the United States, the principle of limited liability is fixed in the U.S. Code, Section 15. Paragraph (b) of §54 provides an exception: no publisher, agency, or advertising intermediary shall be liable for false advertising if such person, at the request of the Federal Trade Commission (FTC) provides the name and mailing address of the advertiser [U.S. Code, 2023]. The rule also applies to the ‘publisher site’ of advertising – i.e. to any media platform for publishing content. Thus, in the United States platforms as advertisers are not responsible for the misleading statements in ads. However, platforms are subject to the requirement of due diligence. It means that advertisers

should collect data about advertisers (name, postal address) to avoid liability, so that the FTC could find the advertiser who edited advertising.

However, if the platform took part in editing the advertisement, then, as an advertising agency (advertising producer), the platform is liable for misleading statements in the advertisement. Therefore, in order to reduce the risk of liability, the platform is obliged to independently verify the information contained in the advertisement [FTC, 2001]. The FTC takes into account the degree of agency's involvement in the preparation of the advertisement, and whether the agency knew or should have known that the advertisement contained false or misleading statements.

Moreover, under Art. 230(C) of the Communications Decency Act of 1996 [Communications Decency Act, 1996] all types of platforms (not only advertising) in the United States benefit from the exclusion of liability of the information intermediary for information on the platform, including for advertising. It is provided that no interactive computing service provider (i.e., platform) should be considered as a "publisher" of any information provided by another information content provider. This rule ensures the immunity of platforms that publish information (including advertising) provided by third-party users (advertisers). For example, in *Goddard v. Google, Inc.* C 08-2738 JF 2008 plaintiffs complained that Google ads redirected them to fraudulent websites by forcing them to enter mobile phone numbers. Plaintiffs alleged that Google failed to take action against the spread of fraudulent sites in ads distributed through AdWords. However, the US Court applied immunity under Art. 230(C) and relieved Google from liability, by acknowledging that Google had not contributed to the spread of fraudulent sites, as it simply provided third parties with neutral tools for creating advertising.

The EU uses a similar approach. In accordance with the Unfair Commercial Practices Directive 2005/29/EC (art. 2), a "trader" is a person who, in commercial activities related to his trade, business, profession, is liable for the use of unfair commercial practices, including advertising [Directive 2005/29/EC, 2005]. In this case, the trader is liable as an advertiser who uses advertising to promote his activities. However, the question arises in what cases the platform will be liable as a "trader"? The Guidance on Directive 2005/29/EC provides that if an intermediary, such as an online platform, does not play an active role in promoting goods or services, but simply provides information storage services, then the platform qualifies for an exemption from liability. If the platform, on the contrary, actively promotes goods or services of third parties, receives income for such promotion, then most likely this platform will be liable as a "trader" (this should be decided by the court on a case-by-case basis) [European Commission, 2021].

As in the United States, the EU law provides for the principle of limited liability of the information intermediary. According to the European Parliament, online advertising platforms provide "hosting" (hosting) services (within the meaning of Article 14 of Directive 2000/31 on e-commerce and Article 6 of Regulation 2022/2065 on a single market for digital services), i.e. they provide storage space for information [Kritikos M (ed.), 2021]. The advertising service provider is not liable if it is not aware of the illegality of activities or information, and if, having become aware of the illegality, it promptly disables access to information (including advertising). The service provider assumes liability, if it influences the content, for example, edits an advertising message. This is confirmed in a number of cases submitted to the EU Court of Justice against Google in regard of the use of trademarks, where the Court ruled that Google only provides technical services and therefore is not responsible for the use of trademarks by advertisers.

Qualification as a trader or information intermediary affects, for example, the applicability of competition and advertising laws. Thus, despite the fact that Directive 2005/29/EC of May 11, 2005 on unfair commercial practices applies to advertising on the Internet, the platform will not be held liable for unfair practices if it is not recognized as a "trader".

In the United States and the EU, platforms providing advertising services are not liable for unfair advertising if the platform does not influence the content of such advertising, does not receive advertising revenue due to the principle of limited liability of online platforms. In Russia,

the approach to the responsibility of platforms for the distribution of advertising is more strict. The FAS practice has shown that most often platforms providing advertising services, such as Yandex.Direct, Google AdWords, are recognized as advertising publishers, that means they are responsible for unfair advertising published by third – party advertisers through platform tools.

For example, in 2022, the FAS investigated Yandex on grounds of a complaint about advertising medical services without a license. An advertiser is an individual, when placing an advertisement through Yandex.Direct, provided Yandex with data on the license of another medical organization that was not related to the advertiser. The FAS noted that Yandex had the opportunity by moderation of advertisement to request from the advertiser information confirming the fact that the clinic provided medical services on the basis of the granted license, but Yandex did not take these measures. Therefore, Yandex was qualified as an advertising publisher and faced a fine for edition of advertisements of medical services provided without a license (clause 7, article 7 of the Law on Advertising).

There is a similar case related to the advertising of dietary supplements from the iherb website through the Google AdWords service. The FAS ruled that advertising undergoes control by AdWords moderation systems (technical "filters" and a self-learning automatic system, "manual" check), therefore Google qualifies as an advertising publisher. There are many other examples of FAS investigations, such as the case No. 022/04/14.3-559/2021 against Google AdWords regarding advertising of abortion services, case No. 08/05/7-67/2019 against Yandex.Direct regarding advertising of inappropriate conformity assessment services, case No. 08/05/25-116/2019 against Yandex.Direct regarding advertising of dietary supplements, etc.

By accepting the fact that the platform moderates advertising, the FAS identifies such platforms as advertising publishers and sets additional requirements for them, for example, the requirement to check an advertiser for a license in the relevant register. The main criterion for recognizing a platform as an advertising publisher is the availability of technical capabilities to prevent the dissemination of unfair advertising through moderation tools.

In this regard the European approach, for instance, is significantly different. Thus, in the case of 2022 judged by the Court of Amsterdam (C/13/692049 / HA ZA 20-1082) the Google company was sued for dissemination of fraudulent advertisements for bitcoin and financial services [Rechtspraak, 2022]. However, the Court dismissed the plaintiffs' allegations, having found that Google had not influenced content of advertisements placed through Google Ads. Therefore only the advertiser is responsible. Furthermore, Google takes technical and administrative measures to prevent and minimize the risk of inappropriate advertising through its moderation tools and restrictions, provides information about advertisers, and marks advertisements as 'ads'.

The contrasting difference between the Russian approach and the European one to the function of moderation procedures in determining the status of a platform is obvious. Whereas foreign courts accept the process of advertising moderation as a measure of compliance and release the platform from liability for taking measures in good faith to counter the spread of unfair advertising, the FAS uses the moderation process as a reason for qualifying the platform as an advertising publisher and impose penalties on the platform for unfair advertising on the same ground as on the advertiser.

It is noteworthy that despite the practice of the FAS to recognize such systems as Yandex.Direct or Google Ads as advertising publishers, the practice of the FAS has precedents of exempting the Yandex service from liability as an information intermediary. For example, in decision N 022/05/8-1140/2019 of the Altai Regional Office of the FAS regarding the advertising of plane tickets, where Aviaflot group of companies was listed as sellers, while the ticket sales website contained information about two individual entrepreneurs as sellers, in result the advertisement was qualified as misleading in regard of the ticket seller, hence the advertiser must have been held liable (Article 8 of the Federal Law on Advertising). However, the Regional Office of the FAS noted that the advertiser independently prepares and edits advertising through the client web interface of the Yandex.Direct website. Yandex company does not have the technical ability

to provide information about the sites to which the user actually visits by following the link provided in the advertisement. As a result, Yandex was released from liability as an information intermediary.

It follows that in Russia platforms are predominantly recognized as advertisers and are held liable for unfair advertising on the Internet. The practice in the United States and the EU shows that platforms, which provide advertising placement services, such as Google AdWords, Twitter, use the regime of limited liability as information intermediaries, which does not apply to advertising platforms in Russia. In foreign jurisdictions platforms are exempted from obligations to monitor the information that they transmit or store, including advertising (for example, in the EU, Article 8 of the Rules on a single digital market). In Russia, on the contrary, the FAS obliges platforms to additionally check advertisers, for example, their licenses. Some Russian practicing lawyers emphasize the problem of absent distinction between the liability of the platform which provides advertising services as an advertiser and as an information intermediary³.

Russian approach is in many ways similar to that of China. In China, paragraph 16 of the 2023 Interim Measures for the Administration of Online Advertising establishes the duty of platforms to take preventive measures against unfair advertising, including keeping information about customers who use advertising services for 3 years; monitoring content of advertisements published by virtue of platform tools, as well as the right of the platforms to correct, remove, block false advertisements [SAIC Order No 72, 2023]. The platform checks certification documents and advertising content and is obliged to hire special employees to this end. Thus, in China and Russia implement a similar approach of increased responsibility of platforms as advertising publishers for the advertisements edited through their systems. At the same time in Russia the obligation of platforms to control advertising was developed in the practice of the FAS, whereas in China the obligation is directly fixed in legislation.

Obligations of platforms which provide advertising services: the legal practice of Russia and foreign countries

In Russia and China platforms have duty of compliance with the requirements of advertising legislation as advertising publishers. In the EU and the United States, on the contrary, platforms can take advantage of the principle of limited liability of information intermediary and avoid liability for unfair practices (under EU Directive 2005/29/EC of May 11, 2005 on unfair commercial practices; §§ 41-58 chapter 15 of the U.S. Code).

Nevertheless, for the past few years, the United States and the EU have imposed additional obligations on platforms which provide advertising services. The level of load on the advertising platforms is determined by requirements, including the rules for placing and disseminating advertising, ensuring transparency of advertising, protecting personal data in personalized advertising, etc. It is necessary to examine some obligations of platforms in regard of advertising practice.

Firstly, platform users should be able to distinguish the commercial and non-commercial character of the distributed content. Therefore platforms are required to flag ads and disclose information about marketing character of message and the advertiser's personality. For example, in the EU Regulation 2022/2065 on a single market for digital services in art. 26 requires platforms that advertise on their online interfaces to indicate each advertisement in real time as an advertising message with prominent markings, and to provide details of the person on whose behalf the advertisement is presented and who paid for the advertisement. The platform should also provide information, which persons are targeted with advertisement in order to determine a recipient of the advertisement, i.e. advertising profiling criteria, as well as information about available options to change the ad settings for customization. In China, the 2023 Interim Administrative Measures for Internet Advertisements also set requirements to information about marketing character of the advertising and labeling as «ad» (Article 9) [SAIC Order No 72, 2023].

³ Contextual advertising of "Yandex.Direct" on E1.ru was considered by the Cassation Court. Kommersant. 12/11/2019. Available at: <https://www.kommersant.ru/doc/4189470> (date of access: 05/10/2023).

In Russia, according to the general rule for advertising goods being sold via distance selling, location and state registration number of the seller are to be indicated. At the same time, since 2022, advertising on the Internet has been subject to labeling requirements - the operator of advertising data assigns a special advertising identifier, without which it is prohibited to distribute advertising (clause 17, article 18.1 of the Law on Advertising). This identifier (as ID number) provides information about the advertiser, as well as parameters of the audience for which the advertisement was placed. This regulation is similar to the requirement of informing in the EU.

Secondly, it is the responsibility of platforms to ensure the traceability of advertising. Since 2021, Russia has introduced a system for accounting all placed advertising in the Unified Register of Internet Advertising. Advertising information is submitted through advertising data operators authorized by the Federal Service for Supervision of Communications, Information Technology and Mass Media (hereafter – the Roskomnadzor) to record advertising (Yandex ORD, Ozon ORD, VK advertising technologies, etc.). The Decree of the Government of the Russian Federation of May 25, 2022 N 948 obliges advertising publishers and operators of advertising systems that distribute advertisements of third-party advertisers on the Internet, as well as social networks, audiovisual services, news aggregators, and organizers of the dissemination of information on the Internet to submit information about advertising to the Register⁴.

In the EU, in accordance with Article 39 of Regulation 2022/206 on digital services, if a very large platform or search engine advertises, then it must collect and publish information about advertising in a special section of its online interface (repositories), providing tools to search for information about advertising using multi-criteria queries [Regulation (EU) 2022/2065, 2022]. The information in the repository is stored for one year from the moment the advertisement was demonstrated for the last time on the platform's interface.

Thus, there are significant differences between the European and Russian approaches to publishing advertising data on the Internet:

- entities that ensure the traceability of advertising. In Russia, all advertisers and advertising publishers or operators of advertising systems are required to provide information about advertising on terms of the agreement with the advertiser. The requirement is also applied to certain types of platforms, which cover any advertising that is distributed on the Internet. In the EU, only very large online platforms⁵ or online search engines with average monthly active users exceeding 45 million (art. 33 para. 1) have the obligation to participate in the advertising transparency process [Regulation (EU) 2022/2065, 2022]. Advertisers are exempted from the obligation to report advertising.

- way to ensure traceability. Russia keeps a state registry to store information, while in the EU, large platforms form their own private registries (repositories).

- list of disclosed information about advertising. The EU requires to publish information on the content of the advertisement (name of the product, the subject of the advertisement), the persons on whose behalf the advertisement is demonstrated, who pays for the advertisement, the demonstration period, the parameters of the audience and the number of ad recipients, the text of the advertisement. In Russia the state register includes similar information, however, it is also necessary to provide information on the type of advertising campaign (based on the cost of the number of demonstrations or clicks of advertising), information on contracts for the dissemination of advertising on the Internet. The registry is not publicly available in Russia.

It can be concluded that in the EU transparency of advertising is ensured largely through self-regulation, while in Russia it is based on state control, which increases the traceability of

⁴ Decree of the Government of the Russian Federation of May 25, 2022 N 948 “On approval of the criteria for classifying advertisers, advertising distributors, advertising system operators who have placed advertising on the Internet information and telecommunications network aimed at attracting the attention of advertising consumers located on the territory of the Russian Federation to persons obliged provide information or ensure the provision of information about such advertising to the Federal Service for Supervision of Communications, Information Technology and Mass Communications. Available at: <http://government.ru/docs/all/141152/> (accessed 05/10/2023).

⁵ Note. - Online Platform means a hosting service provider that stores and distributes publicly available information (art. 3 (i))

advertising, but creates additional costs and risks for businesses in terms of responsibility for the information provided about advertising. At the same time, if in the EU all the costs of ensuring the transparency of advertising fall on platforms (in terms of the costs of implementing and operating the repository), in Russia it is the responsibility of the advertiser, who has to pay for services related to submitting information about advertising to the Registry.

In general, the EU welcomes the self-regulation approach, as referred to in Art. 46 of Regulation 2022/206: the creation of codes of conduct for online advertising is encouraged to ensure greater transparency in the activities of participants in the online advertising value chain. Such codes should implement transfer practices of advertising information, maintaining advertising repositories, providing meaningful information about data monetization.

The United States and China have no such requirements to maintain such registries with information about advertising, but in China, Art. 16 of the Interim Measures requires platforms to store information about customers and advertising for 3 years and to provide such information to government agencies [SAIC Order No 87, 2016].

Third, platforms are subject to disclosure requirements to users. For example, in the EU, platforms that distribute content, including advertising, are obliged to provide information about content moderation, including algorithmic decision-making and manual check (Article 14), as well as to report on content moderation (art. 15).

In addition, the EU introduces reporting for "gatekeepers" or "providers of key platform services" (EU Regulation 2022/1925). The regulation covers platforms⁶ that have a significant impact on the domestic market, that reach an annual turnover of 6.5 billion euros over the past 3 years, if they provide key services in three EU states, have more than 45 million active consumers (who have seen ads at least once a month) per month in the EU and with more than 10,000 active business users (for whom ads were shown at least once a year by the platform).

The Regulation applies to any platforms (social networks, search engines, video hosting, etc.) that provide advertising services as a key service, including any advertising networks, ad exchanges and other intermediary advertising services provided by the provider of any of the platform's key services. Article 5 of the Regulations imposes additional obligations on gatekeepers in terms of transparency of advertising services – notably, the obligation to provide each advertiser (including upon request) and advertisement distributor with information about each placed advertisement, including the price and fees paid by the advertiser, remuneration received by the advertiser, indicators for calculation of prices and remuneration.

In general, EU Regulation 2022/1925 applies to any advertising services, including the services of advertising exchanges. Separate regulation for ad exchanges and brokerage services (intermediaries in ad exchanges) is currently under development in the United States (Digital Advertising Competition and Transparency Bill S.4258). Similarly, as in the EU, it is proposed to regulate the reporting of exchanges to publishers and advertisers in relation to all advertising transactions, as well as brokers to clients in relation to the number of advertising spaces, a description of the routing processes of brokers upon receipt of requests from a client for the purchase or sale of advertising spaces, information on expenses and rewards received, etc.

In Russia, there are currently no requirements for providing information and reporting on content moderation and using algorithms. The regulation of the activities of advertising systems, which can provide exchange services, has introduced a new subject of regulation since 2021 - the operator of advertising systems, which provides services of distributing of advertisement on third-party information resources, for example, as Yandex Advertising Network, VKontakte Advertising Network (within the meaning of paragraph 7.1 of article 38 of the Federal Law on advertising). There are no special requirements for advertising system operators of reporting to advertisers and publishers on the process of advertising distribution (with the exception of social advertising distribution indicators). However, advertising system operators should provide information regarding the cost of the actions of the consumer of advertising or display, as well as

⁶ Note. - Platforms that serve as an important information intermediary (gateway) for business users to connect with end users and have (or will in the future) a strong position on the market.

all information about the volume and distribution of advertising impressions for the Unified Register of Internet Advertising. Nevertheless, this information on advertising is determined for government record keeping, operators of advertising systems are not obliged to report to the publishers and advertisers about the fees and prices per ad views for each client on a daily basis.

Fourth, platforms are obligated to implement compliance procedures aimed at risk management. For example, the EU Regulation 2022/206 requires platforms to have a mechanism which enables users to report information about unfair advertising by users (Article 16) and as well as a mechanism of dispute resolution, to create systems for blocking violators, etc.; to work with the design and organization of the online interface, which do not mislead consumers (Article 25); to protect minors (Article 28). Moreover, very large online platforms or search engines are required to take measures to reduce systemic risks related to the design, algorithms, operation and use of their services, misconduct by recipients of the service, for example, by assessing the selection and submission system advertising to reduce the potential negative impact of promotional activities (Articles 34-35). Large platforms are also responsible for creating a crisis response mechanism against threats, including unfair advertising content (Article 36), and for conducting an audit (Article 37).

These obligations go beyond advertising regulation, as they fall on platforms that distribute any content, not only advertising. However, the listed obligations are important for providing fair advertising services by platforms. For example, when assessing risks in the EU, large platforms should focus on the risks of algorithmic systems that affect ad rankings. In China, Article 15 of the Interim Measures on Internet Advertising directly requires platforms to keep the rules and the records on advertising editions with the use of algorithmic recommendations. In Russia, the requirements of content monitoring and reporting are provided within the information legislation, however, detailed procedures for compliance, audit, implementation of dispute resolution mechanisms, risk assessment, transparency in the use of algorithmic solutions, etc. have not been established.

Thus, regarding the regulation of advertising on the Internet in Russia and other countries, it can be concluded that regardless of whether the platform is an advertising publisher (or trader) or an information intermediary, the platform is subject to additional requirements related to the traceability of advertising, and as well as advertising services. In particular, in Russia and in foreign countries, platforms are responsible for reporting on placed advertisements (whether for state register of information or for a voluntary repository), labeling, and disclosure of information. Nonetheless, the EU is developing not only reporting on advertising, but also additional compliance measures on prevention of systemic risks, transparency of the activities of advertising exchanges (or advertising system operators). Russia has not yet implemented similar regulation.

Problems of use of personal data by platforms for distributing online-advertisement

The quality of advertising demonstration services rise with the use of personalized advertising services – i.e. advertisement demonstrated on the basis of the individual characteristics of the user. The use of personalized advertising increases the percentage of content relevance (in terms of the ratio of responses to advertising content to the number of content views) from 10% to 50% [Skiera B. et al., 2022]. A survey of users by the online publisher Adlucent shows that 57% of respondents are ready to click on a link with standard advertising, while in the case of personalized advertising this figure reaches 70% [Adlucent, 2016].

Moreover, country regulators introduce a requirement to disclose information about the targeted audience (in the EU, Russia), in particular, advertising profiling criteria with the ability to change advertising individualization settings (in the EU). However, provision of personalized advertising requires prior collection and processing of a large amount of users' personal data. That raises the problem what data can be used to provide advertising services.

In Russia, as a general rule, platforms assume responsibility for compliance with the legal regime of personal data as a data operator, whose status is regulated by the provisions of Chapter 4 of the Federal Law “On Personal Data”. Given that the functions of processing personal data,

including processing for display of advertising, constitute a separate legal regime for personal data, special attention should be paid to digital platforms in the role of data controller.

For personalized advertising a digital platform has to collect two types of data: data about characteristics of a user as a consumer, such as gender, age, professional activity (traditional personal data), and data about individual consumer behavior, such as data on actions on digital platforms, about choices of goods, decision-makings about purchases, etc. (behavioral data).

Both types of data are covered by the regime of personal data, but the category of behavioral data has a peculiarity. Unlike traditional personal data, which the user declares himself in the form of consent to the processing of his data, behavioral data are not provided by the user, but “generated” by him, while a digital platform fixes them. Therefore, behavioral data are also called "data generated by users" (in foreign practice, the term "user-generated content" is used). Despite a differing technique for collecting such data, foreign judicial practice confirms that behavioral data are personal data due to the criterion of user identifiability, as noted, for example, in the decision of the Supreme Britain in the case of *Vidal-Hall v Google Inc* [Gill K., 2016]. The same conclusions were reached by the Moscow Court in its ruling dated 11/10/2016 in the case of the social network LinkedIn⁷. Therefore, the collection of behavioral data, including collection for the purpose of providing advertising services, requires compliance with the rights of subjects of personal data.

The cookie-files are the most popular tracking technology among digital platforms. Cookies are small text files sent by a web server and stored on a user's computer that contain information about previous activities on websites. Cookie-files are used for marketing research, since its analysis enables evaluations of a consumer's behavior on the site and determining the most relevant advertising content for this user [Deloitte, 2020]. Some jurisdictions have specific regulation on the use of cookies [OneTrust, 2020]. For example, in the EU there is Directive 2009/136/EU on privacy on the Internet, which establishes the requirements for the mandatory obtaining of the user's consent to collect his behavioral data and for providing access to cookie management tools [Koch R., 2020]. In other jurisdictions, the competent authorities develop specific guidelines for digital platforms for responsible use of cookies, such as the “Cookies and Personal Data Protection” guide from the Brazilian National Authority [ANDP, 2022]. Such guidelines could interest digital companies regardless of jurisdiction, since development of a corporate policy on the use of cookies provides digital platforms with consumer audience trust, both in platform services and in other displayed content, including advertising [Usercentrics, 2021].

Behavioral data separately collected with cookies does not allow a digital platform to display personalized advertising. Digital platforms can personalize advertising through systemic data processing, namely, when creating digital user profiles (profiling) [UiO, 2016]. For this reason practicing lawyers often consider profiling as an integral link between the collection of behavioral data (tracking) and its targeting (targeting) [Skiera B. et al., 2022]. Notably, European law directly requires platforms to ensure transparency in the use of user profiles for displaying advertising, in particular, in accordance with Art. 26 of Regulation 2022/2065, the information about the displayed advertising, which is subject to disclosure, includes the criteria for ad profiling. Thereby users are enabled to manage their personal data for personalization of the displayed advertising.

In Russian legislation, the digital profile is not yet specially regulated. Although the digital profile as a set of personal data falls under the general requirements of the Federal Law "On Personal Data" dated July 27, 2006 N 152-FZ9 (hereinafter - the Federal Law "On Personal Data"), the problem is that the features of such data as complex remain unregulated. For example, it is unclear what data can be included in the digital profile and which cannot, how the platform can notify the user about the use of data for profiling, including purpose of displaying advertising. In

⁷ Decision of the Moscow Court dated 10 November 2016 in case No. 33-38783/2016. Available at: <https://mos-gorsud.ru/mgs/services/cases/appeal-civil/details/19d661b0-6b14-48eb-b753-9adbf19fe32a> (date of access: 05/10/2023).

result in Russia digital platforms that display personalized advertising based on digital user profiles face to blurred limits of their responsibility as data operators. The digital platform has to solve the indicated issues on its own [UiO, 2016].

By comparison, in India the Digital Personal Data Protection Bill 2022 explicitly regulates the nature and purpose of data processing for profiling: it is “any form of processing of personal data that analyses or predicts aspects concerning the behaviour, attributes or interests of a Data Principal” (paragraph 2 of article 2) [DPDP Bill, 2022]. Thus, by formulating a clear definition of profiling, the legislator solves two tasks at once. First, the digital platform clearly understands the scope of its obligations by processing personal data for displaying personalized advertising. The second is that the user of a digital platform is aware of an amount of collected and systematized data, their value, and, accordingly, is able to exercise his right to dispose of his data as a subject of personal data, for example, to withdraw consent to the processing of his collected behavioral data, as a result of which personalized advertising could be no longer displayed.

It is characteristic, that the developers of the Regulation on digital services 2022/2065 of October 19, 2022 excluded in advance the possibility of profiling child users or using sensitive data for online platforms in digital profiles (clause 3 of article 26 of the Regulation) [Regulation (EU) 2022/2065, 2022].

Article 28 of the EU Regulation 2022/206 requires platforms to eliminate risks related to protection of minors by distribution of advertising, thereby forces platforms to take measures to analyze the age of the audience. The UK regulator, in its Age Restricted Online Advertising Guidelines, recommends establishing restrictions for targeting ads for certain types of products, in particular food or non-alcoholic beverages with a high content of fat, salt or sugar and lotteries for children under 16 years old, as well as gambling, alcohol and e-cigarettes for children under 18 [CAP, 2021]. If the resource’s audience under 18 years old is supposedly more than 25%, then it is forbidden to advertise goods restricted to children on this resource. Given that many children may misrepresent their age, for targeted advertising purposes, the Guidelines suggest using behavioral data in order to prevent the distribution of advertising that is prohibited for children's Internet resources.

In China, the Personal Information Protection Law of 2021 requires digital platforms to conduct an impact assessment of their activities for security of personal data (Article 55, paragraph 1), with respect to sensitive data, which includes personal data of users under the age of 14 (p. 28) [PIPL, 2022].

At the same time, digital platforms should not form digital profiles without the direct informed consent of the user, i.e. should not practise the shadow profiling [Aguair L., 2022]. In case of shadow profiles, the user does not control the collection of data, their volume, and cannot withdraw consent to data processing. This provision contradicts the principle of control by the subject of personal data of the processing his collected data [Hatmaker T., 2018]. In addition to violating the law on personal data, shadow profiling practices also violate the principle of good faith in relation to consumers of digital content, because the use of a shadow profile for targeted advertising is actually an illegal tool for manipulating consumer behavior [Cooper D., et al., 2022].

The problem of shadow profiling is most acute for digital platforms such as "gatekeepers" within the meaning of European law. Since profiling looms large as far as volume and variety of data increase, the problem of shadow profiles gets most typical for gatekeeper platforms with a significant amount of operations with users' personal data. Therefore, the EU Regulation 2022/1925 directly establishes a number of restrictions for gatekeepers in processing personal data, including a ban on the processing of personal data of users of third-party sites using the services of the gatekeeper platform for the purpose of displaying advertising.

Taking into account the identified problems in the processing personal data by digital platforms for displaying advertising, it is possible to articulate several key tasks facing digital platforms. First, digital platforms must collect and process data for personalized advertising in accordance with the general requirements of personal data legislation, including data collection by tracking [IMCO EU, 2021].

Second, digital platforms must provide effective mechanisms for informing and obtaining user consent. In practice, it means that digital platforms must necessarily not only notify the user about use of tracking technologies, like cookies, but provide him with the opportunity to agree or refuse tracking, as well as to set limits for collecting his data. For example, in the United States the California Consumer Privacy Act explicitly establishes the user's right to restrict the possibility of selling his data, transferring it to third parties and combining data for processing, which allows the user to control the possibility of digital platforms to demonstrate him personalized advertising [Larrison B., 2023].

Third, digital platforms need to be transparent about their behavioral data policies for advertising purposes. It is noteworthy, that in January 2022 the French data protection authority fined Google, YouTube and Facebook for manipulating the cookie consent form: with their consent forms it was easier for users to agree to the use of files than to refuse them [Meyer D., 2022]. It is important to take into account that the transparency of conditions for user management of their behavioral data results in the possibility of setting up personalized advertising, and therefore in improving its quality.

Fourth, digital platforms should be especially careful with targeted advertising in regard of their most vulnerable users, children. This impact assessment of the digital platform activity certainly covers the displaying of personalized advertising. For demonstrating personalized advertisement to child digital platforms should not only show advertising content that is attractive to the user, but also protect against ads that are inappropriate for the user's age.

CONCLUSION

In Russia digital platforms are mainly recognized as advertising publishers, therefore they are responsible for the distribution of unfair advertising on the Internet on an equal basis with advertisers due to their moderating functions. However, the experience of the United States and the EU provides an opportunity for platforms to avoid liability for such advertising by taking advantage of the principle of limited liability of an information intermediary. But in Russia this principle does not apply to platforms that provide advertising services. At the same time, abroad, the process of moderation by the advertising platform is accepted as a compliance measure to prevent the dissemination of unfair advertising. In Russia, on the contrary, the FAS perceives the use of advertising moderation tools as a circumstance that makes the platform responsible for advertising and verification advertisers. This indicates a higher level of platform's liability in Russia compared to foreign countries.

Absence of the principle of limited liability of an information intermediary in Russia creates the risk of high fines for platforms, even if the platform takes measures to prevent the distribution of advertising inconsistent with the law (sets filters, blocks inappropriate advertising, checks sellers' documents). Therefore, Russian legislation needs introduction of the concept of limited liability of platforms as information intermediaries in order to exempt platforms from liability for placing unfair advertising, but only on condition that the platform does not participate in the creation of advertising message, takes sufficient measures to limit the distribution of unfair advertising (for example, through filtering systems, automated and manual checks, etc.), removes unfair advertising on demand.

Regardless of whether the platform is an advertising distributor, Russia and foreign jurisdictions implement additional measures to ensure the traceability of advertising, in particular, such as maintaining registers with information on advertising to control the distribution of unfair advertising, label advertising, store of advertising information. However, in other countries advertising service platforms are subject to additional requirements in terms of reporting to advertisers and publishers, taking compliance measures and managing risks in the distribution of advertising, for example, risks related to use of algorithms, etc. Russia does not implement similar requirements at the moment.

Digital platforms are also responsible for undue processing personal data of users collected to display personalized ads. Liability is not limited to the information security of data processing.

Digital platforms must also provide adequate conditions for users to exercise their rights as subjects of personal data. The lack of regulatory guidelines in national law regarding technologies for collecting specific - behavioral - data for advertising does not allow digital platforms to ignore the tasks of personal data operators. On the contrary, the absence of instructions increases the responsibility of digital platforms for compliance with the personal data regime, since platforms have to develop optimal solutions on their own for fulfilling their obligations as personal data operators, taking into account the specifics of the collection and processing of behavioral data. For example, digital platforms independently develop the design of the consent form for the use of cookies, form a system of options for setting cookie files by the user, etc. In this regard, expert guidance on data processing for digital platforms which place personalized advertising can be highly demanded in Russia. The development of a such guide could involve not only representatives of public authorities such as the Roskomnadzor and the Ministry of Digital Development, but also experts from business associations, lawyers in information law and independent experts. The relevance of such tools to support Russian digital platforms is growing in view of increasing hacker attacks on the infrastructure of Russian companies and other forms of sanctions.

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