

Identifying the Commercial Nature of ‘Influencer Marketing’ on the Internet

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¹ This article expands on ideas presented by the author in Jan Trzaskowski (ed), Søren Sandfeld Jakobsen, Susanne Karstoft, Hanne Kirk, Lars Bo Langsted, Thomas Riis, Charlotte Bagger Tranberg & Helena Lybæk Guðmundsdóttir, *Internetretten* (3rd edition, Ex Tuto 2017), pp. 239–244 (chapter 4.5.5.1), and Peter Møgelvang-Hansen, Thomas Riis & Jan Trzaskowski, *Markedsføringsretten* (3rd edition, Ex Tuto 2017), pp. 178–183 (chapter 5.3.2.1). See also Søren Sandfeld Jakobsen, “Advertorials” – *hvor går grænsen mellem reklame og journalistik?* in Børge Dahl, Thomas Riis & Jan Trzaskowski, Liber Amicorum Peter Møgelvang-Hansen (Ex Tuto 2016), pp. 167–184.

This article analyses the legal implications when traders use private individuals to promote their products on the Internet through blogs, social media, podcasts etc. The focus is on laws concerning the identification of the commercial nature of information as found in the Unfair Commercial Practices Directive and the E-Commerce Directive. In the RLVs judgment it was found that the Unfair Commercial Practices Directive does not apply to sponsored content in newspapers. In that vein, it is discussed to which extent this decision affects editorial content produced by influencers. It is also discussed to which extent influencers can be independently liable for their commercial practices and to which extent traders may be liable for activities carried out by the influencer.

Technology, media, and advertising are closely related, as technology is an important building block for media that is either financed through advertising or developed as a vehicle for advertising. Information technology took off in Europe more than 500 years ago when Gutenberg introduced and enhanced movable type printing press technology – in times that brought us out of the Dark Ages and into the Age of Discovery. During the last 50 year's time, the Internet has spurred developments that – from both a technological and a societal point of view – may compare to those at the end of the Middle Ages.²

1 Influencer Marketing

One of the most important aspects of the Internet is that the cost of (global) communication has been driven down close to nought. Due to the rapid adoption of the Internet, it has become a means of communication that also enables private individuals to disseminate information to large crowds. Blog services and social media platforms etc. have eliminated barriers relating to the individual's technical skills.

Due to the realisation that consumers trust their peers more than businesses, traders have sought out ways to influence the 'buzz' created among individuals.³ One approach is to use celebrities to endorse companies and/or products. In the early days of the Internet, celebrity status – which includes a particular, and in this context important, 'following' – could only be achieved through or with support from traditional (editorial) media. However, in the wake of the inexpensive means of dissemination discussed above, private individuals are able to establish themselves as 'celebrities' with a following – independently of traditional media and usually by utilizing technology platforms such as social media platforms.

² See a brief introduction to the information society in Jan Trzaskowski, Andrej Savin, Patrik Lindskoug & Björn Lundqvist, *Introduction to EU Internet Law* (2nd edition, Ex Tuto 2018), chapter 1.

³ See e.g. Jan Trzaskowski, *User Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral*, *International Journal of Law and Information Technology*, 2011, pp. 348–380.

The ‘disruption’ of this mechanism for creating celebrity status combined with the commercial interest in influencing buzz, has created a new group of celebrities known to marketers as ‘influencers’. Influencers may earn money by promoting the trader’s products – for remuneration or other benefits. Influencers may gather in networks such as Splay or ‘Bloggers Delight’ in Denmark⁴ which help to connect traders with relevant influencers. There is a lot of money at stake for influencers which can be illustrated by a story of a 6-year-old boy who is said to be making \$11 million a year by reviewing toys on a family-operated YouTube channel.⁵

‘Influencer marketing’ is a marketing practice where traders address individuals that have influence over potential buyers rather than targeting potential buyers directly. In particular through social media platforms, influencers have access to engage with large groups of consumers. The promise is that influencer marketing opens up ‘a new channel for brands to connect with consumers more directly, more organically, and at scale’.⁶

The route that commercial communication may travel can be illustrated as follows:

Trader	The marketer who wishes consumers to be influenced.
→ Influencer/advertising agency	Entity that connects the trader with an influencer who has an appropriate audience.
→ Influencer	Person who has an audience that is entertained through a channel.
→ Platform/media	The technological platform that the influencer uses to reach his audience.
→ Consumer	The influencer’s audience that comprises potential customers of the trader.

Illustration 1: How traders may communicate to consumers through influencers.

The trader may choose to address influencers directly, i.e. without using an agency, e.g. by sending products to the influencer. The influencer may use established platforms such as social media to connect with his audience, but may also establish his own (media) platform such as a website or a blog. Influencers will usually have a presence on established (social) media – often with a view to

⁴ Splay.tv/about” and “bloggersdelight.dk/” respectively.

⁵ Samantha Schmidt, *6-year-old made \$11 million in one year reviewing toys on You Tube*, Washington Post (11 December 2017).

⁶ Misha Talavera, *10 Reasons Why Influencer Marketing is the Next Big Thing*, Adweek (14 July 2015), “www.adweek.com/digital/10-reasons-why-influencer-marketing-is-the-next-big-thing/” (visited March 2018).

attract traffic to their own platforms from which they exercise more direct control over revenue streams from e.g. advertising.

It is important to realise that influencers build a brand around themselves in order to establish and grow an audience. Influencers on the Internet thus create a commercial media platform for themselves and – despite the often narcissistic nature and sometimes questionable quality – the content on these media cannot be denied to have elements of an editorial nature. Hence, influencer marketing falls inside the realms of both marketing law and media law. The purpose of this article is to analyse and discuss legal implications in that vein.

The focus in this article is on the law concerning identification of the commercial nature of information that influencers disseminate to their followers with a view to promote the trader's product.

2 Marketing Law

At an EU-level, rules concerning unfair commercial practices that may harm consumers' economic interests are fully harmonised by the Unfair Commercial Practices Directive.⁷ It follows from Article 5 that *unfair* commercial practices shall be prohibited. A commercial practice is unfair if the practice is (1) listed in Annex I of the directive or (2) contrary to the requirements of professional diligence – including by being misleading and/or aggressive, cf. Articles 6–9 – and is likely to materially distort the economic behaviour with regard to the product of the average consumer.⁸

For the purpose of this analysis, it is relevant to consider the extent to which the use of influencer marketing may amount to a misleading commercial practice. In addition, the directive's scope of application must be discussed as this scope – due to the full harmonisation – sets the limit for regulating the matter on a national level.

2.1 Identification of 'Commercial Intent'

A commercial practice is misleading (A) if it is untruthful or in any way, including overall presentation, is likely to deceive the average consumer, even if the information is factually correct ('misleading action', Article 6), and/or (B) it in its factual context – taking account of all its features and circumstances and the limitations of the communication medium – omits 'material information' that the average consumer needs, according to the context, to take an informed

⁷ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. On full harmonisation *See* e.g. case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, ECLI:EU:C:2010:660, paragraph 30 with references. *See* also Jan Trzaskowski, Andrej Savin, Patrik Lindskoug & Björn Lundqvist, *Introduction to EU Internet Law* (2nd edition, Ex Tuto 2018), chapter 7.

⁸ For the practices laid out in Articles 6–9 (misleading and aggressive practices), the commercial practice needs only to be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, which, together with the details of the provisions, is likely to amount to 'material distortion'.

transactional decision ('misleading omission', Article 7). Such material information must be provided in a clear, intelligible, unambiguous, and timely manner.

Failure to provide material information is only a misleading omission if it 'causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'. This threshold for 'commercial effect' is relatively low as transactional decision – in Article 2(1)(k) – is broadly defined as 'any decision taken by a consumer concerning whether, how and on what terms to purchase'. This concept covers not only the (potential) decision whether or not to purchase a product, but also decisions directly related to such a decision, including the consumer's decision to enter a shop.⁹

The directive does not elaborate much on what information is considered 'material'. However, it follows explicitly from Article 7(2) that it is a misleading omission not to 'identify the commercial intent of the commercial practice if not already apparent from the context'.

Limitations of the communication medium must be taken into account when determining whether material information is omitted. This is elaborated on in Article 7(3) which reads: 'Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.'

It is important to emphasise that the provision concerning limitations in space and time – which may be relevant in the context of media used by influencers – only concerns the disclosure of information and thus does not seem to deviate from the requirement that the commercial intent must be apparent – at least from the context. In addition, it must also be emphasised that the provision only applies to misleading *omissions*, and that the commercial practice may be a misleading *action* taking into consideration the 'overall presentation' (even when information is 'factually correct').¹⁰

When determining whether a commercial practice is a misleading *action*, one of the elements to take into account is 'the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product', cf. Article 6(1)(c).

As mentioned above, Annex I of the Unfair Commercial Practices Directive comprises 31 commercial practices that are – 'under all circumstances', i.e. without considering professional diligence or possible impact on transactional decisions – considered unfair. Point 11 concerns 'using editorial content in the media to promote a product where a trader has paid for the promotion'. In such situations, it is an unfair commercial practice if it is done 'without making that clear in the content or by images or sounds clearly identifiable by the consumer'.

⁹ Case C-281/12, *Trento Sviluppo og Centrale Adriatica*, ECLI:EU:C:2013:859, paragraphs 35–36. However, See also Case C-391/12, *RlvS*, ECLI:EU:C:2013:669, discussed below.

¹⁰ See in general Case C-611/14, *Canal Digital Denmark*, ECLI:EU:C:2016:800.

It is explicitly mentioned in point 11 that the provision is without prejudice to the Audiovisual Media Services Directive which is dealt with below under 3. As discussed below, the Court of Justice of the European Union (CJEU) has decided that this 'exemption' also covers newspaper publishers. In that light, it cannot be ruled out that the provision also does not apply to influencer's editorial activities. It is not completely settled what is considered 'editorial content' and 'media', but it must include situations where e.g. a trader runs advertising that resembles editorial content (native advertising).¹¹

To the extent point 11 is applicable to influencers' communication concerning the trader's product, it applies only when the trader has paid for the commercial communication. Point 11 goes a bit further than the provision on misleading omissions in that it does not require a commercial effect (affecting transactional decisions) and it does not mention limitations in space and time.

2.2 Commercial Practices

It is assumed that the *trader's* activity is of a commercial nature, but it is not clear to what extent the *influencer's* activity will constitute a commercial practice within the meaning of the Unfair Commercial Practices Directive.

In cases where there is an agreement between the trader and the influencer, under which the influencer must promote the trader's products, the influencer could either be perceived as (1) employed by the trader (acting on his behalf), which is dealt with below under 6, or (2) acting in his own name as self-employed, which is dealt with immediately below.

Just because a practice is commercial does not necessarily entail that it is a 'commercial practice' within the meaning of the Unfair Commercial Practices Directive. In the directive, '[business-to-consumer] commercial practice' is defined as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by *a trader*, directly connected with the promotion, sale or supply of *a product to consumers*' (emphasis added).

It is clear from the definition that the commercial practice must be carried out by a 'trader' which – in Article 2(1)(b) – is defined as 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft, or profession and anyone acting in the name of or on behalf of a trader'.

The CJEU has consistently maintained that the Unfair Commercial Practices Directive is 'characterised by a particularly wide scope *ratione materiae*',¹² and

¹¹ Case C-391/12, *RlvS*, ECLI:EU:C:2013:669, paragraphs 44–45.

¹² See e.g. cases C-388/13, *UPC Magyarország*, ECLI:EU:C:2015:225, paragraph 34, C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, ECLI:EU:C:2010:660, paragraph 21, and C-59/12, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:2013:634, paragraph 40.

that the act in question must 'clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development'.¹³

To the extent the influencer act as self-employed, his commercial activities in relation to promote, sell or supply his own product – editorial content, merchandise etc. – to consumers constitutes a commercial practice within the meaning of the directive.¹⁴ It is, however, not similarly obvious that the influencer's activity to promote the trader's product falls inside the scope of the directive.

In the *RLvS* judgment,¹⁵ the CJEU concluded that the Unfair Commercial Practices Directive does not preclude 'a national [German] provision under which [...] publishers are required to identify specifically, in this case through the use of the term "advertisement" ("Anzeige"), any publication in their periodicals for which they receive remuneration, unless it is already evident from the arrangement and layout of the publication that it is an advertisement.'

The case concerned two articles published by *RLvS* in the 'GOOD NEWS Prominent' and 'GOOD NEWS Wunderschön', respectively, and for which *RLvS* had received remuneration from sponsors. In both cases, the headline was accompanied by the wording 'sponsored by' and the name of the sponsors: 'Scharf' and 'Germanwings', respectively. A competitor, *Stuttgarter Wochenblatt*, considered that this was a violation of Paragraph 10 of the *Land Press Law* as the two articles were not clearly identified as being advertisements. The provision is found in virtually identical form in almost all the *press and media laws* of the German *Länder*.

The first German instance, the *Landgericht Stuttgart* (Regional Court, Stuttgart), ordered *RLvS* not to publish or cause to be published for remuneration in the *GOOD NEWS* advertiser any publication not identified by the term 'advertisement' ('Anzeige'), concluding that it was not generally apparent from the arrangement and layout that the two articles were advertising. The decision was upheld by the *Oberlandesgericht Stuttgart* (Higher Regional Court, Stuttgart) and appealed on a point of law before the *Bundesgerichtshof* (Federal Court of Justice) (Germany). Here it was argued that the *Land Press Law* infringed European Union law and therefore was not applicable.

The CJEU found – in contrast to the opinion presented by Advocate General Wathelet¹⁶ – that the Unfair Commercial Practices Directive could not be relied on against newspaper publishers to preclude the application of the national provision; even though the national law in question also sought to protect the interests of consumers.¹⁷

The CJEU found that even though the publications could be classified as commercial practices, the relevant trader – in relation to the consumers – would

¹³ See case C-310/15, *Deroo-Blanquart*, ECLI:EU:C:2016:633, paragraph 28 with references.

¹⁴ See e.g. case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag*, ECLI:EU:C:2010:660. See also Case C-391/12, *RlvS*, ECLI:EU:C:2013:669, discussed below.

¹⁵ Case C-391/12, *RlvS*, ECLI:EU:C:2013:669.

¹⁶ Case C-391/12, *RlvS*, ECLI:EU:C:2013:468 (opinion), paragraph 44.

¹⁷ Paragraph 31.

be Scharr and Germanwings, and not the media itself. It was emphasised that the two articles were not such as to promote the newspaper publisher's product – in this case a free newspaper – but products of the two undertakings.¹⁸ The Court found that *RLvS* did not act in the name of or on behalf of those undertakings within the meaning of Article 2(1)(b).

In addition, the Court concluded that the newspaper publisher's publication of the two articles – which were liable to promote, possibly indirectly, products – '[was] not liable to alter significantly the economic behaviour of the consumer in his decision to purchase or take possession of the (free) newspaper in question'. Thus, such a publishing practice could not be classified as a 'commercial practice' within the meaning of Article 2(1)(d).

Finally, the Court emphasised that since the European Union legislature has not yet adopted secondary legislation as the German law for the written press, the Member States retain the power to impose obligations on newspaper publishers to indicate when editorial content has been sponsored.

With the same arguments, it may be argued that the influencer's activity to promote the trader's product falls outside the scope of the Unfair Commercial Practices Directive; i.e. it does not relate to the influencer's product (e.g. a blog) and the promotion is not likely to influence consumers' (transactional) decisions relating to the services offered by the influencer.

It is, however, mentioned in paragraph 38 of the *RLvS* judgment that – given the definition of 'trader' – that directive may apply 'in a situation where an operator's *commercial practices* are put to use by another undertaking, acting in the name or on behalf of that operator, with the result that the provisions of that directive could, *in certain situations*, be relied on as against both that operator and the undertaking, if they satisfy the definition of "trader".' (emphasis added).

One argument *against* the exclusion of influencers editorial content from the scope of application could be the fact that the CJEU generally focuses on the effectiveness of the protection afforded to consumers by the directive.¹⁹ Treating commercial content differently dependant on whether the trader or influencer disseminate it could lead to skewed results – in particular to the extent that there is no regulation/harmonisation of commercial content disseminated by influencers.

It is unclear to which extent the decision in the *RLvS* case extends beyond sponsored editorial content with the result that the Unfair Commercial Practices Directive cannot be relied on against e.g. publishers in the context of traditional advertising. It may be difficult to see why a decision to include advertising should relate more to the service provided by the media than sponsored content – and advertising in media is also regulated through media law.

The CJEU has found that the directive applies to certain intermediaries, including an online sales platform's ('MeinPaket.de') promotion of other

¹⁸ The fact that the plaintiff was a competitor is unlikely to have had any bearing on the decision. The court mentioned in this context that these two undertakings 'were not parties to the main proceedings'. However, it would lead to arbitrary results – and be contrary to the effectiveness pursued – if the national law's compatibility with EU law would depend on the nature of the plaintiff in a concrete case.

¹⁹ See e.g. case C-357/16, *Gelvora*, ECLI:EU:C:2017:573, paragraph 28.

suppliers' products²⁰ and a debt collection agency's ('Gelvora') actions for recovery against the debtors of other trader.²¹ In both cases the scope was extended as to include third parties to services that did not directly relate to the third party's products.²² This could be an indication that media service providers in general fall outside the scope to the extent the commercial content does not seek to promote the media service provider's product.

The *RLvS* case is clear with regard to the application of the Unfair Commercial Practices Directive to advertising in print media such as newspapers. It is, however, not clear to which extent the result can be applied to influencer marketing, which may form part of editorial content provided by the influencer. It cannot be ruled out that – at least under certain circumstances – the content provided by the influencer can be perceived as editorial – falling inside the realm of media law – and that the promotion of the trader's products does not relate to the product offered by the influencer.

To the extent the relationship between the influencer and his audience falls outside the scope of the Unfair Commercial Practices Directive, member states are free to regulate (in compliance with European Union law).²³ This entails that Member States possibly could regulate influencers separately under media law – at least to the extent the regulation does not illegally hinder the free movement of goods and services.²⁴

3 Media Law and Services on the Internet

Even though the Unfair Commercial Practices Directive has a broad scope of application due to *inter alia* ensure effectiveness of the afforded protection, it must be held that it is indeed possible that the influencer's content – including e.g. sponsored content of an editorial nature – falls outside the scope of that directive and inside the realm of media law.

In the *RLvS* judgement it is concluded that the situation – *in casu* sponsored content in print media – should be dealt with through media law rather than marketing law.²⁵ Reference was made to the Audiovisual Media Services

²⁰ Case C-146/16, *Verband Sozialer Wettbewerb*, ECLI:EU:C:2017:243.

²¹ Case C-357/16, *Gelvora*, ECLI:EU:C:2017:573.

²² It could be argued that the advertising by the online sales platform also concerned (directly) the services provide by the platform, but the question related to the obligation to provide material information about the suppliers.

²³ See for illustration case C-339/15, *Vanderborgh*, ECLI:EU:C:2017:335, concerning the provision of oral and dental care services.

²⁴ See for illustration Case C-368/95, *Familiapress*, ECLI:EU:C:1997:325, concerning a periodical containing prize puzzles.

²⁵ Case C-391/12, *RlvS*, ECLI:EU:C:2013:669, paragraphs 43–45, by making reference to the explicit exclusion of directive 89/552/EEC (now directive 2010/13/EU) in point 11 of Annex 1 to the Unfair Commercial Practices Directive.

Directive,²⁶ which does not apply to print media, and only may be relevant in this context for influencers that maintain 'editorial responsibility' over an 'on-demand audiovisual media service'.²⁷ However, inspiration as to regulation can be drawn from this directive.

The Audiovisual Media Service Directive regulates three forms of commercial communication that can also serve as illustration for the ways influencers may promote the trader's products:

1. *Advertising* (Article 9 and Chapter VII). Television advertising must be recognisable and distinguishable from editorial content. The proportion of television advertising spots within a given clock hour shall not exceed 20%. Surreptitious audiovisual commercial communication is prohibited and subliminal techniques may not be used.
2. *Sponsorship* (Article 10). Sponsored content may not be influenced in such a way as to affect the responsibility and editorial independence of the media service provider. Such content may not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services, and viewers must be clearly informed of the existence of a sponsorship agreement.
3. *Product placement* (Article 11). Product placement is prohibited, but with a number of exceptions. When product placement is allowed, and in addition to the requirements concerning sponsored content, the programme may not give 'undue prominence' to the product in question.

In conclusion, advertising should be recognisable *and distinguishable* from editorial content and other commercial relationships to traders (sponsorship and product placement) must not affect the editorial independence or entail undue prominence of products. In addition to these provisions, media law also regulates various aspects of both commercial and editorial content as well as editorial liability.

Media law, as established in the Audiovisual Media Services Directive, thus seems to raise the bar for identification of commercial communication – compared to the Unfair Commercial Practices Directive – as it in addition to identification also requires advertising to be 'distinguishable' from and without (editorial) influence on editorial content.

The division of the three types of commercial interaction can be explained from its possible impact on the media's editorial freedom. Advertising is clearly separated from the editorial content (otherwise it would be sponsorship or

²⁶ Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. *See* also proposal of 25 May 2016 for a directive amending Directive 2010/13/EU, COM(2016) 287 final, 2016/0151 (COD) in which it is proposed to expand the scope of application.

²⁷ Defined in Article 1(1)(g) as 'an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider'. *See* also Søren Sandfeld Jakobsen & Sten Schaumburg-Müller, *Medieretten* (Jurist- og Økonomforbundets Forlag 2013), pp. 613–616.

product placement). Sponsorship serves primarily to support the production of content and affiliate the sponsor with the editorial content, whereas product placement serves to incorporate the trader's product into the editorial content. Thus advertising can be said to finance the media platform as such, sponsorship supports the production and/or dissemination of particular content, and product placement utilises the editorial content to promote the trader's products.

Activities on the Internet is regulated by the E-Commerce Directive²⁸ which regulates a group of services (information society services) defined by particular characteristics that leaves the definition technologically neutral. Due to the broad definition – and the prominence of the world wide web at the time when the directive was adopted – most Internet services are covered.²⁹

The rules on commercial communication found in the E-Commerce Directive seem to fall inside the ambit of both marketing and media regulation as discussed above.

3.1 Identification of Commercial Communication

Article 6(1)(a) of the E-Commerce Directive provides that 'commercial communication shall be clearly identifiable as such'. In addition, the E-Commerce Directive goes a step further than the Unfair Commercial Practices Directive as it requires – in Article 6(1)(b) – that 'the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable'. However, there is no requirement that commercial communication must be distinguishable from editorial content.

According to Article 1(1)(f) of the E-Commerce Directive, commercial communication is defined as '*any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial [...] activity [...]*' (emphasis added). Like for the definition of a commercial practice, the definition of commercial communication seems broad and includes – in contrast to the Unfair Commercial Practices Directive – also 'indirect' promotion (UCPD: 'directly connected with the promotion [...]).

The definition seems to include promotion of another trader's product or image. The fact that it must be identifiable on whose behalf the commercial communication is made corroborates that it also covers situations where e.g. an influencer disseminates editorial content that is 'designed to promote' the trader's products.

The definition of commercial communication explicitly excludes communications compiled in an independent manner, 'particularly when this is without financial consideration'. It seems obvious from a teleological point of view that this exemption/clarification is intended to cover e.g. (editorial) product

²⁸ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²⁹ See, however, case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:981, in which the services provided by Uber was found to constitute a transportation service and therefore Uber could not rely on the directive.

reviews etc. independently of the trader's economic interest, and not to exclude situations where e.g. an influencer has agreed – for remuneration – to produce content in an 'independent manner' (maintaining artistic freedom) with a view to promote the trader and/or his products. However, the wording ('particularly') indicates that communication can be independently compiled even when the trader has paid for it.

3.2 *Information Society Service*

The E-Commerce Directive applies only when the commercial communication is part of, or constitutes, an information society service. It is important to note that it is a requirement that a service must be commercial ('normally provided for remuneration') in order to be an information society service.³⁰

'Normally provided for remuneration' should be understood in the same manner as in the provisions on 'freedom to provide services'.³¹ This entails that the service that must normally be provided for remuneration is the service in question,³² i.e., in this context, the service provided by the influencer (e.g. a blog) – and not that of the trader which is given to be commercial.

It follows from recital 18 of the E-Commerce Directive that 'information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data'.

The threshold for when a blog is commercial is not settled by case law, but it is obvious that the activity of a self-employed blogger falls within the scope if the activity is sufficiently professional to potentially attract streams of revenue from either the audience or traders who may buy advertising space, sponsor content, or provide products.

It can be discussed whether a profile on a social media platform in itself may constitute an information society service. There is no doubt that a social media platform is an information society service.³³ And there is – based on the definition of an information society service: '[1] any service normally provided for remuneration, [2] at a distance, [3] by electronic means and [4] at the

³⁰ See recital 17 with reference to Directive 98/34/EC that is now replaced by directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). See also Andrej Savin, *EU Internet Law* (2nd edition, Elgar 2017), pp. 49–50, and Jan Trzaskowski, Andrej Savin, Patrik Lindskoug & Björn Lundqvist, *Introduction to EU Internet Law* (2nd edition, Ex Tuto 2018), chapter 1.

³¹ Articles 56 to 62 of the Treaty on the Functioning of the European Union (TFEU).

³² See e.g. cases C-263/86, *Belgian State v Humbel and Edel*, ECLI:EU:C:1988:451, paragraph 17, and C-422/01, *Skandia and Ramstedt*, ECLI:EU:C:2003:380, paragraph 23.

³³ See e.g. Jan Trzaskowski, *Commercial Communication in Social Media*, in Andrej Savin & Jan Trzaskowski, *Research Handbook on EU Internet Law* (Edward Elgar 2014), pp. 411–431.

individual request of a recipient of services'³⁴ – any reason to exclude that a profile on a social media service can be considered an information society service in itself.³⁵

Based on the discussions above, the E-Commerce Directive seems to serve as both marketing law and media law in this context. This is further supported by recital 4 of the directive that compares the intentions of the directive with those concerning television broadcasting activities. Radio and television broadcasting are not information society services because they – in contrast to online services – are not provided at individual request, cf. recital 18.

It cannot at this stage be *completely* ruled out that the CJEU will decide – in line with the *RLvS* case – that issues within the ambit of media law fall outside the scope of the E-Commerce Directive.³⁶ It is, however, important to note that the purpose is to ensure the free movement of services on networks with particular characteristics without regard to the nature of the content disseminated (e.g. editorial). It seems most likely that media service that constitutes information society services must comply with the E-Commerce Directive.

4 Conflicts of Rules

There will be situations where both directives are applicable and it must thus be discussed how to resolve potential conflicts.

Whether the Unfair Commercial Practices Directive applies to the situation remains a 'known unknown'. The *RLvS* judgment suggests that as long as the commercial communication does not concern the consumers' transactions with regard to the product(s) offered by the influencer, the directive does not apply within the realm of media law.

It seems clear that the E-Commerce Directive will apply to the influencer's activity as long as it can be characterised as commercial which must include most situations where the service competes with commercial services such as professional blogs etc. (normally provided for remuneration, including advertising). The threshold may be relatively low and the fact that a trader will pay for exposure – or even just send products for free with no strings attached – must be an important indicator for the service being an information society service.

It should be emphasised that if the situation in question falls under the scopes of application of both the E-Commerce Directive and the Unfair Commercial Practices Directive, both directives will be applicable – unless there is a conflict between them.

³⁴ Article 1(1)(b) of directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification).

³⁵ It should be emphasised that 'hosting' in itself is an information society service and that a website thus is delivered on top an information society service – just as a profile on a social media platform.

³⁶ The decision in case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:981, seems reasonable and well-argued, but the outcome of the case was not an easy one to predict.

It follows from Article 1(3) of the E-Commerce Directive that 'this Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, [...] consumer interests, as established by Community acts and national legislation implementing them [...]'. In addition, it follows from Article 3(4) of the Unfair Commercial Practices Directive that 'in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'.

If there should be a conflict, it seems reasonable to expect that the Unfair Commercial Practices Directive would yield to the E-Commerce Directive in questions concerning identification of the commercial nature of information that is part of an information society service. Whether there is a conflict between the requirements of the two directives is discussed immediately below.

4.1 Substantive Requirements

Neither of the provisions concerning *identification* of the commercial nature necessarily requires explicit *disclosure*, as long as the commercial nature is apparent from the context. When it comes to paid exposure, point 11 of Annex I to the Unfair Commercial Practices Directive is likely to come into play as long as the activity falls within the scope of that directive. This provision could be interpreted as a requirement for explicit disclosure as it must be made 'clear in the content' that the trader has paid – or made clear by 'images or sounds'.

The E-Commerce Directive contains a positive and unconditional requirement, whereas the requirement on misleading omissions in the Unfair Commercial Practices Directive requires an assessment of whether the information is needed – in the context; taking account of all its features and circumstances and the limitations of the communication medium – by the average consumer (in order for him to take an informed transactional decision). In that vein, it should also be noted that the provision in the E-Commerce Directive is not (explicitly) limited to situations where the omission may influence 'transactional decisions' of the average consumer.

The Unfair Commercial Practices Directive takes as a benchmark 'the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors' (recital 18). A similar – but not necessarily identical – standard must be applied when determining whether the (average) recipient of the information society service will recognise commercial communication as such.³⁷

As mentioned above, it follows from the E-Commerce Directive that the person on whose behalf the commercial communication is made must be clearly identifiable. This does not follow explicitly from the Unfair Commercial Practices Directive, but according to Article 7(5) of the Unfair Commercial

³⁷ This is true even though the provision does not explicitly make such a reference. See about such benchmarks in Thomas Riis & Jan Trzaskowski, *Det markedsretlige persongalleri* in Børge Dahl, Thomas Riis & Jan Trzaskowski, *Liber Amicorum Peter Møgelvang-Hansen* (Ex Tuto 2016), pp. 439 – 469.

Practices Directive, information requirements established by Community law in relation to commercial communication – including the provisions found in the E-Commerce Directive – are regarded as 'material' in the context of misleading omissions.

It follows from Article 7(3) of the Unfair Commercial Practices Directive that if the medium used to communicate the commercial practice imposes limitations of space or time, 'these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted'. This provision applies only to misleading omissions and can only be taken into account when explicit information is omitted. Secondly, this provision does not affect the requirement found in the E-Commerce Directive.

Given that it follows from Article 6 of the E-Commerce Directive that the information requirements are in addition to 'other information requirements established by Community law' and that the Unfair Commercial Practices Directive treat information requirements in other Community acts as material, there is no apparent conflict between the two directives with regard to identification of the commercial nature of information. This is, however, not the same as to conclude that it is without importance which directives are applicable.

5 How to Make the Commercial Nature Identifiable

Whether the commercial nature of information is identifiable depends on how an average consumer/user of the influencer's service is expected to perceive the information in the actual context. In order to determine how the influencer must identify commercial content, one must *ex ante* foresee what expectation judges will have to an average consumer/user in the given context. That is two levels of abstraction which necessarily must lead to a high level of uncertainty – especially with the lack of case law.

5.1 Is the Content Commercial?

The first question to be asked is whether the information in question is commercial. To the extent the content is not considered private (e.g. a personal website with holiday photos published to be shared with friends etc.), the content must be found on the editorial-commercial continuum.

If the influencer has been paid to disseminate the information, the presumption must be that the content is commercial. However, it follows from the definition of commercial communication in the E-Commerce Directive that it does not necessarily include 'communications [...] compiled in an independent manner' – even if it is made for financial consideration.

An important rule of thumb could be to determine the influencer's reasons for and interests in disseminating the information. If the trader has been involved with the influencer, the nature of the trader's influence on both production and dissemination must be included in the equation. To the extent it seems plausible that the information would have been disseminated in the same form without the

trader's involvement, the presumption could be that the content is editorial and not commercial.

If the trader gets involved in the production and/or dissemination of the content, it would usually be for commercial reasons. It does not matter whether the content is developed by the trader or the influencer, as long as the content/activity is intended to promote the trader. There is no explicit requirement of the existence of an agreement or consideration, but the existence hereof must indicate that the content is intended to promote the trader.

It must be possible for a trader to sponsor content without the content itself becomes commercial – provided that trader has no influence on the content. Basically, advertising on a particular medium may be perceived as sponsoring the media by generating revenue that can be used to produce editorial content which is not all that different from sponsoring specific content.

A typical way that traders engage with influencers is by sending products. To the extent the product is sent unsolicited and without prior interaction, the influencer remains free to mention or review the product. If the influencer chooses to mention the product, it could be argued that the trader's involvement (sending the product) affects the information, but probably not in itself sufficiently to constitute that the content is commercial *per se*. In this situation, the influencer's reasons for and interest in dissemination must be considered. Especially for less professional influencers, it may happen that products will be mentioned favourably³⁸ to encourage traders to send more free products.

For good measure, it should be mentioned that within media law, content may be considered to be (surreptitious) advertising even without the provision of payment or of consideration of another kind.³⁹

5.2 Measures to Make the Commercial Nature Identifiable

It goes without saying that the overall context must be taken into account when determining whether commercial communication is clearly identifiable as such. This follows explicitly from the Unfair Commercial Practices Directive's provision on misleading omissions.

The (commercial) information in question must be assessed in the context of inter alia the design and surrounding content. The court must – while taking the context into consideration – determine whether an average consumer/user is able to clearly identify the commercial nature of the content. In that vein, the age, experience etc. of the audience must be taken into consideration. The norm for identification may not necessarily be the same under the two directives.

The influencer's audience may grow accustomed to navigating and decoding the content produced by the influencer in order to spot commercial content. This could entail that possibly the majority of the audience would spot commercial

³⁸ A negative review may indicate that the influencer is not influenced by the trader, but a positive review does not necessarily entail that he has been influenced by the trader. However, a decision to only mention products that the influencer likes may reflect a legitimate, editorial choice.

³⁹ C-52/10, *Eleftheri tileorasi and Giannikos*, ECLI:EU:C:2011:374.

content that it is not clearly identifiable as commercial to new users of the influencer's service. Thus, the provision in the E-Commerce Directive may offer better protection as it does not make explicit reference to an 'average user'.

As a rule of thumb it must be assumed that the more the content resembles editorial content, the more likely the user is to perceive it as such; and thus the more important explicit disclosure is. Even though many followers may be aware of the commercial dynamics of influencer marketing, it must be borne in mind that this type of marketing is relatively new and under constant development. Influencer marketing does, in addition, often utilize platforms primarily intended for person-to-person communication.

According to the E-Commerce Directive, it must also be clearly identifiable on whose behalf the commercial communication is made. In principle, this does not need to be explicit, as it cannot be ruled out that this is apparent from the context, including e.g. situations where it is obvious that the trader behind a product is involved and the commercial nature is clearly identifiable by, for instance, the accompanying text.

Material information in the provision on misleading omissions is not limited to identification of commercial intent and 'information requirements established by Community law'. It could be argued that the average user following an influencer should be informed about 'material connections' – i.e. connections between the trader and the influencer that might materially affect the weight or credibility of the information – unless such connection is reasonably expected by the audience.⁴⁰ A material connection may also exist in the form of e.g. ownership or sponsorship that does not relate to e.g. a particular blogpost.

Neither of the two directives include a requirement that commercial content must be distinguishable from editorial content. It could, however, be discussed whether it would be considered an unfair commercial practice under the main rule in Article 5(2) not to distinguish such content in situations where the influencer's service resembles editorial media. It follows from the definition of 'professional diligence' (Article 2(1)(h)) that 'the general principle of good faith in the trader's field of activity' must be taken into account. This could be an argument for drawing inspiration from media law in the assessment under professional diligence.

It must be borne in mind that commercial communication – given its overall presentation – may constitute a misleading *action*, even though the commercial intent and material connection is disclosed ('even if the information is factually correct'). This could – at least in principle – also cover situations, where editorial and commercial content is not sufficiently separated.

⁴⁰ See similarly the US Federal Trade Commission's guide on endorsement (16 C.F.R. Part 255, § 255.5).

6 The Trader's Responsibilities and Liabilities

It is obvious that the trader is not responsible for content produced and/or disseminated by the influencer in situations where there is no connection between the trader and the influencer. However, the situation may change when the trader engages with the influencer in a way that may encourage the influencer to promote the trader's products.

It is assumed that the trader's activity is of a commercial nature, but the Unfair Commercial Practices Directive applies, according to Article 3(1), only to business-to-consumer commercial practice. As discussed above, it seems reasonable to assume that the threshold for when an influencer is to be considered as self-employed is relatively low. In those cases, the interaction may fall under the Misleading and Comparative Advertising Directive,⁴¹ because the influencer does not act in his capacity as a consumer.

The purpose of the Unfair Commercial Practices Directive is to contribute to the proper functioning of the internal market by harmonising rules concerning commercial practices 'harming consumers' economic interests' (Article 1). Thus, a commercial practice that is intended to affect the transactional decisions of consumers through professional intermediaries may fall under the purpose (Article 1), but outside the scope (Article 3) of the directive.

This issue is akin to wholesalers who offer bonuses to stores and which is undisclosed and likely to influence the advice consumers will receive. The question is not settled in case law, but the *Europamur Alimentación* case – concerning a national prohibition of sale at a loss – may indicate that the Unfair Commercial Practices Directive could apply to transactions between a wholesaler and small retailers to the extent the activity 'affect the consumer'.⁴²

To the extent we assume that the influencer is acting as an entity independent of the trader, it may – from a legal perspective – be difficult to assume that the trader should be liable for the activities of the influencer. Again, it may make sense to consider how professional the influencer is. Influencers that are closer to the status of an amateur may be easier to affect than a professional influencer with a platform, staff, brand, and integrity that resembles that of professional media.

Even though the amateur influencer may provide a service that is sufficiently commercial to constitute an information society service, it could be assumed that the influencer is acting on behalf of the trader, who is then responsible for compliance with the law. This could in particular be true if the influencer is paid by the trader or the connection has been established through a professional intermediary such as an influencer or advertising agency.

Consideration from the trader could also include the value of products sent unsolicited to the influencer, in particular if the product/package has a residual

⁴¹ Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising (codified version). Its purpose is to protect traders against misleading advertising (Article 1).

⁴² C-295/16, *Europamur Alimentación*, ECLI:EU:C:2017:782, paragraph 35.

value (beyond what is necessary for editorial purposes) that is likely to persuade the influencer to promote the product.

A professional influencer may be less likely to be affected by the trader. It seems obvious from the conclusion in the *RLvS* case that the mere dissemination of commercial communication from the trader does not entail that the media is acting 'in the name or on behalf' of the trader.

Questions concerning responsibilities and liabilities will, to a large extent, remain an issue to be dealt with under national law. It follows from Article 23 ('responsibility') of the 2011 Consolidated ICC Code on 'Advertising and Marketing Communication Practice' that (emphasis added)

Marketers have overall responsibility for the marketing communications of their products.

Agencies or other practitioners should exercise due care and diligence in the preparation of marketing communications and should operate in such a way as to enable marketers to fulfil their responsibilities.

Publishers, media owners or contractors, who publish, transmit, deliver or distribute marketing communications, should exercise due care in the acceptance of them and their presentation to the public.

The role that influencers play in the trader's marketing may resemble that of agencies and/or publishers, because influencers may develop and disseminate content that seek to promote the trader's products. However, traditional agencies and publishers may also be involved. Agencies may establish contacts and develop strategies for engaging with influencers. Publishers and media owners may be involved as they provide the platforms on which the influencers disseminate their content. The responsibilities and liabilities of these intermediaries are not settled in EU law.

7 Conclusion

This article has turned out to be a venture into discovering 'unknowns' in the context of requirements concerning the identification of the commercial nature of information in situations where influencers disseminate information about a trader's product. Uncertainties relates to both scopes of application and the obligations that can be inferred from the substantive provisions.

The latter is less surprising due to the amount of factors to be considered in order to establish whether the commercial nature is identifiable, and, because none of the provisions are elaborate on how the commercial nature may be clarified.

It seems reasonable to assume that the E-Commerce Directive will apply to the information disseminated by the influencer on the Internet, whereas the *RLvS* judgment casts doubt on the applicability of the Unfair Commercial Practices Directive – at least to the extent that the service provided by the influencer resembles editorial media. It should be emphasised that Member States may

maintain more specific rules – under marketing law and/or media law – to the extent the matter falls outside the scope of that directive.

In order for an influencer to flourish – i.e. cultivate an audience – he or she must do something of interest to other people which could be sharing information and observations. This entails that activities carried out by the influencer, at least to some degree, have an editorial nature. There is no common definition of editorial content, but it follows from telecommunication law that 'editorial responsibility' does not necessarily imply any legal liability under national law for the content or the services provided.⁴³

The E-Commerce Directive does serve as a kind of media regulation, as it requires commercial communication to be identifiable. However, that regulation is not necessarily as flexible as that found in the Unfair Commercial Practices Directive.

It may seem more natural to regulate (most) influencers under marketing law rather than media law. Traditional media play an important role in a democratic society and many (/most) of the purposes pursued under media law are not relevant in the context of influencers. Due to the lack of harmonisation, it will, however, still remain unclear when an influencer's platform would amount to a media that falls outside the scope of the Unfair Commercial Practices Directive.

Due to the editorial nature of influencers' activities, it would make sense to draw inspiration from media law in the interpretation of the requirements in both directives. This includes in particular (1) that information may constitute advertising even though no payment or consideration of another kind is provided, and (2) that – at least in certain situations – it must be a requirement that commercial content is distinguishable from editorial content (even when the commercial nature is disclosed). It should be emphasised that the assessment under the provision of unfair commercial practices, including requirements of professional diligence, is (usually) left to the national courts.

Influencer marketing is apparently effective, but from both a societal and ethical perspective, it can be discussed whether and to what extent it makes sense that professional traders use (often amateur) influencers to disseminate their commercial messages – especially if the reason is that consumers do not want or trust advertising disseminated through traditional channels.

⁴³ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC (the 'Better Regulation Directive').