

#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing*

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Abstract: Social media has become an integral part of our contemporary society. The social media revolution has led to the emergence of so-called *influencers* as key players in the advertising industry. However, the use of influencers for marketing purposes is not without risks for the consumer. This paper analyses to what extent influencers are subject to the Unfair Commercial Practices Directive and, in so far as the directive applies, how it may deal with unfair influencer marketing practices. In addition, this contribution examines how European and national soft law initiatives may complement the unfair commercial practices regime in regulating influencers.

Résumé:

Zusammenfassung:

* The final version of this article was submitted on 24 October 2022. #NoFilter is a popular hashtag on social media platforms (especially on Instagram), indicating that no effects were added to enhance the accompanied photograph or video. In the title of this article, it is used to question whether the filter of the law applies to influencer marketing.

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1. Introduction

1. The ubiquity of social media in the contemporary digital society cannot be denied. According to figures published by Eurostat, more than 50 percent of the EU population aged 16 to 74 years are active on social media. Among younger people between the ages of 16 to 24 years, almost 9 in 10 individuals participate in social networks.¹ In this online community, a major role is played by so-called *influencers*.² In its Best Practice Recommendation on Influencer Marketing³, the European Advertising Standards Alliance (hereinafter: EASA)⁴ defines influencers as ‘independent third party endorsers who shape audience attitudes through blogs, posts, tweets, and the use of other social media’.⁵ Many of these influencers are underage.⁶ Some of them have amassed a tremendous amount of followers among their peers. As an illustration, in 2021, the then seventeen-year-old Charli D’Amelio became the first TikTok user to reach no fewer than 100 million followers on the video platform, and this number of followers continues to increase every day.⁷ The YouTube

¹ Eurostat, *Are you using social networks?*, 26 June 2019, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20190629-1>.

² A recent study provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the Committee on the Internal Market and Consumer Protection shows that the influencer industry has grown significantly in recent years, becoming one of the most popular and effective forms of online advertising (see F. MICHAELSEN et al., *The impact of influencers on advertising and consumer protection in the Single Market*, February 2022, [www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)).

³ EASA, *Best Practice Recommendation on Influencer Marketing*, December 2018, www.easa-alliance.org/sites/default/files/EASA%20BEST%20PRACTICE%20RECOMMENDATION%20ON%20INFLUENCER%20MARKETING_2020_0.pdf.

⁴ The EASA brings together a network of national self-regulatory organisations and organisations representing the advertising industry. The goal of the EASA is to set high operational standards for advertising self-regulation within the EU. For more information, see <https://easa-alliance.org/about-easa>.

⁵ For a more in-depth analysis of the concept, see F. MICHAELSEN et al., *The impact of influencers*, pp 15-26.

⁶ See M. DE VEIRMAN, L. HUDDERS and M. R. NELSON, ‘What is influencer marketing and how does it target children? A review and direction for future research’, *Front. Psychol. (Frontiers in Psychology)* 2019, pp 1-16.

⁷ X, ‘TikTok star Charli D’Amelio first to hit 100m followers’, *BBC News* 23 November 2020, www.bbc.com/news/technology-55048385 (accessed 29 June 2021).

channel Ryan's World, on which eleven-year-old⁸ Ryan Kaji tests and reviews toys, counts more than 33 million subscribers.⁹

Besides an immense reach, influencers also have a significant impact on their followers' decision-making.¹⁰ It goes without saying that they are therefore very appealing from a commercial point of view, and businesses increasingly rely on them for marketing purposes. Nowadays, it is common practice for brands to ask influencers, whether directly or indirectly by employing an advertising or influencer agency, to endorse their products via social media content¹¹ and in return offer them compensation in the form of, *inter alia*, a monetary payment, free goods or an invitation to attend an exclusive event. The YouTube channel of the previously mentioned Ryan Kaji, for example, generated approximately 30 million U.S. dollars in 2020, which granted him the title of highest-paid YouTuber for the third year in a row.¹² Clearly, influencers—both adults and minors—are being deployed as advertising vehicles. Their followers—who are largely made up of their peers and thus often consist of minors as well—constitute the primary target audience of the commercial content. Furthermore, influencers are not only engaged as a medium to distribute advertising, they also usually create the marketing content themselves.¹³ In this way, commercial messages seamlessly blend in with other user-generated content. On top of that, in spite of the existing prescriptions (see *infra*), influencers only sporadically disclose the commercial nature of their messages, and even if they do, they often do it insufficiently.¹⁴

⁸ In theory, social media platforms are only accessible to people over the age of 13. This is stipulated in social media platforms' terms of service to comply with the American Children's Online Privacy Protection Rule and the European General Data Protection Regulation. For example, see www.youtube.com/static?template=terms (YouTube), www.facebook.com/terms.php (Facebook), https://help.instagram.com/581066165581870/?helpref=hc_fnav (Instagram) and www.tiktok.com/legal/terms-of-service?lang=en#terms-eea (TikTok). In practice, minors are much younger when they first create a social media account.

⁹ See www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w (accessed 6 December 2022).

¹⁰ The key aspect that differentiates social media influencers from other marketing actors is that the relationship between influencers and their audience is characterised by perceived closeness, authenticity and trust, which increases their credibility (see F. MICHAELSEN et al., *The impact of influencers*, pp 15-26).

¹¹ Influencers could also use other media (e.g., their own website) to share content, but they are mainly active on social media platforms, which allow them to reach an unprecedented amount of consumers (see F. MICHAELSEN et al., *The impact of influencers*, pp 19 and 28).

¹² R. NEATE, 'Ryan Kaji, 9, earns \$29.5m as this year's highest-paid YouTuber', *The Guardian* 18 December 2020, www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber (accessed 30 June 2021).

¹³ Influencers are therefore often referred to with the term *content creator* (see F. MICHAELSEN et al., *The impact of influencers*, p 23).

¹⁴ A study conducted in 2018, which included a content analysis of 200 blog posts, found that only 15 percent of the investigated bloggers accompanied their content with a sponsorship disclosure. In addition, it was

This lack of transparency makes it difficult for social media users—especially when they are minors¹⁵—to distinguish between messages that reflect the influencer's genuine unbiased opinion and messages with a marketing intent. In addition to the disclosure issue, influencer marketing poses many other risks that require attention.¹⁶ For instance, in 2018, a Belgian YouTuber directly exhorted his mainly underage subscribers to steal their parents' credit cards, allowing them to purchase his merchandise.¹⁷ One could also think of a social media influencer incorrectly assigning certain distinguishing properties to an advertised product, such as the ability to cure diseases.¹⁸ The question arises to what degree the current regulatory framework for influencer-created commercial content is able to prevent the—underage—consumer from being misled and their economic behaviour from being distorted.

2. At the present time, regulations specifically targeting influencer marketing are almost non-existent. Nonetheless, there are a lot of rules out there that may apply in the influencer context due to their broadly formulated field of application. These provisions can be found at European and national level, in different branches of the law (e.g., consumer law, media law, tax law, labour law and privacy law) and in both legally binding instruments and soft law. However, an exhaustive discussion of all the possibly relevant provisions goes beyond the scope of this contribution. This article approaches influencer marketing solely from a consumer law perspective. In doing so, it focuses on the application issues that may occur in this area of the law.

As for the legally binding regulation in the field of consumer law, this paper covers the European framework, comprising the Unfair Commercial Practices Directive

established that the provided disclosures often did not comply with the self-regulatory guidelines of the Federal Trade Commission, as regards the American blog posts, and the Stichting Reclame Code, as regards the Dutch blog posts (see S. C. BOERMAN, N. HELBERGER, G. VAN NOORT and C. J. HOOFNAGLE, 'Sponsored Blog Content: What do the Regulations Say? And what do Bloggers Say?', *JIPITEC (Journal of Intellectual Property, Information Technology and Electronic Commerce Law)* 2018, pp 146-159). A study by the European Commission also reveals a major concern about influencers' failure to properly disclose commercial content (see European Commission, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, June 2018, https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0_en).

¹⁵ Given the limited advertising literacy of children (i.e., their knowledge of advertising and their ability to critically reflect on advertising), they are a highly vulnerable target group when it comes to persuasion (see M. DE VEIRMAN, L. HUDDERS and M. R. NELSON, *Front. Psychol.* 2019, pp 1-16).

¹⁶ See F. MICHAELSEN et al., *The impact of influencers*, pp 52-60.

¹⁷ D. DECKMYN, 'Steel de creditcard van je ouders!', *De Standaard* 21 September 2018, www.standaard.be/cnt/dmf20180920_03770634 (accessed 5 October 2021).

¹⁸ See Point 17 Annex I UCPD.

(hereinafter: **UCPD**)¹⁹ and, to a lesser extent, the Consumer Rights Directive (hereinafter: **CRD**)²⁰, the Unfair Contract Terms Directive (hereinafter: **UCTD**)²¹, the Sale of Goods Directive (hereinafter: **SGD**)²² and the Digital Content Directive (hereinafter: **DCD**)²³. Given the principle of directive-compliant interpretation and since all of these directives, with exception of the UCTD²⁴, introduce a maximum level of harmonisation²⁵, meaning that EU member states cannot provide less or additional consumer protection within the field approximated by these directives, the national consumer law regimes existing in the different member states are nearly identical. This justifies the choice to analyse the underlying European instruments rather than their national implementation.

3. This publication addresses two central research questions arising from the application of the consumer law framework in the influencer context. The first—and most important—question is to what extent influencers have to comply with European consumer law when they distribute commercial content through their social media profiles. This essentially boils down to the question whether social media influencers are subject to the unfair commercial practices regime, seeing that it is rather uncommon that influencers enter into a contractual relationship with their followers. For the UCPD to be applicable, it is necessary that the influencer can be qualified as a *trader* and their marketing activities as *commercial practices* within the meaning of the directive.²⁶ Since the classification criteria provided in the UCPD are not unequivocal, in many cases it will not be easy to categorise the influencer and their activities, which causes serious legal uncertainty. The second—less intricate—question is how the UCPD, in so far as the directive applies, may capture unfair

¹⁹ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, O.J. L. 149/22, <http://data.europa.eu/eli/dir/2005/29/oj>.

²⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L. 304/64, <http://data.europa.eu/eli/dir/2011/83/oj>.

²¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. L. 95/29, <http://data.europa.eu/eli/dir/1993/13/oj>.

²² Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, O.J. L. 136/28, <http://data.europa.eu/eli/dir/2019/771/oj>.

²³ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, O.J. L. 136/1, <http://data.europa.eu/eli/dir/2019/770/oj>.

²⁴ Recitals UCTD.

²⁵ Recitals 14-15 UCPD, Art. 4 CRD, Art. 4 SGD and Art. 4 DCD.

²⁶ Arts. 2(b) and 2(d) UCPD.

influencer marketing practices. For the purpose of answering this second question, this article will give a global overview of the most relevant obligations the UCPD imposes on influencers falling within its scope.

Nevertheless, it is not unthinkable that a social media influencer sells and advertises his own products or services, in which case consumers who (are offered to²⁷) contract with the influencer will be able to call on not only the UCPD but also the CRD, the UCTD, the SGD and the DCD. In this hypothesis, it is equally necessary that the influencer is regarded a trader or seller within the meaning of these directives, but the road to that qualification will be considerably more straightforward. The remainder of this study, however, concentrates on a simplified—yet legally more challenging—model of influencer marketing and primarily examines the situation where the influencer promotes a third-party trader's products among their followers. The issue of whether other players who may be involved in the influencer marketing chain (e.g., the third-party trader, the advertising agency, the influencer's management and the social media platform) come within the UCPD's scope does not form the focus of this research. The same goes for the question of whether influencers themselves can invoke the protection of the consumer acquis when they conclude a contract with a business to develop their influencer activities (e.g., social media influencers may need to purchase a camera or microphone to create the requested content).²⁸

4. In addition to legislation, soft law must also be taken into account. For example, in recent years, recommendations and guidelines for influencers from national authorities and self-regulatory organisations (hereinafter: **SROs**) have emerged around the globe. Although these soft law instruments are not legally binding, the third section of this article aims to research to what extent soft law can still help to give substance to the—vaguely and broadly formulated—legal provisions regarding the recognizability of marketing communication. Again, a substantial part of the analysis will be devoted to the application conditions of the discussed soft law documents.

²⁷ The scope of the CRD extends to contracts concluded between a trader and a consumer and any corresponding offers (see Arts. 5(1) and 6(1) CRD).

²⁸ Paradoxically, for the CRD, the UCTD, the SGD and the DCD to apply in this situation, the influencer must be regarded as a *consumer*, meaning a natural person acting for purposes which are outside his professional activity (see Art. 2(1) CRD, Art. 2(b) UCTD, Art. 2(2) SGD and Art. 2(2) DCD). At first sight it seems that influencers and their followers can only enjoy consumer protection at the expense of each other: When the influencer can be classified as a trader, his followers will enjoy the protection offered by the UCPD. When the influencer can be classified as a consumer, he himself will be able to rely on the EU consumer law framework (e.g., when he engages in a contract with a trader). However, since it is undisputed that professional influencers can still acquire the status of consumer in the case of dual purpose contracts, this issue is not such a hard nut to crack after all (see Recital 17 CRD).

5. Firstly, this article will delve deeper into the scope of the UCPD, whereafter it will give a global overview of the potentially applicable rules enclosed therein. Secondly, soft law initiatives will be looked at more closely. Lastly, the examined legal framework will be evaluated.

2. The UCPD and Influencer Marketing

2.1 *The UCPD's Scope of Application*

6. To begin with, the applicability of the UCPD depends on the social media influencer's classification as a trader within the meaning of Article 2(b) UCPD. The analysis of the UCPD's scope *ratione personae* is fundamental since it is only when the influencer carries the status of trader that it is useful to examine whether his activities come within the directive's scope *ratione materiae*. Hence, when the social media influencer concerned is considered to be a trader within the meaning of the directive, the subsequent step is to determine whether his activities (i.e., the promotion of a third-party trader's products) constitute commercial practices within the meaning of Article 2(d) UCPD.

7. The concepts delineating the UCPD's scope of application must be interpreted in the light of the case law of the Court of Justice of the European Union (hereinafter: **CJEU**). Indeed, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which does not expressly refer to the law of the member states for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the EU.²⁹ Unfortunately, there are no specific cases with regard to influencer marketing yet. Nonetheless, case law on the UCPD's scope of application is not completely non-existent. In this section, the relevant principles set out by the CJEU respecting the directive's scope will be distilled and then transposed to the specific context of influencer marketing.

2.1.1 *The Social Media Influencer as Trader*

8. Under Article 2(b) UCPD a trader is considered 'any natural or legal person who, in commercial practices covered [by the UCPD], 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 definition of trader consists of two parts, covering both the natural or legal person who is acting for professional purposes and anyone acting in the name of or on behalf of a trader. To identify the meaning of the first part of the UCPD's definition of trader, which concerns the requirement of a professional activity, the recent ruling of the CJEU in the *Kamenova*

²⁹ See *inter alia* CJEU 3 October 2013, Case C-59/12, *BKK Mobil Oil*, ECLI:EU:C:2013:634, para 25.

case provides for an adequate starting point. With respect to the second part of Article 2(b) UCPD, which extends the concept of trader to anyone carrying out an activity in the name of or on behalf of a trader, the *RLvS* case will offer additional guidance.

2.1.1.1 The Requirement of a Professional Activity

9. In the *Kamenova* case³⁰, the CJEU answers the question whether a natural person who simultaneously publishes a number of advertisements on a website offering new and second-hand goods for sale may be classified as a trader within the meaning of Article 2(b) UCPD and Article 2(2) CRD and whether such activity constitutes a commercial practice under Article 2(d) UCPD.

In short, the facts of the case are the following: A consumer acquired a used watch on an online sales platform under a distance sales contract. After the consumer discovered that the watch she had purchased did not match the description in the advertisements on the website and the seller refused to accept her request to return the item in exchange for a refund, she filed a complaint with the Bulgarian Consumer Protection Commission (hereinafter: **CPC**). The seller, who turned out to be Evelina Kamenova, had published a total of eight sales advertisements for various products on the website. The CPC issued a notice establishing an administrative offence, which Kamenova contested on the ground that she did not have the status of trader. The CPC subsequently adopted a penalty decision against Kamenova relying on her infringement of several pre-contractual information requirements. Kamenova brought an action against the penalty decision before the District Court of Varna. The District Court held that Kamenova could not be classified as a trader and annulled the CPC's penalty decision. The CPC lodged an appeal on a point of law against that judgment before the referring court, the Administrative Court of Varna.³¹

10. The CJEU starts by recalling that the concept of trader is defined almost identically in the UCPD and the CRD.³² Furthermore, the CJEU explains that both directives are based on Article 114 of the Treaty on the Functioning of the European Union (hereinafter: **TFEU**)³³ and thus pursue the same objectives, namely to contribute to the proper functioning of the internal market and to ensure a high level of consumer protection.³⁴ Advocate General SZPUNAR additionally argues in his Opinion that, to achieve those

³⁰ CJEU 4 October 2018, Case C-105/17, *Kamenova*, ECLI:EU:C:2018:808.

³¹ Case C-105/17, *Kamenova*, para 13-19.

³² Case C-105/17, *Kamenova*, para 27.

³³ Treaty on the Functioning of the European Union, O.J. C. 326/47, http://data.europa.eu/eli/treaty/tfeu_2012/oj.

³⁴ Case C-105/17, *Kamenova*, para 28.

objectives, both directives bring about the same degree of harmonisation.³⁵ Therefore, the CJEU decides that the concept of trader, as defined in the UCPD and the CRD, must be interpreted uniformly.³⁶

The CJEU continues by pointing out that the European legislator adopted a particularly broad notion of the term trader, which refers to any natural or legal person who carries out a gainful activity, not excluding either bodies pursuing a task of public interest or those which are governed by public law.³⁷ The meaning and scope of the concept of trader must be determined in relation to the related but diametrically opposed concept of consumer, referring to any individual not engaged in commercial or trade activities.³⁸ In relation to a trader, consumers find themselves in a weaker position, which means they are deemed to be less informed, economically weaker and less experienced in legal matters.³⁹ It follows that the notion of trader is a functional concept.⁴⁰ The CJEU stresses that the classification as a trader requires a case-by-case approach.⁴¹ Several criteria should be taken into account: whether the sale on the online platform was carried out in an organised manner; whether the sale was intended to generate profit; whether the seller had more technical information and expertise than the consumer concerning the products offered for sale; whether the seller had a legal status which enabled them to engage in commercial activities and to what extent the online sale was related to the seller's commercial or professional activity; whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive⁴²; whether the seller was subject to VAT; etc.⁴³ The CJEU notes that the criteria it sets out in the judgement are neither exhaustive nor exclusive and that the mere fact that one or more of these criteria are met is not sufficient, in itself, to establish the classification as a trader.⁴⁴ It is for the national courts to make an overall assessment, on the basis of all the facts available to it, in order to decide whether a natural person may be regarded as a trader.⁴⁵

³⁵ Opinion of Advocate General SZPUNAR of 31 May 2018, Case C-105/17, *Kamenova*, ECLI:EU:C:2018:378, para 30, 33-39 and 46-47.

³⁶ Case C-105/17, *Kamenova*, para 29.

³⁷ Case C-105/17, *Kamenova*, para 30. See also Case C-59/12, *BKK Mobil Oil*, para 32.

³⁸ Case C-105/17, *Kamenova*, para 33. See also Case C-59/12, *BKK Mobil Oil*, para 33.

³⁹ Case C-105/17, *Kamenova*, para 34. See also Case C-59/12, *BKK Mobil Oil*, para 35.

⁴⁰ Case C-105/17, *Kamenova*, para 35.

⁴¹ Case C-105/17, *Kamenova*, para 37.

⁴² Advocate General SZPUNAR links this criterion to influencer marketing: 'In some cases, a trader rewards an 'influencer' for purchases of the trader's products made via the 'influencer's' website' (see Opinion, Case C-105/17, *Kamenova*, footnote 36).

⁴³ Case C-105/17, *Kamenova*, para 38.

⁴⁴ Case C-105/17, *Kamenova*, para 39-40.

⁴⁵ Case C-105/17, *Kamenova*, para 45. See also Opinion, Case C-105/17, *Kamenova*, para 52-53.

2.1.1.2 The Extended Definition of Trader

11. As regards traders' agents, Advocate General SZPUNAR points out in his Opinion in the *Kamenova* case that the second part of Article 2(b) UCPD refers to 'anyone acting in the name of or on behalf of a trader', whereas article 2(2) CRD describes a trader as 'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, *including through any other person acting in his name or on his behalf*, for purposes relating to his trade, business, craft or profession in relation to contracts covered by [the CRD]'. In contrast to the definition of trader in the UCPD, Article 2(2) CRD, which must—after all—be interpreted in the same way as Article 2(b) UCPD⁴⁶, does not cover persons who are operating in the name of or on behalf of a trader. The Advocate General stresses that it should be observed that the issue of the classification as an agent acting in the name of or on behalf of a trader does not arise in the context of the CRD since the directive applies to contracts which, in principle, have already been concluded between the trader and the consumer. However, the Advocate General's observation seems to overlook the fact that the CRD does impose obligations on traders prior to the conclusion of a contract (e.g., the requirement to provide certain information), which may also be of relevance to traders' agents. As a matter of fact, in the recent *Tiketa* case, the CJEU established that Article 2(2) CRD is to be interpreted as meaning that an intermediary may itself be regarded as a trader bound by the obligations set out in the directive.⁴⁷ In view of the uniform interpretation advocated by the CJEU, it can at least be assumed that the concept of trader, as defined in the UCPD and the CRD, must be construed as including both traders acting on their own behalf, traders acting through another person acting on their behalf and anyone acting on behalf of a trader.⁴⁸ Of course, it still needs to be determined what it means to act in the name of or on behalf of a trader.

12. In the *RLvS* case⁴⁹, the CJEU attends to the question whether the UCPD precludes the application of a national provision, intending not only to protect consumers against misleading practices but also to protect the independence of the press, under which publishers are required to include a specific identification, *in casu* by the use of the term advertisement, 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.

⁴⁶ Case C-105/17, *Kamenova*, para 29.

⁴⁷ See CJEU 24 February 2022, Case C-536/20, *Tiketa*, ECLI:EU:C:2022:112.

⁴⁸ The CJEU appears to confirm this in the *Kamenova* case as it states that it is clear from the wording of Article 2(b) UCPD and Article 2(2) CRD that, in order to qualify as a trader, the person concerned must be acting for purposes relating to his trade, business, craft or profession *or* in the name of or on behalf of a trader (see Case C-105/17, *Kamenova*, para 32).

⁴⁹ CJEU 17 October 2013, Case C-391/12, *RLvS*, ECLI:EU:C:2013:669.

In short, the facts of the case are the following: RLVs, an advertising magazine publisher established in Stuttgart, published two articles for which it had received compensation from sponsors. Stuttgarter Wochenblatt, a publisher of a weekly newspaper and a competitor of RLVs, considered that the two publications violated Paragraph 10 of the Landespressegesetz Baden-Württemberg—the national provision at issue—as they were not clearly identifiable as advertisements. At first instance, the Regional Court of Stuttgart upheld the action brought before it by Stuttgarter Wochenblatt and ordered RLVs not to publish or cause to be published for remuneration any publication not identified by the term advertisement (*Anzeige*) in its advertiser. The Higher Regional Court of Stuttgart dismissed RLVs’s appeal against that judgment. In its appeal on a point of law before the referring court, the Federal Court of Justice, RLVs maintained its form of order seeking dismissal of Stuttgarter Wochenblatt’s application, arguing that Paragraph 10 of the Landespressegesetz Baden-Württemberg infringed EU law and was therefore not applicable.⁵⁰

13. To answer the question referred for a preliminary ruling, the CJEU assesses, taking into account the complete harmonisation effected by the UCPD and the fact that the national provision in question pursues the protection of both consumers’ and competitors’ interests, whether the conduct covered by the national provision, namely the publication of editorial content by a newspaper publisher, does in fact come within the field approximated by the directive (i.e., constitutes a commercial practice within the meaning of Article 2(d) UCPD). As to the UCPD’s personal scope, the CJEU underlines that, given the second part of its description of a trader, the directive can also apply in a situation where an operator’s commercial practices are put to use by another undertaking acting in the name of or on behalf of that operator, with the result that the provisions of the directive could in certain situations be invoked against both the operator and the undertaking if they both satisfy the definition of trader.⁵¹ The question is whether the second part of the UCPD’s definition, which extends the concept of trader to *anyone* acting in the name of or on behalf of a trader, also covers persons who are not acting for professional purposes and thus whether the UCPD can effectively be relied on against those non-professional actors.

14. The CJEU’s approach in this regard is open to more than one interpretation. The requirement ‘if they both satisfy the definition of trader’ in particular raises more questions than it answers. Firstly, this condition could imply that the CJEU’s only decisive factor in determining whether a certain entity comes within the UCPD’s personal scope is whether that entity is acting for purposes relating to its trade, business, craft or profession. In other

⁵⁰ Case C-391/12, *RLVs*, para 14-26.

⁵¹ Case C-391/12, *RLVs*, para 38. See also Opinion of the Advocate General SZPUNAR of 24 June 2021, Case C-371/20, *Peek and Cloppenburg*, ECLI:EU:C:2021:520, para 24.

words, a person acting in the name of or on behalf of a trader would not be subject to the UCPD if he does not himself fulfil the requirement of a professional activity. Of course, this would not exclude the UCPD's applicability to the initiating trader who is carrying out a commercial practice through a non-professional entity. Following this interpretation, the words 'if they both satisfy the definition of trader' should be construed as meaning that both the main trader and the intermediary must be acting for professional purposes for the UCPD to be invoked against both entities.⁵² Accordingly, the extension of the definition of trader would only be germane to the issue of whom, as in which professional entities, the commercial practices can be attributed to. In that case, the last part of the definition may have been included to indicate that the initiating trader bears the primary responsibility for violations of the UCPD (cfr. the structure of Article 2(2) CRD).⁵³ However, it must be explicitly noted that the UCPD does not deal with liability, which remains a national matter.

The second plausible interpretation is that the UCPD can be relied on against both the main trader and the intermediary in the situation where the main trader is acting for professional purposes (i.e., satisfies the first part of the definition of trader) and the intermediary is acting in the name of or on behalf of the main trader (i.e., satisfies the second part of the definition of trader), regardless of whether the latter is operating for professional purposes itself. In line with this reading of the CJEU's assessment, the UCPD could also be invoked against a consumer who undertakes an activity in the name of or on behalf of a trader.⁵⁴ The guidance on the interpretation and application of the UCPD of the European Commission (hereinafter: EC) leaves no room for doubt in this respect: 'This definition covers not only traders who act on their own account but also persons, including consumers, acting 'in the name of' or 'on behalf of' another trader.'⁵⁵ The EC's guidance is irreconcilable with the first interpretation of the CJEU's judgement, which puts forward the requirement of a professional activity as a breaking point and thus entirely eliminates consumers—even if they act in the name of or on behalf of a trader—from the UCPD's personal scope. However, it must be reminded that the aforementioned guidance—although it may shed some light on the wording of the directive—is in no way binding in terms of the interpretation of the UCPD. The authoritative interpretation of EU law remains within the

⁵² The fact that the CJEU uses the word undertaking—and not person—to refer to the intermediary seems to corroborate this interpretation.

⁵³ See to that effect B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law* (Oxford: Hart Publishing 2011), p 240.

⁵⁴ Of course, this would not automatically lead to the consumer's liability under national law.

⁵⁵ EC, *Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, 17 December 2021, p 32.

sole remit of the CJEU.⁵⁶ Moreover, the second interpretation is itself incompatible with one of the criteria established by the CJEU to determine the professional nature of a certain activity, namely ‘whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive’. Why should it be examined whether an intermediary is acting for professional purposes if an unprofessional intermediary is equally subject to the UCPD?

15. Whether or not the UCPD also intends to target certain non-professional actors, it is clear that the CJEU insists on a restrictive interpretation of the words ‘acting in the name of or on behalf of a trader’. According to the CJEU, it is common ground that, in circumstances such as those at issue in the *RLvS* case, a newspaper publisher, which inserts two paid-for articles in its free advertiser, does not act in the name of or on behalf of the sponsors in question.⁵⁷ This assessment of the CJEU is perhaps too short-sighted.⁵⁸ The justification of the European Parliament (hereinafter: EP) for the extended definition of trader does not corroborate this strict delimitation on the UCPD’s scope: ‘The directive must cover the promotion of actions by other firms, since more and more often unfair practices are being employed by third parties which have contractual links to a trader. By the same token, interaction between a variety of firms (advertising, distribution, mail order) often makes it impossible to identify precisely which one is responsible for the breach of the rules.’⁵⁹ As can be read, the EP’s explanatory statement only demands a contractual link with a trader. Such contractual link is clearly present in the case where a trader commissions a newspaper publisher to publish editorial content to promote its products. Further, it must

⁵⁶ In his Opinion in the *Slewo* case, Advocate General SAUGMANDSGAARD ØE notes that the guidance document on the application of the CRD cites mattresses as examples of goods which might not be returnable due to health protection or hygiene reasons. Advocate General SAUGMANDSGAARD ØE, however, emphasizes that the guidance document is not legally binding and as such does not constitute a formal interpretation of EU law (see Opinion of Advocate General SAUGMANDSGAARD ØE of 19 December 2019, Case C-681/17, *Slewo*, ECLI:EU:C:2018:1041, para 37 and footnote 31). The CJEU eventually decided—opposing the guidance—that mattresses are not excluded from the right of withdrawal if they have been unsealed after delivery (see CJEU 27 March 2019, Case C-681/17, *Slewo*, ECLI:EU:C:2019:255, para 41-48). The preamble to the EC’s guidance on the interpretation and application of the UCPD also expressly states: ‘This Notice is intended purely as a guidance document — only the text of the Union legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court.’

⁵⁷ Case C-391/12, *RLvS*, para 40.

⁵⁸ See to that effect W. VAN BOOM, *TvC (Tijdschrift voor Consumentenrecht & handelspraktijken)* 2014, pp 141-150.

⁵⁹ EP, *Report on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)*, 18 March 2004, p 13.

be observed that the commentary refers to the promotion of actions by other *firms* and the interaction between a variety of *firms*, which—again—could imply that entities carrying out an activity in the name of or on behalf of a trader must be operating for professional purposes themselves in order to come within the UCPD’s scope *ratione personae*. It is also probable, however, that the EP simply had not yet considered the possibility of a non-professional entity acting in the name of or on behalf of a company.

2.1.1.3 The Influencer Marketing Context

16. To fall within the UCPD’s personal scope, social media influencers must act for purposes relating to their trade, business, craft or profession or, alternatively, in the name of or on behalf of a trader within the meaning of the directive.⁶⁰ Depending on which interpretation of Article 2(d) UCPD is to be endorsed, it will or will not be necessary to ascertain whether the influencer who operates as an intermediary is acting for professional purposes.⁶¹ In the analysis of the professional nature of the influencer’s marketing activities, all the circumstances of the individual case (e.g., regularity, frequency, information asymmetry, profit-seeking motive and turnover) have to be considered. Some influencers frequently collaborate with brands, while other influencers only occasionally engage in a commercial deal. Furthermore, there are numerous ways in which influencers can be compensated for their advertising services. For instance, influencers may receive a fixed amount of money, a reward based on the number of sales they generate in the case of affiliated marketing⁶², free products or a discount code to purchase the company’s goods. Consequently, in some cases, it will be obvious that the influencer holds the status of trader, whereas other scenarios of influencer marketing will not be as black-and-white.⁶³ However, by analogy with the context of the collaborative economy, it is not feasible to set EU-wide quantitative thresholds, such as the level or percentage of income drawn from the influencer activities, for the purpose of differentiating between professional and non-professional

⁶⁰ EC, *Guidance*, p 122.

⁶¹ According to the EC’s guidance on the application of the UCPD, non-professional influencers can be subject to the directive: ‘In contrast, the UCPD does not apply to consumers who provide information about their experience with products or services, unless they can be considered as acting ‘in the name of or on behalf of a trader’ (see further section 4.2.6 on influencer marketing)’ (see EC, *Guidance*, p 94).

⁶² This transactional structure whereby the influencer is paid a percentage of referral sales can often be identified through the use of personal discount codes shared by the influencer with their audience (see F. MICHAELSEN et al., *The impact of influencers*, p 38).

⁶³ See C. RIEFA and C. CLAUSEN, ‘Towards fairness in digital influencers’ marketing practices’, *EuCML (Journal of European Consumer and Market Law)* 2019, p 66.

influencers, in particular due to the differences in the level of incomes across the EU member states and the unique features of influencer marketing.⁶⁴

17. The importance of the second assessment to be made (i.e., whether the influencer is acting in the name of or on behalf of a trader) is twofold. Firstly, as indicated above, when a professional or non-professional influencer is acting as an intermediary, the initiating trader will always be responsible for ensuring compliance with the UCPD. Secondly, as will become clear in the next section of this paper, the fact that the influencer⁶⁵ is or is not acting in the name of or on behalf of a trader determines whether a certain commercial practice carried out by the influencer in the interest of that trader can be linked to the influencer for the application of the UCPD and thus whether the influencer will be subject to the obligations imposed by the directive with regard to that specific commercial practice. On the basis of the current case law, it is practically impossible to establish criteria for determining whether the influencer is acting in the name of or on behalf of a trader. Several variables could potentially play a role. To start with, the nature of the agreement between the influencer and the company can differ: Some influencers have to adhere to extensive and detailed instructions regarding the required content, while other influencers are given *carte blanche*. Moreover, the duration of the collaboration could be a factor: In some cases, influencers only enter into an occasional contractual arrangement with a trader, while in other cases, influencers are involved in long-term partnerships as so-called brand ambassadors. Finally, the type of incentive received by the influencer to promote the company's products could also be taken into account.

2.1.2 *Social Media Influencers' Marketing Activities as Commercial Practices*

18. The UCPD is characterised by a particularly wide scope *ratione materiae*.⁶⁶ Article 2(d) UCPD defines commercial practices as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a

⁶⁴ EC, *Report of the Fitness Check*, SWD (2017) 209 final, p 109.

⁶⁵ In the case of the first interpretation of Article 2(b) UCPD, the influencer must be acting for professional purposes. Following the second interpretation, non-professional influencers also fall within the UCPD's personal scope if they are acting in the name of or on behalf of a trader.

⁶⁶ CJEU 23 April 2009, Joined Cases C-261 and 299/07, *VTB-VAB and Galatea*, ECLI:EU:C:2009:244, para 49; CJEU 14 January 2010, Case C-304/08, *Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, para 36; CJEU 9 November 2010, Case C-540/08, *Mediaprint*, ECLI:EU:2010:660, para 17 and 21; CJEU 30 June 2011, Case C-288/10, *Wamo*, ECLI:EU:C:2011:443, para 30; Case C-391/12, *RLvS*, para 37; CJEU 19 September 2013, Case C-435/11, *CHS Tour Services*, ECLI:EU:C:2013:574, para 27; Case C-59/12, *BKK Mobil Oil*, para 40; CJEU 20 July 2017, Case C-357/16, *Gelvora*, ECLI:EU:C:2017:573, para 19; Case C-105/17, *Kamenova*, para 41.

trader, directly connected with the promotion, sale or supply of a product to consumers’.⁶⁷ Article 3(1) UCPD supplements this definition by specifying that the UCPD applies to unfair commercial practices before, during and after a commercial transaction in relation to a product. The recitals to the directive also provide further clarification: ‘In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution.’⁶⁸ Undisputedly, commercial communications, including advertising and marketing, which take place prior to or outside the conclusion of a contract, may form commercial practices within the meaning of the directive. This will, however, only be the case if the commercial communication is ‘directly connected with the promotion, sale or supply of a product to consumers’. For the purpose of identifying the meaning of this notion of a direct connection, the next section revisits the judgement of the CJEU in the *RLvS* case and introduces the *Peek and Cloppenburg* case.

2.1.2.1 The Presence of a Direct Connection with the Promotion, Sale or Supply of a Product to Consumers

19. The CJEU has repeatedly emphasized in its case law—and has, to my knowledge, only once altered its stance in this regard (see *infra*)—that an activity can only be regarded as a practice that is commercial in nature if it originates from a trader, forms part of its commercial strategy and is directly connected with the promotion, sale or supply of *its* products to consumers.⁶⁹ The *RLvS* case allowed the CJEU to reiterate, in the context of the publication of editorial content by the publisher of a free advertiser (see *supra*), that the practices covered by Article 2(d) UCPD must originate from traders and must be directly connected with the promotion, sale or supply of *their* products to consumers.⁷⁰ *In casu*, the CJEU holds that, even though they are liable to be classified as commercial practices, the two publications in question did not promote the publisher’s product (i.e., a free newspaper) but rather the products of the undertakings that paid for the articles.⁷¹ If a direct connection could be established with respect to the commercial communications, that connection would

⁶⁷ Art. 2(c) UCPD defines product as ‘any goods or service including immovable property, rights and obligations’.

⁶⁸ Recital 13 UCPD; Case C-357/16, *Gelvora*, para 20; CJEU 4 July 2019, Case C-393/17, *Kirschstein*, ECLI:EU:C:2019:563, para 40.

⁶⁹ Cases C-261/07 and C-299/07, *VTB-VAB* and *Galatea*, para 50; Case C-304/08, *Plus Warenhandelsgesellschaft*, para 37; Case C-540/08, *Mediaprint*, para 18; Case C-288/10, *Wamo*, para 31; Case C-393/17, *Kirschstein*, para 41 and 43; CJEU 2 September 2021, Case C-371/20, *Peek and Cloppenburg*, ECLI:EU:C:2021:674, para 31.

⁷⁰ Case C-391/12, *RLvS*, para 36-37.

⁷¹ Case C-391/12, *RLvS*, para 39-40.

exist with the goods and services of those undertakings and not with the publisher's product.⁷² The articles, the CJEU proceeds, were not such as to significantly alter the economic behaviour of the consumer in their decision to purchase or—more appropriate—take possession of the free newspaper.⁷³ Moreover, the CJEU finds that the publisher did not act in the name of or on behalf of the sponsors (see *supra*).⁷⁴ All of the foregoing arguments lead the CJEU to the conclusion that, in circumstances such as those at issue in the *RLvS* case, the publishing practices of a newspaper publisher in themselves cannot be classified as commercial practices and thus do not come within the UCPD's scope *ratione materiae*. To be more specific, the CJEU decides that the UCPD does not apply to the publication of editorial content on the part of the publisher of a free advertiser where it is established that the publication is not directly connected with the promotion of the newspaper and the publisher does not act in the name of or on behalf of another trader.⁷⁵ *A contrario*, it can be concluded—presuming that the two foregoing premises are not to be regarded as concurrent conditions—that the publisher will be subject to the UCPD where the publisher is either acting in the name of or on behalf of the other trader, provided that there exists a direct link to the promotion of the other trader's products, or the publication of the editorial content is directly connected with the promotion of the newspaper.

The CJEU seeks further support for this perspective in Point 11 of Annex I to the UCPD. Under Point 11 of Annex I using editorial content in the media to promote a product is in all circumstances considered unfair where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.⁷⁶ According to the CJEU, Point 11 is not aimed as such to oblige newspaper publishers to prevent possible unfair commercial practices by advertisers for which a direct connection could thereby be potentially established with the promotion, sale or supply to consumers of the products of those advertisers.⁷⁷ Finally, the CJEU argues that a broader application of the UCPD would be in conflict with the European legislation existing in the field of audiovisual media.⁷⁸ The responsibility for publishers enclosed in the national provision in question, the CJEU explains, corresponds in essence to the obligations EU law imposes on the suppliers of audiovisual media services.⁷⁹ The CJEU concludes that since the EU legislator has not yet adopted this kind of secondary legislation for the written press,

⁷² Case C-391/12, *RLvS*, para 40.

⁷³ Case C-391/12, *RLvS*, para 41.

⁷⁴ Case C-391/12, *RLvS*, para 40.

⁷⁵ Case C-391/12, *RLvS*, para 49.

⁷⁶ Case C-391/12, *RLvS*, para 43.

⁷⁷ Case C-391/12, *RLvS*, para 44.

⁷⁸ Case C-391/12, *RLvS*, para 45.

⁷⁹ Case C-391/12, *RLvS*, para 48.

the member states retain the power to obligate newspaper publishers to indicate when editorial content has been sponsored.⁸⁰

20. The reasoning the CJEU puts forth in the *RLvS* case is—to put it mildly—questionable. Moreover, the CJEU’s ruling also leaves several questions unanswered. To begin with, it remains a tricky affair to determine a threshold for when a commercial practice is no longer ‘directly connected’ with the promotion of a product. In the *RLvS* judgement, the CJEU does not adopt a stand on the issue of whether the two paid-for articles in question directly or indirectly promoted the products of the initiating sponsors.⁸¹ The first of the two publications was financed by an energy company offering a wide range of services, including the sale of bio heating oil. The article consisted of a short introduction, a report accompanied by photographs on prominent guests who attended the final game of the season played by a German football team and an indication that the item was sponsored by a third party. The second article, comprising an editorial snapshot of a German city and a similar sponsorship disclosure, was paid for by a German low-cost airline.⁸² The guidance on the application of the UCPD—correctly—points out that where a trader, for example, sells a street map, not containing any promotional messages whatsoever, and the consumer subsequently uses that street map to find their way to a shop, the selling of that street map cannot be qualified as a commercial practice directly connected with the promotion of a product in that given shop.⁸³ On the other side of the spectrum, it is clear-cut that where a trader provides information relating to the availability of a product at an attractive price during a certain period, a direct link to the promotion of that product can be established.⁸⁴ The analysis is, however, not as straightforward in the case of certain other promotion strategies, such as branding (e.g., displaying a company’s logo on the jerseys of a professional football team), image advertising (e.g., highlighting a company’s environmental awareness in an interview with the press) or, for that matter, native advertising (e.g., promoting a company’s products via sponsored editorial content on a news website). Although these frequently used marketing techniques can definitely have a positive impact on the sales figures of a trader, it is unclear whether they directly or only indirectly influence the consumer’s choice to purchase a product within the meaning of the UCPD. Eventually, the CJEU will have to rule on this matter.⁸⁵

Respecting the connection with the promotion of the publisher’s product, the CJEU settles, on the one hand, that the publication of editorial content by the publisher of a free

⁸⁰ Case C-391/12, *RLvS*, para 49.

⁸¹ Case C-391/12, *RLvS*, para 40-41.

⁸² Case C-391/12, *RLvS*, para 22-23.

⁸³ EC, *Guidance*, 35.

⁸⁴ CJEU 19 December 2013, Case C-281/12, *Trento Sviluppo*, ECLI:EU:C:2013:859, para 35.

⁸⁵ See B. KEIRSBILCK, *The New European Law*, p 229.

newspaper, in circumstances such as those at issue in the *RLvS* case, is not directly connected with the promotion of that newspaper.⁸⁶ On the other hand, according to the CJEU, a newspaper publisher may employ a commercial practice by offering consumers the chance of winning a prize in games, puzzles or competitions, thereby encouraging them to purchase its product.⁸⁷ It is incorrect to infer from the CJEU's assessment in the *RLvS* case that the publication of sponsored content by the publisher of a newspaper cannot under any circumstances—directly or indirectly—promote the publisher's product. In the *Peek and Cloppenburg* case, a company active in the retail sale launched a nationwide advertising campaign in a fashion magazine which invited readers to an evening of private sales under a title which referred to both the clothing retailer and the magazine.⁸⁸ The CJEU holds that the fact that the publication concerned a promotional event organised in cooperation with the fashion magazine acting as media operator and also intended to promote the magazine's sales, cannot call into question the nature of that action as a commercial practice attributable to the clothing business.⁸⁹ Advocate General SZPUNAR adds to this finding that the CJEU has already stated that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name of or on behalf of that operator, with the result that the provisions of the directive could in certain situations be relied on against both the operator and the undertaking if they satisfy the definition of trader. *A fortiori*, the Advocate General proceeds, it cannot be ruled out that a single commercial practice can be attributed to two separate operators when they act on their own behalf and on behalf of a co-operant. Such commercial practice would also fall within the scope of the UCPD.⁹⁰ However, the Advocate General underlines that the question of whether the provisions of the UCPD can be relied on in respect of the fashion magazine (i.e., whether the publisher was acting in the name of or on behalf of the clothing company or whether the article is directly connected with the promotion of the magazine) does not arise in this case since the action in the main proceedings was directed solely against the clothing company. This notwithstanding, the Advocate General remarks in a footnote that the CJEU's judgement in the *RLvS* case may suggest that the publication of an article cannot constitute a commercial practice originating from a newspaper publisher. In that regard, the Advocate General straightens out that the articles in the *RLvS* case related to events external to a newspaper publisher, whereas the *Peek and Cloppenburg* case concerns the publication of an advertisement organised by a fashion magazine publisher in cooperation with another trader.⁹¹ In this way, the Advocate General implicitly answers the

⁸⁶ Case C-391/12, *RLvS*, para 40.

⁸⁷ Case C-391/12, *RLvS*, para 44. See also Case C-540/08, *Mediaprint*, para 18.

⁸⁸ Case C-371/20, *Peek and Cloppenburg*, para 12.

⁸⁹ Case C-371/20, *Peek and Cloppenburg*, para 32.

⁹⁰ Opinion, Case C-371/20, *Peek and Cloppenburg*, para 24.

⁹¹ Opinion, Case C-371/20, *Peek and Cloppenburg*, footnote 11.

question of whether the publication of the article can be considered as a commercial practice emanating from the magazine publisher.

All this being said, the inscrutability of the CJEU goes much further: On what grounds does the CJEU maintain—time and again—that a practice, to be commercial in nature, must originate from a trader and must be directly connected with the promotion, sale or supply of *its* product to consumers?⁹² The condition that a direct connection must be established with the initiating trader’s own products cannot be derived from the wording of the UCPD. In this context, it can be noted that the referring court in the *Peek and Cloppenburg* case drew attention to the concept of commercial practices as defined in German law.⁹³ According to the referring court, the definition of the concept adopted in German law is broader than the UCPD’s definition as it also includes acts by third parties aimed at promoting the sales or purchases of a third company not acting on behalf of or in the name of the trader.⁹⁴ However, Advocate General SZPUNAR stresses that the CJEU has not been asked to clarify whether German law correctly transposes Article 2(d) UCPD, nor is it necessary, in order to answer the questions referred for a preliminary ruling, to determine the extent to which the definition given in German law is broader than that laid down in EU law.⁹⁵ Even though the CJEU is rather persistent in its case law, it still chooses to deviate from its restrictive view in the context of debt collection. In the *Gelvora* judgment, the CJEU rules that debt recovery activities fall under the concept of commercial practices since the conditions in which a debt owed by a consumer are recovered may be so important as to decisively influence the consumer’s decision to take out a loan (i.e., the product of a third party and not of the debt collection agency).⁹⁶ The CJEU continues that the exclusion of credit repayment transactions in the event of the assignment of a debt could call into question the effectiveness of the protection afforded to consumers by the UCPD since professionals could be tempted to separate the recovery phase in order not to be subject to the protective provisions of the directive.⁹⁷ Although the CJEU jumps through unnecessary hoops to bring debt collection activities under the UCPD’s scope *ratione materiae*, the CJEU’s argument regarding consumer protection does make sense and can be

⁹² See B. KEIRSBILCK, ‘Oneerlijke handels- en beroepspraktijken jegens consumenten (2008-2014)’, *TPR (Tijdschrift voor Privaatrecht)* 2016, p 256; W. VAN BOOM, *TvC* 2014, p 149.

⁹³ The Gesetz gegen den unlauteren Wettbewerb defines the concept as any conduct by a person for the benefit of their own or a third party’s undertaking before, during or after the conclusion of a business transaction which is objectively linked to promoting the sale or supply of goods or services.

⁹⁴ Opinion, Case C-371/20, *Peek and Cloppenburg*, para 26.

⁹⁵ Opinion, Case C-371/20, *Peek and Cloppenburg*, para 27.

⁹⁶ Case C-357/16, *Gelvora*, para 27.

⁹⁷ Case C-357/16, *Gelvora*, para 28.

extended to encompass certain influencer marketing cases (see *infra*). After all, the UCPD's primary objective is still to achieve a high level of consumer protection.⁹⁸

This leaves only the CJEU's final—unsatisfactory—attempts to justify its delimitation on the scope of the UCPD. Firstly, there is the argument that Point 11 of Annex I to the UCPD does not intend to target the media operator but rather the advertiser that paid for the editorial content. Strangely enough, this brings the CJEU to the conclusion that the publication of editorial content does not constitute a commercial practice originating from the publisher of a newspaper. Surely, the fact that the practice of one trader appears on the list of commercial practices which are in all circumstances regarded as unfair does not preclude another trader from simultaneously committing an unfair commercial practice of its own, for example, under the general prohibition of misleading commercial practices.⁹⁹ Secondly, according to the CJEU, the existence of the obligations imposed on suppliers of audiovisual media services entails that the UCPD may not be relied on against the written press. This reasoning of the CJEU seems to be drawn out of thin air. The UCPD applies in so far as there are no other EU law provisions regulating specific aspects of unfair commercial practices.¹⁰⁰ Even practices occurring in audiovisual media services, such as misleading and aggressive practices, are subject to the UCPD to the extent that they are not covered by the provisions mentioned above. Only in the case of conflict between the provisions of the UCPD and other EU rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.¹⁰¹

2.1.2.2 The Influencer Marketing Context

21. In order to determine whether the influencer's marketing activities, which may take place prior to or outside the conclusion of a contract, fall within the UCPD's material scope, a distinction must be made between the influencer who promotes his own products and the influencer who promotes the products of a third-party trader. The latter category must be subdivided into influencers acting in the name of or on behalf of the third-party trader and influencers not acting in the name of or on behalf of the third-party trader.

Commercial messages concerning the influencer's own products¹⁰² are subject to the UCPD if the influencer holds the status of trader (see *supra*), the messages form part of the influencer's commercial strategy and are directly connected with the promotion, sale or

⁹⁸ Art. 1 UCPD. See also Recital 1, 20 and 24 UCPD.

⁹⁹ See to that effect W. VAN BOOM, *TrC* 2014, p 149.

¹⁰⁰ Recital 10 UCPD.

¹⁰¹ Art. 3(4) UCPD.

¹⁰² For example, in 2021, the Dutch Nikkie De Jager, best known to her 13 million subscribers on YouTube as NikkieTutorials, launched her own cosmetics brand, Nimya by NikkieTutorials, which she promotes in many of her videos (see www.youtube.com/watch?v=EVRIgx7Qv6c).

supply of the influencer's products to consumers. As is apparent from the CJEU's case law, the UCPD can be relied on, for instance, when the influencer provides his followers with a discount code to purchase his products¹⁰³ or organises a giveaway (i.e., an online contest to win his products)¹⁰⁴. In other scenarios (e.g., the influencer wears his merchandise in a photo or video), it is less clear whether a direct connection can be established with the promotion, sale or supply of the influencer's products within the meaning of the directive.

Where the influencer shares marketing content regarding the products of a third-party trader and acts in the name of or on behalf of that third-party trader, the content must be directly connected with the promotion of that trader's products in order for the UCPD to apply. As in the case of the influencer promoting his own products, such a direct connection is present if, for example, the content provides information concerning a discount offer or a giveaway. By analogy with the CJEU's findings in the *Peek and Cloppenburg* case, the UCPD also applies to the publication of an article in which the influencer invites his followers to an evening of private sales organised by the third-party trader.¹⁰⁵ However, as is apparent from the *RLvS* judgement, it cannot be automatically assumed that the publication of paid-for editorial content by the influencer is directly connected with the promotion of the sponsor's products.¹⁰⁶

When drawing a parallel with the *RLvS* case, the situation where the influencer communicates about the products of a third-party trader but is not acting in the name of or on behalf of that third-party requires a direct connection with the promotion of the influencer's own products for the UCPD to impose obligations on the influencer. Further, it can be assumed that the publication of sponsored editorial content by the influencer, acting as media operator, is not directly connected with the promotion of the medium through which the content is distributed (e.g., the influencer's blog, Instagram profile or YouTube channel).¹⁰⁷ A direct connection with the influencer's product could be present, for example, when the influencer organises a give-away regarding the products of the third-party trader, requiring people who want to participate to follow or subscribe to the influencer's social media profile.

¹⁰³ Case C-281/12, *Trento Sviluppo*, para 35.

¹⁰⁴ Case C-391/12, *RLvS*, para 44. See also Case C-540/08, *Mediaprint*, para 18.

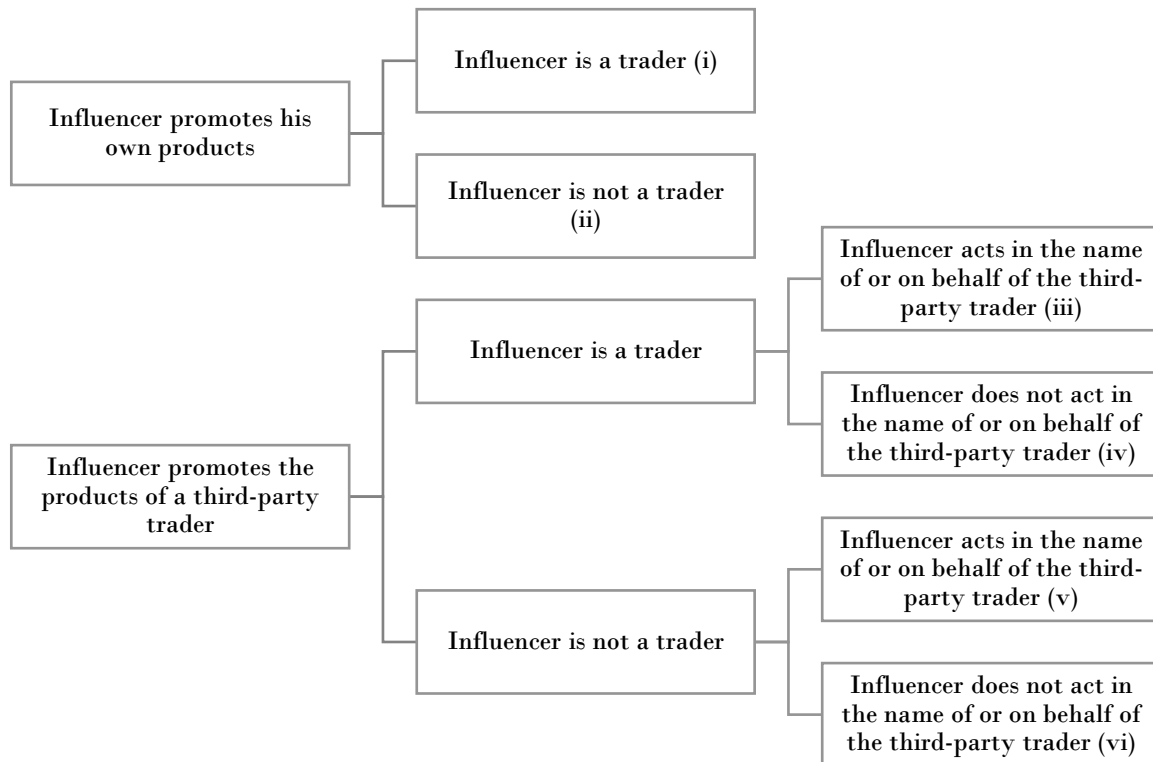
¹⁰⁵ Case C-371/20, *Peek and Cloppenburg*, para 32.

¹⁰⁶ Case C-391/12, *RLvS*, para 40-41.

¹⁰⁷ Case C-391/12, *RLvS*, para 39-40.

2.1.3 Schematic Representation

22.



- (i) When, in accordance with the criteria developed by the CJEU in the *Kamenova* case (e.g., regularity, frequency, information asymmetry, profit-seeking motive and turnover), it is established that the influencer-seller carries the status of trader, the UCPD applies to the influencer if there exists a direct connection with the promotion of the influencer's products. The UCPD also applies to the professional influencer when he is operating through another person acting in his name or on his behalf.
- (ii) The UCPD does not apply to non-professional influencers who promote their own products since they do not come within the directive's personal scope.
- (iii) The UCPD applies to the professional influencer who acts in the name of or on behalf of a third-party trader if there is a direct connection with the promotion of the third-party trader's products and, *a fortiori*, if the commercial message is also directly connected with the promotion of the influencer's products. In this hypothesis, the third-party trader is equally responsible for compliance with the UCPD.
- (iv) In this situation the UCPD does not apply to the influencer if there is no direct connection with the promotion of the influencer's own product (e.g., his blog or merchandise). The UCPD applies to the influencer if such direct connection is present, which is not very likely since the influencer is promoting a third-party trader's products.

- (v) The UCPD does not apply to the non-professional influencer if the first interpretation of Article 2(b) UCPD is followed, which requires that the influencer is acting for professional purposes. If the second interpretation is followed (i.e., the interpretation put forward by the EC's guidance), the UCPD applies if there is a direct connection with the promotion of the third-party trader's products and, *a fortiori*, if the commercial message is also directly connected with the influencer's products. In both instances, the other trader is subject to the UCPD.
- (vi) The UCPD does not apply to the influencer since he does not fall within the directive's personal scope.

2.1.4 Interim Conclusion

23. The extensive analysis of the UCPD's scope of application shows that determining in which situations influencers are subject to the directive is nothing like a walk in the park. As a result, both influencers and consumers are confronted with a high degree of legal uncertainty. To begin with, it is difficult to set a threshold for when influencers meet the requirement of a professional activity or, alternatively, are acting in the name of or on behalf of a trader. Influencers may not even be aware of the fact that they have become traders within the meaning of the UCPD. In addition, the UCPD's scope *ratione materiae* also leaves room for speculation: When is a commercial message directly connected with the promotion, sale or supply of the third-party trader's or the influencer's product? For instance, is such a direct connection present in the scenario where the influencer only wears the clothing of a fashion retailer in one of his videos?

It is certain, however, that in a number of typical cases influencers will not be subject to the obligations imposed by the UCPD, mainly because of the CJEU's delineation of the directive's scope of application. In some of those cases, the UCPD cannot even be invoked against the third-party trader, thus completely depriving the consumer of the protection afforded by the directive. As an illustration, there is the influencer who receives unsolicited free products from a third-party trader. The influencer is not instructed to post (specific) content regarding the products in question. However, the influencer wishes to encourage the company to send more products in the future and decides to mention the products favourably on his social media profile. In doing so, the influencer may violate the UCPD by, for example, sharing misleading information or directly exhorting children to buy the products. If the CJEU's reasoning in the *RLvS* case is followed, the consumer will not be able to rely on the UCPD against the influencer, even when he is acting for professional purposes, since he is promoting the products of a third-party trader but is not acting in the name of or on behalf of that third-party trader. The third-party trader is not subject to the directive either since it did not initiate the commercial practice nor is acting through another person. In this way, brands may be provided with advertising services by influencers while at the same time escaping their responsibilities under the UCPD. The

question is whether this situation, in which the consumer loses all possible safety nets the UCPD has to offer, is reconcilable with the directive's objective, namely to ensure a high level of consumer protection. Clearly, the EC's guidance on the interpretation and application of the UCPD insists on a broader application of the directive. Can the CJEU uphold its delimitations on the UCPD's scope of application—primarily the requirement of a direct connection with the initiating trader's own products and the strict interpretation of the words 'acting in the name of or on behalf of a trader'—in the context of influencer marketing?

Of course, despite the UCPD's maximum harmonisation approach, member states could extend the scope of the directive to all influencers. This, however, would lead to a fragmented consumer law framework for influencers within the EU. Given the intrinsic cross-border nature of influencer marketing and the digital world in general, this seems detrimental to the functioning of the internal market.

2.2 *The Prohibition of Unfair Commercial Practices*

2.2.1 *Three-Layer Structure*

24. The UCPD contains several provisions that are germane to the influencer context. Article 5(1) UCPD prohibits all unfair commercial practices. To start with, commercial practices are particularly unfair when they are considered misleading or aggressive. Annex I to the Directive encloses a list of misleading and aggressive commercial practices which are in all circumstances regarded as unfair (i.e., the so-called blacklist). Commercial practices which are not included in the blacklist, may also fall under the general prohibition of misleading (Articles 6 and 7 UCPD) and aggressive commercial practices (Articles 8 and 9 UCPD). Secondly, commercial practices which do not appear on the blacklist and are not considered misleading or aggressive under Articles 6 to 9 UCPD, may still be caught by the general clause of Article 5 Para 2 UCPD.

25. To demonstrate the importance of the qualification issues that arise in the influencer marketing context, this contribution will give a brief overview of the relevant commercial practices covered by the blacklist and the general clauses.¹⁰⁸

¹⁰⁸ See also in this regard J. LUZAK, 'Influencer marketing as a potentially unfair commercial practice: the Commission's new guidance', *TvC* 2022, p 60.

2.2.2 *Misleading Commercial Practices*

2.2.2.1 The Blacklist

26. Firstly, the blacklist of misleading commercial practices prohibits the use of editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (see *supra*).¹⁰⁹ In the *Peek and Cloppenburg* judgement, the CJEU stresses that Point 11 of Annex I to the UCPD should be interpreted in a manner that reflects the reality of journalistic and advertising practice.¹¹⁰ It also highlights the relevance of covert advertising on the internet through the dissemination of comments on social networks, forums or blogs, which appear to come from consumers themselves, whereas in fact they are commercial messages, directly or indirectly created or paid for by economic operators. Specifically, the case concerned the interpretation of the concept of payment within the meaning of Point 11. The CJEU decided that a trader pays for the promotion of a product by the publication of editorial content within the meaning of the UCPD where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment by that trader and that publication.¹¹¹ Thus, the mere fact that the influencer is not compensated through a monetary payment is not sufficient, by itself, to prevent the application of Point 11 of Annex I.¹¹² The only thing of importance to the CJEU is that the trader grants the media operator some kind of advantage having an asset value which is liable to influence the content of that publication.¹¹³ In the *RLvS* case, however, the CJEU clarified that the prohibition of so-called advertorials is not aimed as such to oblige newspaper publishers to prevent possible unfair commercial practices by advertisers.¹¹⁴ It cannot be ruled out that this exemption of newspaper publisher also

¹⁰⁹ Point 11 Annex I UCPD.

¹¹⁰ Case C-371/20, *Peek and Cloppenburg*, para 42.

¹¹¹ Payment was found to be present in the case where the trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale (see Case C-371/20, *Peek and Cloppenburg*, para 49).

¹¹² See to that effect J. LUZAK and C. GOANTA, ‘#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg’, *EuCML* 2022, p 189.

¹¹³ Case C-371/20, *Peek and Cloppenburg*, para 44.

¹¹⁴ Case C-391/12, *RLvS*, para 44. In the *Peek and Cloppenburg* judgement, the CJEU seems to confirm this stand: ‘In the context of the first sentence of Point 11 of Annex I to that directive, that protection is given concrete expression in the field of the press and other media, in that that point requires *advertising undertakings* to indicate clearly that they have paid for editorial content in the media where that content is intended to promote a product or service originating from those traders’ (see Case C-371/20, *Peek and Cloppenburg*, para 40).

applies to influencers posting editorial content.¹¹⁵ Practically, if such influencer activities were to be excluded from the UCPD's scope, the prohibition of advertorials could only be relied on against the third-party trader who initiated the commercial practice and not against the influencer acting as media operator. Moreover, there is no case law yet with regard to the other conditions of Point 11 of Annex I. Therefore, it is questionable whether posts on the influencer's social media profile can actually be classified as editorial content.¹¹⁶ Nonetheless, according to the guidance on the interpretation and application of the UCPD, the concept of editorial content should be interpreted broadly, covering in some cases content generated by influencers or posted by them on social media platforms.¹¹⁷ Furthermore, there is also uncertainty about the extent of disclosure required to make it clearly identifiable to the consumer that a trader has paid for the editorial content.¹¹⁸

27. Secondly, influencers could also be captured by Point 22 of Annex I to the UCPD. Under Point 22 it is in all circumstances considered unfair to falsely claim or create the impression that the trader is not acting for purposes relating to its trade, business, craft or profession or to falsely represent oneself as a consumer. Where the influencer who is regarded a trader under the UCPD fails to disclose the commercial nature of a given post, he violates the blacklist's prohibition on disguised trading. However, in situations where the commercial nature of the content is communicated, it is again uncertain in how far the used indicators, such as a link to the trader's website, always fulfil the disclosure requirement under Point 22 of Annex I.¹¹⁹ Of course, the qualification as trader may in itself be problematic (see *supra*).

28. Thirdly, considering the immense popularity of giveaways organised by influencers on social media platforms, it is relevant to refer to Point 19 of Annex I to the UCPD. This provision forbids traders to claim in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

¹¹⁵ See J. TRZASKOWSKI, 'Identifying the Commercial Nature of 'Influencer Marketing' on the Internet' in P. WAHLGREN (ed.), *50 Years of Law and IT: The Swedish Law and Informatics Research Institute 1968-2018* (Stockholm: Stockholm Institute for Scandinavian Law 2018), p 85.

¹¹⁶ See J. LUZAK and C. GOANTA, '#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg', *EuCML* 2022, p 190-191.

¹¹⁷ EC, *Guidance*, p 98.

¹¹⁸ EC, *Behavioural Study*, p 15.

¹¹⁹ EC, *Behavioural Study*, pp 14-15.

2.2.2.2 The Special General Clauses of Articles 6 and 7 UCPD

2.2.2.2.1 Misleading Actions

29. Under the special general clause of Article 6 UCPD a commercial practice is considered as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to a number of essential elements, such as the existence or nature of the product, the main characteristics of the product or the nature, attributes and rights of the trader or its agent. A commercial practice is also regarded as misleading if it involves marketing of a product which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor or non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound¹²⁰. Furthermore, it must be demonstrated that the commercial practice causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.¹²¹ Article 2(k) UCPD defines transactional decision as ‘any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting’. It is apparent from the wording of Article 2(k) that the concept of transactional decision is broadly defined. In the *Trento Sviluppo* case, the CJEU held that the concept therefore covers not only the decision whether or not to purchase a product, but also any decision directly related to that decision.¹²² In that sense, the concept of transactional decision also includes pre-purchase decisions such as the decision to enter a shop or the decision to visit the trader’s website.¹²³

A social media post in which the influencer promotes a skincare product could, for example, potentially breach Article 6 UCPD when the influencer uses a beauty filter to exaggerate the effect of the product, especially when the influencer claims otherwise (e.g., by using the hashtag #nofilter).¹²⁴ Whether the content is misleading and is likely to have an impact on the transactional decision of the consumer must, however, be assessed on a case-by-case basis.¹²⁵

¹²⁰ The commitments must be firm and capable of being verified and the trader must indicate in the commercial practice that it is bound by the code (see Art 6(2)(b) UCPD).

¹²¹ EC, *Guidance*, 30-32.

¹²² Case C-281/12, *Trento Sviluppo*, para 36-38.

¹²³ EC, *Guidance*, p 31.

¹²⁴ E. HALLETT, ‘Influencers told not to use ‘misleading’ beauty filters’, *BBC News* 3 February 2021, www.bbc.com/news/uk-england-55824936 (accessed 30 March 2022).

¹²⁵ EC, *Behavioural Study*, pp 16-17; EC, *Guidance*, p 40.

2.2.2.2.2 Misleading Omissions

30. Under the specific general clause of Article 7 UCPD a commercial practice is regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium¹²⁶, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision. A commercial practice is also regarded as a misleading omission when a trader hides or provides the aforementioned material information in an unclear, unintelligible, ambiguous or untimely manner or fails to identify the commercial intent of the commercial practice if not already apparent from the context. Again, these commercial practices are subject to the transactional decision test and thus must cause or must be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. The UCPD does not define the concept of material information, except for the specific case of an invitation to purchase. Article 2(i) UCPD defines an invitation to purchase as a commercial communication which indicates the characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.

In the context of influencer marketing, Article 7 UCPD thus offers another possibility to tackle hidden advertising and other unfair influencer marketing practices. However, the influencer's content will only amount to a misleading practice under Article 7 UCPD if it causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise, which is not the case for the backlisted commercial practices. Moreover, national authorities will need to assess on a case-by-case basis whether material information has been omitted since the influencer's commercial communication will usually not constitute an invitation to purchase and whether the influencer has fulfilled the transparency requirements under Article 7.

2.2.3 *Aggressive Commercial Practices*

2.2.3.1 The Blacklist

31. Point 28 of Annex I to the UCPD prohibits, including in advertisements, direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. To determine whether a commercial practice

¹²⁶ Article 7(3) UCPD clarifies that 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.

falls under Point 28 of Annex I all circumstances of the individual case must be taken into account. The trader's own definition of the target group is not decisive.¹²⁷

2.2.3.2 The Special General Clauses of Articles 8 and 9 UCPD

32. Under the special general clause of Article 8 UCPD a commercial practice is regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.¹²⁸

According to the guidance on the interpretation and application of the UCPD, the influencer's behaviour could in some cases amount to an aggressive commercial practice through the use of undue influence given that the relationship between the influencer and his audience is often based on trust and a personal connection. This is particularly relevant when the main target audience of the influencer includes vulnerable consumers, such as children and young people.¹²⁹

2.2.4 The Comprehensive General Clause

33. Article 5(2) UCPD provides that a commercial practice is regarded as unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed or of the average member of the group when a commercial practice is directed to a particular group of consumers. According to Article 2(e) UCPD to materially distort the economic behaviour of consumers means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. Thus, the requirement in relation to the material distortion of the consumer's economic behaviour is the same as that under the special general clauses.¹³⁰ The EC's guidance on the interpretation and the application of the UCPD clarifies that the notion of professional diligence encompasses principles such as honest market practice, good faith and good market practice. These principles emphasise normative values that apply in

¹²⁷ EC, *Guidance*, p 70.

¹²⁸ Art. 8 UCPD.

¹²⁹ EC, *Guidance*, p 99.

¹³⁰ EC, *Guidance*, p 32.

the specific field of business activity. It may include principles derived from codes of conduct.¹³¹

2.2.5 *The Social Media User as Consumer*

2.2.5.1 The Average Consumer

34. Under Article 2(a) UCPD consumer means any natural person who, in commercial practices covered by the UCPD, is acting for purposes which are outside his trade, business, craft or profession.¹³² The recitals to the UCPD clarify that it is appropriate to protect all consumers from unfair commercial practices, but the CJEU has found it necessary in adjudicating on advertising cases to examine the effect on a notional, typical consumer. In line with the principle of proportionality and to permit the effective application of the protections contained in it, the UCPD uses as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case law of the CJEU, to determine the typical reaction of the average consumer in a given case.¹³³

2.2.5.2 Vulnerable Groups of Consumers

35. The UCPD also aims to prevent the exploitation of consumers whose characteristics such as age, physical or mental infirmity or credulity make them particularly susceptible to unfair commercial practices or to the underlying products (e.g., children).¹³⁴ Where a commercial practice specifically targets a vulnerable group of consumers, it is desirable that the impact of the commercial practice is assessed from the perspective of the average member of that group.¹³⁵

2.2.6 *Interim Conclusion*

36. In theory, unfair influencer marketing practices can be tackled by appealing to the existing consumer acquis. The blacklists of misleading and aggressive commercial practices

¹³¹ EC, *Guidance*, p 37.

¹³² Art 2(a) UCPD.

¹³³ Recital 18 UCPD.

¹³⁴ Point 28 of Annex I to the UCPD, for example, protects children from direct exhortations to purchase (see *supra*).

¹³⁵ Recital 18-19 UCPD. See also B. DUIVENVOORDE, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive', *EuCML* 2013, pp 69-79.

offer the best prospects in this respect, as they do not require a causality with the distortion of the consumer's economic behaviour. In addition, the special general clauses and the comprehensive general clause also present several opportunities to address both hidden advertising and other unfair commercial practices in influencer marketing.

Regarding disguised advertising, the blacklist of misleading practices includes two potential avenues through Point 11 and Point 22 of Annex I to the UCPD. However, there are doubts as to whether Point 11 can actually be applied in the context of influencer marketing, since the CJEU has not yet interpreted the concept of editorial content within the meaning of that provision. Moreover, the value of Point 11 seems limited given the boundaries inflicted upon it by the CJEU in the *RLvS* judgment. Item 22 faces its own obstacles, particularly the difficulties associated with the qualification of the influencer as trader. Furthermore, in both instances it is unclear how the influencer must provide disclosure to adhere to the transparency requirements. Similarly, this is the case when invoking the prohibition on misleading omissions, which forms another possibility to deal with hidden advertising. On top of that, in order for Article 7 to be relied on, it will have to be shown that the influencer's failure to disclose his commercial intent causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

As for other unfair influencer practices, the UCPD's blacklists do not contain any tailored provisions either. The general clauses could bring some comfort, but the chances of success will again depend on the outcome of the transactional decision test. The fact that it all comes down to an individual assessment by the national judge, in combination with a lack of relevant case law from the CJEU serving as guidance, leads to a—by now expected—high degree of legal uncertainty.

One solution could be to update the blacklisted practices to better fit the digital context or even supplement them with new tailored provisions to reflect certain specific unfair commercial practices in influencer marketing.¹³⁶ Furthermore, soft law initiatives may be able to further assist influencers in the practical implementation of the vague principles of the law (see *infra*).

¹³⁶ With respect to consumer reviews and endorsements, the so-called Omnibus Directive added a Point 23b to Annex I to the UCPD, which prohibits stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers. A new Point 23c prohibits submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products. See Recitals 47-49 and Art. 3(7)(b) Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, O.J. L. 328/7, <http://data.europa.eu/eli/dir/2019/2161/oj>.

3. Soft Law Initiatives

37. The UCPD obliges member states to take appropriate measures to inform consumers of the national law transposing the directive and, where appropriate, to encourage traders and code owners to inform consumers of their codes of conduct.¹³⁷ Over the years, both national authorities and SROs have implemented the generally formulated standards from the law in tailored guidelines and recommendations for influencers. Since EU law does not determine this itself, national authorities and SROs try to clarify what, in concrete terms, should be understood under the recognizability of advertising and how influencers can fulfil the imposed transparency requirements in practice. As mentioned in the introduction of this contribution, these soft law documents are not legally binding on their own. Nevertheless, the legal provisions on the basis of which they are adopted, are.

38. First, this article will examine the EASA's Best Practice Recommendation on Influencer Marketing, which was developed to assist national SROs in creating their own codes. After that, this contribution will delve deeper into the soft law initiatives that have been established at the level of the EU member states, whereby Belgium and the Netherlands in particular will be discussed as case studies.

3.1 *The EASA's Best Practice Recommendation on Influencer Marketing*

39. According to the EASA's Best Practice Recommendation on Influencer Marketing (hereinafter: **BPRIM**), content uploaded by influencers should be identified as marketing communication by national SROs if two conditions are present: compensation and editorial control. Compensation should refer to monetary payments as well as to a mere provision of free goods or other reciprocal arrangements in favour of the influencer. National SROs may define the concept of editorial control broadly, also encompassing the advertisers' suggestion or proposal for the tone, structure or direction of the message (e.g., the request for a positive review or a specific number of posts) or more strictly, including only a dominant control with a pre-suggested message script, scenario or speech with additional requests for validation of the content before its publication. The inclusive description of compensation matches the CJEU's broad interpretation of the concept of payment under point 11 of Annex I to the UCPD in the *Peek & Cloppenburg* case. The requirement of editorial control is to some extent reminiscent of the second part of Article 2(b) UCPD, referring to anyone acting in the name of or on behalf of a trader.

¹³⁷ Art. 17 UCPD.

If both of the above-mentioned conditions are met and thus the influencers' message can be considered as marketing communication according to the BPRIM, it should be designed and presented in such a way that the audience immediately identifies it as such. The BPRIM then specifies that the disclosure of the commercial nature of the communication can take various forms, but it should appear instantly. Moreover, it should be appropriate for all different types of formats the influencer uses (e.g., pictures, videos, posts or tweets), all different platforms the content is uploaded to (e.g., Instagram, YouTube, TikTok, Facebook or Twitter), the main target audiences (e.g., adults, young adults or children) and the different national languages. Accordingly, national SROs should pay attention to the placement, timing, labelling and wording of the disclosure.

With regard to whom should be held accountable for breaches, the EASA acknowledges that the provisions regarding liability in national laws and the specific circumstances of the case may differ. The EASA stresses it is important that national SROs clarify the responsibilities and obligations of all parties concerned (i.e., the influencer and his management, if present, and the advertiser).

3.2 *National Level*

40. In Belgium guidelines for influencers were first adopted in May 2018 by the FPS Economy, SMEs, Middle Classes, and Energy¹³⁸. However, after a major backlash on social media, the FPS Economy removed the document from their website as the guidelines were 'not validated' and, therefore, the publication was 'premature'.¹³⁹ In April 2022, the FPS Economy published new—albeit less strict—recommendations for content creators.¹⁴⁰ The recommendations clarify in which cases and how influencers must indicate the commercial nature of their content, as such constituting the FPS Economy's interpretation of the Belgian law on unfair commercial practices. As a federal public service, the FPS Economy may impose administrative fines on influencers violating the law.¹⁴¹ The new recommendations apply whenever the influencer shares a commercial message. According to the recommendations, this is the case when (i) the influencer verbally, visually or

¹³⁸ The FPS Economy, SMEs, Middle Classes, and Energy is a federal public service of Belgium, which is responsible for the preparation, implementation and evaluation of economic policy (see <https://economie.fgov.be/en/about-fps-economy>).

¹³⁹ See https://twitter.com/FODEconomie/status/996437432164904960?s=20&t=zxDer_cNx3JqYOxy8tXxzw.

¹⁴⁰ See <https://economie.fgov.be/nl/themas/verkoop/reclame/u-bent-contentcreator> and <https://news.economie.fgov.be/213090-contentcreators-moeten-reclame-duidelijk-kenbaar-maken>.

¹⁴¹ K. DELBEKE, 'Influencers laten Wilde Westen achter zich', *De Standaard* 26 april 2022, www.standaard.be/cnt/dmf20220425_97728687 (accessed 27 april 2022).

textually highlights a product or brand¹⁴² and (ii) the influencer receives a benefit from the company behind the advertised product or brand. The benefit can consist of free products (even if the influencer did not request them), a monetary compensation, free tickets to a festival, a free meal at a restaurant, an invitation to an event, etc. In other words, it is not required that there is an agreement between the influencer and the company, that the company explicitly asks the influencer to publish a post nor that the company has editorial control. Surprisingly, the FPS Economy does not take into account the concept of trader as transposed in Belgian law. However, it remains to be seen whether the FPS Economy will actually sanction non-professional influencers, thus exceeding its authority.¹⁴³

In terms of content, the basic rule is that the commercial message should be recognizable as such. If the commercial nature of the message is not immediately clear from the context, the influencer will be subject to a labelling obligation. Generally, the advertising label must be so apparent that there can be no doubt about the marketing purpose of the influencer's post. The FPS Economy's recommendations demand that the label is visible at first glance. This means, for example, that the label cannot be placed at the end of the post. In addition, the label should be in the same language as the influencer's message. *Preferably*, influencers should use the tags #advertisement or #publicity. However, the tag #sponsored is allowed if no agreements were made on the specifics of the content.¹⁴⁴ *In many cases*, tags such as #ad, #adv, #collaboration and #partner will not be sufficient. Due to the ambiguous wording the FPS Economy chooses to use, the recommendations seem rather non-committal. With regard to children, the FPS Economy only stresses that it is prohibited under the law to directly encourage children to buy products or to persuade their parents or other adults to buy products for them.

41. In October 2018, the Communicatie Centrum (French: Centre de la Communication) and the Jury voor Ethische Praktijken inzake reclame (hereinafter: **JEP**) (French: Jury d'Ethique Publicitaire)¹⁴⁵, the independent self-regulatory body of the Belgian advertising sector, also published recommendations for influencers.¹⁴⁶ These recommendations were

¹⁴² This is also the case when the influencer shares a discount code or affiliate link or when he organises a giveaway or competition regarding the products in question.

¹⁴³ J. KERCKAERT, 'FOD Economie publiceert nieuwe aanbevelingen voor influencers', *TBH* 3 mei 2022, www.rdc-tbh.be/nl/news/fod-economie-publiceert-nieuwe-aanbevelingen-voor-influencers.

¹⁴⁴ Influencers publishing content in Dutch should use the words *reclame*, *advertentie*, *publiciteit* or *gesponsord*.

¹⁴⁵ The Communicatie Centrum is the professional organisation that unites the different communication professions in Belgium. The Communicatie Centrum founded the JEP in 1974. This is an independent self-regulatory body whose mission is to ensure fair, sincere and socially responsible commercial communication.

¹⁴⁶ Communicatie Centrum, *Aanbevelingen inzake online influencers*, October 2018, www.jep.be/sites/default/files/rule_recommendation/aanbevelingen_van_de_raad_voor_de_reclame_online_influencers_nl.pdf.

revised in 2022.¹⁴⁷ As a SRO, the JEP may receive complaints and may, if necessary, take a decision to modify or terminate the advertising campaign, counting on the voluntary compliance by the advertiser. Initially, the applicability of the JEP's recommendations was limited to the situation where the influencer received compensation and the advertiser had control over the commercial communication.¹⁴⁸ A clear reflection of the EASA's BPRIM could be seen in the older recommendations. In the situation where the advertiser did not have significant control over the message, the JEP did not consider the influencer's message to be advertising, but simply an opinion that an individual disseminates via the internet. In that case, the recommendations were not applicable. Following the revision in 2022, the question of whether the advertiser has editorial control over the content is no longer relevant in determining the recommendations' scope. The recommendations apply as soon as the influencer receives compensation. Here as well, the concept of compensation must be interpreted broadly, encompassing both monetary payments and payments in kind.

If the recommendations apply, the fundamental rule is that commercial communication must be clearly recognizable as such. The commercial nature of the message can either be very clear from the context or can be made identifiable by an explicit textual disclosure. When it comes to that textual disclosure, the initial recommendations were not strict at all. Almost all labels seemed possible. Various words and abbreviations were given as examples of appropriate labels/hashtags (#spon, #adv, #prom, #sample, etc.). The revised recommendations advise influencers to use the tags #advertisement or #publicity in situations where certain instructions are given regarding the promotional activities and the tags #sponsored and #productplacement in situations where those instructions are not present, thus establishing consistency with the FOD Economy's guidelines. Disclosure options offered by social media platforms themselves can help to make the commercial relationship clear, but will not always be enough. With regard to the placement of the disclosure, the JEP asks that the commercial communication is disclosed in such a way that recipients immediately understand the correct nature of the message, which means they should not be forced to take additional steps to do so (e.g., watching the entire video or go to a website). Furthermore, the label must be appropriate for the used platform (e.g., YouTube, Instagram and TikTok) and suitable for all the different types of devices on which the influencer's content might be viewed (e.g., computer, mobile phone and iPad). Influencers should be particularly careful when their target audience consists of children. Consequently, whereas the JEP's initial recommendations still left a lot of room for discussion, the updated recommendations succeed in bringing more clarity.

¹⁴⁷ Communicatie Centrum, *Aanbevelingen inzake influencer marketing*, 2022, www.jep.be/wp-content/uploads/2022/04/influencers_NL.pdf.

¹⁴⁸ The scope of the initial recommendations was therefore less broad than the FPS Economy's guidelines, since control by the advertiser was required.

42. In the Netherlands, the relevant document is the Reclamecode Social Media & Influencer Marketing of the Stichting Reclame Code (hereinafter: SRC), which was recently updated.¹⁴⁹ Regarding self-regulation, the situation in the Netherlands is similar to the situation in Belgium. Nonetheless, there are some small discrepancies between the self-regulating codes of both countries. The scope of the Dutch Reclamecode corresponds to the current scope of the Belgian recommendations published by the JEP. The Dutch code applies the instant the advertiser offers the influencer any kind of advantage that may compromise the credibility of a given message. The Dutch Reclamecode thus comes into play regardless of whether the advertiser has directly instructed the influencer to promote its products. For example, the SRC has repeatedly clarified that, whether or not the advertiser specifically asks the influencer to promote its products, the fact that the advertiser sends free products to the influencer implies the existence of some kind of commercial relationship which should be disclosed.

Contentwise, the Dutch guidelines are, compared to the JEP's revised recommendations, reasonably tolerant. The code allows hashtags like #ad or #spon and accepts that influencers make use of features on social media platforms themselves, such as the paid partnership tool on Instagram. The Dutch code emphasizes that influencers should pay attention to the placement and language of the disclosure and mentions that it is crucial to take the comprehension of children into account when they form the primary target group of the influencer activities, but it does not go any further than that.

3.3 *Interim Conclusion*

43. At European level, the EASA's BPRIM tries to establish a coherent self-regulatory framework for influencer marketing across the EU, thus contributing to the creation of the internal market and ensuring a high level of consumer protection. As regards content, the BPRIM leaves national SROs a lot of room for manoeuvre, which is why it adds little to the existing vaguely formulated legal provisions. In addition, the BPRIM constitutes its own application criteria (i.e., compensation and editorial control), which—again—are open to interpretation. The failure of the EASA to harmonize the self-regulatory system of its members becomes apparent when comparing the Belgian recommendations of the JEP and the Dutch Reclamecode of the SRC¹⁵⁰, which maintain a different view on what labels should be approved of. Since Dutch consumers will undoubtedly come into contact with Belgian influencers and vice versa, discrepancies between EU member states are not to be welcomed with open arms.

¹⁴⁹ SRC, *Reclamecode Social Media & Influencer Marketing*, 1 July 2022, www.reclamecode.nl/nrc/reclamecode-social-media-rsm.

¹⁵⁰ Both the JEP and the SRC are members of the EASA (see www.easa-alliance.org/members/europe).

Furthermore, soft law (under which this contribution understands both self-regulation and guidelines of national authorities) shows other weaknesses. A first key point has already been emphasized repeatedly: Soft law is not legally binding. This is certainly the case for recommendations from national SROs, which may target influencers to whom the law does not apply or may contain additional measures, but even guidelines issued by national authorities can only provide a possible interpretation of the law. The judge may take this interpretation into account, but is never bound by it. Compliance with self-regulatory initiatives depends entirely on the moral authority of the SRO in question. This is somewhat different for guidelines from national authorities, as these authorities can also impose administrative sanctions on influencers. Lastly, it can be noted that the discussed soft law initiatives mostly cover the issue of transparency, but seem to forget about other problematic influencer marketing practices.

Nevertheless, soft law initiatives can still fulfil a—modest—purpose. As such, guidelines can inform influencers about the existing regulation by giving an overview of the relevant legal provisions and their scope. Soft law can also make influencers more aware of the legal implications of their influencer activities, which may lead to better compliance. Despite the fact that soft law is not legally binding, it can still give an idea of how the law should be implemented in practice. Finally, as previously mentioned, self-regulation can even amplify the binding regulation.

4. Conclusion

44. This contribution examined the extent to which the existing consumer acquis, in particular the UCPD, can be applied in the context of influencer marketing. From a thorough analysis of UCPD's scope, it appears that the application of the directive in the influencer context is not self-evident. In many cases, the qualification of the influencer as trader and the qualification of his marketing activities as commercial practices will be problematic. Consequently, influencers are confronted with legal uncertainty. In principle, the EU member states could broaden the scope of the unfair commercial practices regime and thus subject all influencers to it, without prejudice to the maximum harmonization of the UCPD. However, with the internal market idea in mind, this seems anything but desirable.

On top of that, the unfair commercial practices regime itself creates a lot of ambiguity. Despite the fact that the UCPD could theoretically deal with unfair influencer marketing practices, the general clauses are formulated very vaguely, which makes it challenging for influencers to know how to comply with them. An extension of the blacklist, which is the most interesting to appeal to, with more tailored provisions could address this issue.

Finally, this contribution took a closer look at the soft law initiatives that have emerged in recent years at European and national level. These initiatives try to remedy the insecurities associated with the application of the existing binding legal framework by offering influencers fairly understandable guidelines. However, these initiatives are not foolproof either, thus failing to solve the qualification issues existing under the law. To achieve real legal certainty, there is only one option: legislative action, preferably at EU level.