

# #Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg

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## 1. Peek & Cloppenburg and Influencer Marketing

The interest of European and national policymakers, as well as consumer and market authorities in influencer marketing and its impact on consumer protection has recently escalated.<sup>1</sup> In a nutshell, influencer marketing is a form of advertising which

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<sup>1</sup> See e.g. European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514>>; F Michaelsen et al, 'The impact of influencers on advertising and consumer protection in the Single Market' (Study requested by the IMCO committee, European Parliament, February 2022) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)>; Stichting Reclame Code, 'Reclamecode Social Media & Influencer Marketing (RSM) 2019' <<https://www.reclamecode.nl/nrc/reclamecode-social-media-rsm/>>; Committee of Advertising Practice (CAP) & Competition and Markets Authority (CMA), 'Influencers' guide to making clear that ads are ads' (6 February 2020, 2<sup>nd</sup> edition)

implies the provision of advertising services against a direct or indirect financial benefit. In turn, an influencer is a social media content creator ‘with commercial intent, who builds trust and authenticity-based relationships with their audience (mainly on social media platforms), and engages online with commercial actors through different business models for monetisation purposes’.<sup>2</sup> Whilst the Court of Justice of the EU (CJEU) has not yet elaborated directly on such practices, its judgment in the *Peek & Cloppenburg* case<sup>3</sup> prompted our inquiry into the possibility of applying Point 11 of Annex I of the Unfair Commercial Practices Directive (UCPD)<sup>4</sup> to influencer marketing.<sup>5</sup> This UCPD provision blacklists as a misleading commercial practice *“using 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 (advertorial)”*. In this contribution we will briefly summarise the main findings of the judgment, before sharing our thoughts on two contentious concepts of this provision, at least in light of influencer marketing: ‘payment’ (part 2) and ‘editorial content’ (part 3).

The dispute in *Peek & Cloppenburg* revolved around a promotional campaign published in the fashion magazine *Grazia*, which invited readers to come to a night of private shopping in a German fashion department store. The published content

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<<https://www.asa.org.uk/static/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf>> all accessed 8 August 2022.

<sup>2</sup> F Michaelsen et al (fn 1), 9.

<sup>3</sup> Case C-371/20 *Peek & Cloppenburg* ECLI:EU:C:2021:674.

<sup>4</sup> Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L-149/22 (UCPD).

<sup>5</sup> We ~~are~~ assume hereing that influencers (or content creators) will be classified as traders and their practices as commercial practices and, therefore, UCPD could apply.

included several images of goods that would be sold during the event, which the department store made available to the fashion magazine. The main question posed to the CJEU was whether Point 11 of Annex I UCPD could be applicable here, as there was no monetary payment exchanged between the fashion retailer and the magazine. However, copyright protected images were made available for free.

The CJEU had no doubts that the concept of ‘payment’ should be interpreted and applied broadly. The justification for this approach is based mainly on the purposive interpretation of the UCPD. Besides the general aim to ensure a high level of protection of consumers, as weaker transactional parties,<sup>6</sup> Point 11 of Annex I UCPD ensures protection of consumers against hidden advertising and guarantees consumers’ confidence in the neutrality of the press.<sup>7</sup> In order to achieve these goals and for the prohibition to be effective, any payment for editorial content would need to be disclosed, regardless of whether it was provided in a monetary form.<sup>8</sup> National courts, when identifying the payment or benefit provided as counter-performance for publishing editorial content, will need to find a causal link between them.<sup>9</sup> In the case at hand, the fashion retailer provided images protected by copyright to the fashion magazine, which could be deemed a direct payment for the publication, as these images were used free of charge in the publication.<sup>10</sup>

The CJEU refers in its judgment to the need to address practices that reflect the “*reality of journal-*

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<sup>6</sup> *Peek & Cloppenburg* (fn 32), para 39.

<sup>7</sup> *Ibid*, para 45.

<sup>8</sup> *Ibid*, para 41.

<sup>9</sup> *Ibid*, para 45.

<sup>10</sup> *Ibid*, para 46.

*istic and advertising practice*”, mentioning the European Parliament’s concern about the harmful impact of hidden online commercial advertising on consumer confidence and on competition law.<sup>11</sup> If advertising is hidden from consumers, this may affect their perceptions of the authenticity of the communication, and, consequently, their reliance on the presented information.<sup>12</sup> This is particularly relevant for publications and other cultural production environments where consumers expect a degree of content neutrality. Consequently, in this contribution we examine the possibility of this judgment steering the applicability of Point 11 of Annex 1 UCPD to influencer marketing, as one of the currently prevailing online advertising practices, which could mislead and harm consumers by presenting information as neutral, when in fact it is a paid perspective.

## **II. Influencer Marketing: a Primer**

The development of content monetisation in support of small-scale entrepreneurs professionalizing the production of cultural media has led to a wide range of business models that are often highly profitable.<sup>13</sup> For instance, influencers can sell products,<sup>14</sup> they can ask their followers to offer donations, or they can receive platform advertising or

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<sup>11</sup> Ibid, paras 42-43.

<sup>12</sup> See on the importance of experienced authenticity of social media communication e.g. V Luoma-aho et al, ‘Primed Authenticity: How Priming Impacts Authenticity Perception of Social Media Influencers’ (2019) 13(4) International Journal of Strategic Communication 352-365.

<sup>13</sup> S Bradley, ‘How much money Instagram influencers make’ (*Business Insider*, 28 June 2022) <<https://www.businessinsider.com/how-much-money-instagram-influencers-earn-examples-2021-6?international=true&r=US&IR=T>> last accessed 8 August 2022.

<sup>14</sup> Selling products directly to followers will often qualify influencers as traders who have information duties under the European consumer *acquis*, see for instance D Baert, ‘Acid en tientallen andere influencers op vingers getikt omdat ze bedrijfsgegevens niet

support money (e.g. through Google AdSense; TikTok Creator Fund).<sup>15</sup> Yet, the most well-known business model that also gave influencers their (by now) infamous name, is the advertising business that came with the commodification of personal identity.<sup>16</sup>

Influencer marketing involves a wide spectrum of actors in its supply chain, such as commercial or public entities who need advertising services (e.g. brands, public administration), advertising/PR agencies, influencer agencies and managers or data analytics platforms.<sup>17</sup> In these supply chains, bilateral agreements govern the types of performances and exchanges parties expect from one another,

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vermelden: "Ik ga dit niet doen" (NWS, 5 August 2022)

<<https://www.vrt.be/vrtnws/nl/2022/08/05/influencers-vs-fod-economie/>> accessed 8 August 2022.

<sup>15</sup> For a comprehensive overview of business models, see F

Michaelsen et al (fn 1). See also G De Gregorio and C Goanta, "The Influencer Republic: Monetizing Political Speech on Social Media" (2022) 23 German Law Journal 204.

<sup>16</sup> It is noteworthy that in this article, the term 'influencer' is used to reflect the advertising activities of content creators. For an overview of influencer marketing see for instance J Trzaskowski, 'Identifying the Commercial Nature of Influencer Marketing on the Internet' (2018) 65 Scandinavian Studies in Law 81-100; CC Carpenter and M Bonin, 'To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing after Ten Years of the Endorsement Guides' (2021) 23 Vanderbilt Journal of Entertainment and Technology Law 253; MK Bannigan and B Shane, 'Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry' (2019) 64 New York Law School Law Review 247; A J Roberts, 'False Influencing' (2020) 109 Georgetown Law Journal 81; K Cooper, 'Influencers: Not So Fluent in Disclosure Compliance' (2021) 41 Loyola of Los Angeles Entertainment Law Review 77.

<sup>17</sup> C Goanta and I Wildhaber, 'In the Business of Influence: Contractual practices and Social Media content monetisation' (2019) 91(4) Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 346 <<https://www.szw.ch/de/artikel/2504-0685-2019-0033/business-influence-contractual-practices-and-social-media-content>> accessed 8 August 2022.

which can generally be grouped into three types of practices:

i. *Endorsement* - the influencer offers advertising content against a monetary contribution from their contracting party. This model is often used when influencers are brand ambassadors and have long term contracts with such brands, but it can also be used in short campaigns where the influencer has to make a specific number of posts, videos, etc. during a specific period of time.

ii. *Barter* - the influencer offers advertising content against the receipt of goods or services. In some industries, it is common for brands to offer so-called 'PR packages' as gifts to influencers and other individuals who the brands consider relevant to reach out to. This poses some issues with respect to the intention behind such actions - if the brand offers the products with the intention of receiving advertising, this can qualify as a bilateral contract (e.g. an innominate contract, as many jurisdictions recognize barter solely for an exchange of goods). However, if brands consider such actions as mere gifts, the existence of an obligation incumbent upon the influencer to perform advertising services can be questioned.

iii. *Affiliate marketing* - the influencer offers advertising services against the receipt of a percentage of the prices of all the conversions traced to them. For instance, an influencer can advertise a good or a service using a discount code which enables affiliate networks to track how many leads or transactions the use of the code generates, and for each such conversion, the influencer gets a predetermined percentage of the sale.

The three business practices listed above are commonplace on social media, and they often lead to

hidden advertising.<sup>18</sup> Because making relatable, authentic and entertaining content is an influencer's bread and butter, there are mixed incentives when it comes to disclosures. On the one hand, influencers must be appealing to audiences. For this goal, they must develop a relatable identity to stimulate the parasocial relations with their fandom or followers, which consist of the one-sided relationship between a media user and the media being consumed.<sup>19</sup> This is normally reflected in the type of content made by the influencers. On the other hand, they must appeal to advertisers, whose offerings they need to include in their content. The resulting tension has generally led to a very low industry willingness to acknowledge the fact that a lot of content made by influencers is in actuality advertising.<sup>20</sup>

### **III. *Ratio legis* of the Prohibition of Sponsored Editorial Content and Influencer Marketing**

In the European Union, even though advertising rules predate the emergence of influencer marketing, it took a while for the European regulator to clarify how instruments such as the Unfair Commercial Practices Directive apply to social media influencers. In December 2021, building on the *Peek & Cloppenburg* case, the Commission issued guidelines clarifying this matter.<sup>21</sup> The guidelines clearly specify that influencers qualify as traders if they

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<sup>18</sup> For a general discussion about disclosures on social media, as well as an experiment on blogger disclosures, see S C Boerman, N Helberger, G van Noort and Ch J Hoofnagle, 'Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say' (2018) 9 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 146.

<sup>19</sup> P Ballantine and B A S Martin, 'Forming Parasocial Relationships in Online Communities' (2005) Advances in Consumer Research Volume 197-201.

<sup>20</sup> Ibid.

<sup>21</sup> Commission Guidance (fn 1), 1–129.

*‘frequently carry out promotional activities towards consumers on their social media accounts [...] regardless of the size of their following.’*<sup>22</sup> In addition, the guidelines also address the counter-performance to the advertising services offered by influencers, specifying that a commercial element in a transaction is present when the influencer ‘receives any form of consideration for the endorsement, including in case of payment, discounts, partnership arrangements, percentage from affiliate links, free products (including unsolicited gifts), trips or event invitations etc.’<sup>23</sup> The Commission therefore builds on the CJEU’s interpretation of payment, and confirms that ‘paid for’ does not exclude non-monetary revenue, but that it must be, in the words of the CJEU, a ‘consideration with an asset value’.<sup>24</sup> All the three business practices enumerated above therefore seem to be captured by the interpretation of the CJEU in the *Peek & Cloppenburg* case in that they reflect ‘any form of service and any economic advantage provided by the trader for the purposes of publication of an article’. Further, in this case the publication of an article is the counter-performance for such a service or an economic advantage.<sup>25</sup>

While the Commission deems *Peek & Cloppenburg* as governing influencer content monetisation based on advertising, the argumentation provided by in the Guidelines is succinct. We expand upon the Commission’s stance by further clarifying the

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<sup>22</sup> Ibid, § 4.2.6.

<sup>23</sup> Ibid.

<sup>24</sup> *Peek & Cloppenburg* (fn 32), para 49.

<sup>25</sup> *Peek & Cloppenburg* (fn 32), para 27. In addition, this interpretation also aligns to other international developments. After a call for evidence, the US Federal Trade Commission adopted amendments for its *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, with some of the amendments specifying that duties to disclose also apply to practices such as affiliate marketing. The amended Guides will include best practices in the form of examples to address the disclosure of affiliate links. See <[https://www.ftc.gov/system/files/ftc\\_gov/pdf/P204500%20Guides%20Concerning%20Endors%20and%20Testimonials.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P204500%20Guides%20Concerning%20Endors%20and%20Testimonials.pdf)> [accessed](#) 8 August 2022.



similarities between social media content and editorial content.

Paragraph 65 of the judgment *Peek & Cloppenburg* lists two goals that the prohibition from Point 11 of Annex I UCPD aims to achieve. At first glance, it may appear that in the context of influencer marketing it is less relevant to focus on the need to ensure consumers' confidence in the neutrality of the press and the objective to protect consumers against hidden advertising should take precedence. We argue that both objectives remain relevant, though. Whether the prohibition could apply to practices of digital influencers depends partially on the interpretation of the notion of 'editorial content'.

The notion of 'editorial content' could encompass broadly interpreted media communications, i.e. communications published in mass media channels, in which their authors transmitted facts mixed with their own opinion.<sup>26</sup> The addition of a personal opinion is aimed at swaying viewers or listeners and distinguishes editorial content from factual reports, but it does not mean that editorial content could not be informative. Importantly, editorial content is not explicitly directed at selling something, and editors retain responsibility for this content.<sup>27</sup> Influencer marketing consists of communication that tends to include both facts and opinion, e.g. a digital influencer would list the producer's information about characteristics of a product followed by their own review thereof and rarely directly links to its commercial aim. Therefore, influencer marketing could potentially qualify as editorial content if digital influencers retained editorial control over this content.

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<sup>26</sup> See e.g. J Frager, 'What is Editorial Content?' (Power Digital Marketing blog, 21 February 2020) <<https://powerdigitalmarketing.com/blog/what-is-editorial-content/#gref>> accessed 8 August 2022.

<sup>27</sup> See e.g. Independent Press Standards Organisation, 'What is editorial discretion?' (IPSO Blog, 30 October 2020) <<https://www.ipso.co.uk/news-press-releases/blog/ipso-blog-what-is-editorial-discretion/>> accessed 8 August 2022.

It has to be stressed here that electronic word-of-mouth (eWOM), i.e. online communication aimed at influencing others, whether paid for by brands, advertorials, or user-generated is not a new phenomenon.<sup>28</sup> It is through the popularity of social media channels that the practices of digital influencers gained more traction. Further, developments in digital marketing and ~~digital~~ media, which aimed to redress the low click-through rates (CTR) for online banner ads, as well as circumvent ad-blocking software, blurred some of the lines between advertising and sponsored content, editorials and advertorials.<sup>29</sup> What negatively distinguishes influencer marketing from other eWOM and gains the attention of consumer activists and consumer authorities, is its potential for covert, native advertising, that is the seamless mixing of non-sponsored and sponsored content.<sup>30</sup> Consequently, it may be more difficult to recognise the branded, sponsored content upon which influencer marketing relies.

The prohibition of Point 11 of Annex I UCPD of sponsored editorial content, advertorials, clearly recognises that media participate in advertising. However, based on ethical codes of journalists, editors, and publishers, we would expect them to be prompted to clearly delineate their marketing from other types of communication.<sup>31</sup> It is debateable

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<sup>28</sup> See for an early comparison of the effectiveness of different types of eWOM e.g. B Bickart and RM Schindler, 'Internet forums as influential sources of consumer information' (2001) 15(3) Journal of Interactive Marketing 31-40.

<sup>29</sup> See e.g. J Hardy, 'Sponsored Editorial Content in Digital Journalism: Mapping the Merging of Media and Marketing' (2021) 9(7) Digital Journalism 865-886.

<sup>30</sup> See e.g. S Kay, R Mulcahy and J Parkinson, 'When less is more: the impact of macro and micro social media influencers' disclosure' (2020) 36(3-4) Journal of Marketing Management 248-278.

<sup>31</sup> On the changes that internet brought to journalistic ethics see e.g. J Singer, 'Norms and the Network: Journalistic Ethics in a

whether we could expect all digital influencers to have the same level of media education and experience as journalists or editors. However, any potential difference therein could be mitigated by the fact that digital influencers may have more editorial control over the content they publish.<sup>32</sup> This could bring with it additional ethical responsibility, that of disclosing sponsored content, which would likely correspond to Elliott's classification of some of the essential shared values of journalists: accuracy and completeness.<sup>33</sup> Consequently, we can see that various national advertising codes of conduct require influencer marketing to transparently communicate the commercial intention of the communications to consumers.<sup>34</sup> In this scenario, advertising law steps in to regulate the new media communications, specifically taking place via social media channels.

Influencer marketing profits from the popularity of social media channels. These social media channels should nowadays be considered mass media channels, as empirical evidence shows not only high numbers of users of these media channels in the

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Shared Media Space', in Ch Meyers (ed), *Journalism Ethics: A Philosophical Approach* (OUP 2010), 117-129; D Elliott, 'Essential Shared Values and 21<sup>st</sup> Century Journalism' in L Wilkins and CG Christians (eds), *The Handbook of Mass Media Ethics* (Routledge 2008, 1<sup>st</sup> ed) 28-39.

<sup>32</sup> Although editorial control of digital influencers may be restricted by marketers (see e.g. C Goanta and I Wildhaber, 'Controlling Influencer Content Through Contracts: A Qualitative Empirical Study on the Swiss Influencer Market' in: C Goanta and S Ranchordas, *The Regulation of Social Media Influencers* (Elgar 2020) 210-231), journalists are likely going to be restricted by both marketers and publishers. It is important to mention here that were the marketer relinquishes their editorial control, the content would be seen as sponsored rather than branded or advertising in marketing terms.

<sup>33</sup> Elliott (fn 319).

<sup>34</sup> See e.g. for Dutch and English examples in (fn 1).

modern society, but also the high level of engagement of these users with social media.<sup>35</sup> For the purposes of using the notion of ‘editorial content’, which requires the mass media character of communication, should it matter that the posts on social media are likely to be mainly directed at users of that channel? First, posts of digital influencers would often be publicly available. This means that anyone could find the relevant content via online search engines and likely have some access to it, sometimes even without an account on a particular social media channel. Second, as an alternative, the posts would be open to a wide circle of followers of digital influencers, similarly to subscribers of a particular printed news journal. This means that the communication would be aimed at mass audience. For most ~~digital~~ influencers, one of the goals is to pursue increasing exposure of their digital brand, gaining new followers. Interestingly, some definitions of digital influencers require the evidence of a certain level of influence, measured so far by the number of followers, to recognise<sup>12</sup> the commercial character of their activities.<sup>36</sup> Consequently, it seems spurious to reject the applicability of Point 11 of Annex I UCPD to influencer marketing based on the exclusivity of social media channels’ audience.

Before we conclude this paragraph, we would want to mention that despite the interest that advertising and unfair commercial practices law takes in influencer marketing, media law could regulate it further, as well. It is worth noticing here that at least some national laws started expanding their scope of application to account for developments in the

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<sup>35</sup> See e.g. OFCOM, *Online Nation 2021 report*

<<https://www.ofcom.org.uk/research-and-data/internet-and-on-demand-research/online-nation>> accessed 8 August 2022, 3.

<sup>36</sup> See e.g. Commission, ‘Behavioural study on advertising and marketing practices in online social media’ (June 2018)

<[https://ec.europa.eu/info/files/advertising-and-marketing-practices-online-social-media-final-report-2018\\_en](https://ec.europa.eu/info/files/advertising-and-marketing-practices-online-social-media-final-report-2018_en)> accessed 8 August 2022, 32.

digital sphere. For example, in Poland, the new revision of the Act on radio and television<sup>37</sup> from 2021 applies now also to the providers of audio-visual media services on demand who utilise online platforms to provide such services, e.g. YouTube. Consequently, this may require the registration of such providers, and these may include ~~digital~~ influencers, e.g. YouTubers, TikTokers as media providers. Similarly, in the Netherlands as of July 1, 2022, anyone regularly uploading videos online, who has at least 500.000 followers, is mandated to register with the *Commissariaat voor de Media* (The Dutch Media Authority) and will be supervised by this authority.<sup>38</sup> The expectation is that the threshold of number of followers will be lowered with time, or replaced with other measurements of influence, particularly since the dynamics of engagement (e.g. number of followers and reach) are not fully comparable cross-platform. Applying such registration and other professional conduct requirements to digital influencers as media providers would clarify their role on the market and further strengthen our argument as to their need to follow specific ethical codes of conduct. This could extend beyond the need to clearly identify the author and the commercial character of the message conveyed in online videos, towards duties to protect minors from harmful online content.<sup>39</sup>

We claim then here that it is possible to broadly interpret the current notion of ‘editorial content’ and apply it to influencer marketing. This would follow from the purposive interpretation of the UCPD and allow giving effect to the European legislators’ intentions.

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<sup>37</sup> Ustawa z 11.08.2021 r. o zmianie ustawy o radiofonii i

telewizji oraz ustawy o kinematografii (Dz.U. z 2021 r. poz. 1676).

<sup>38</sup> See Commissariaat voor de Media, ‘Commissariaat voor de

Media start toezicht op video-uploaders’ (17 May 2022)

<<https://www.cvdm.nl/actueel/commissariaat-voor-de-media-start-toezicht-op-video-uploaders>> accessed 8 August 2022.

<sup>39</sup> Ibid.

However, to increase the effectiveness of consumer protection against hidden online advertising whilst accounting for the changing media practices, it would be beneficial to review the wording of Point 11 of Annex I UCPD and to consider replacing the notion of ‘editorial content’ with the simpler and broader notion of ‘content’.

## **IV. Conclusions**

Although the CJEU does not provide an analysis of influencer marketing, it is important to consider that while the marketing industry has seen various trends and practices with different names (e.g. product placement, influencer marketing), potential embedded issues of hidden, inconspicuous advertising have the same characteristics: Consumers no longer interact with neutral content made by a neutral creator, which can affect consumer confidence.<sup>40</sup> Instead, they deal with information that is the outcome of content monetisation. The extent to which this interpretation accurately reflects today’s social media realities in terms of consumer behaviour and advertising recognition, requires more scientific insight. However, what is clear is that positive obligations rooted in European consumer protection and interpreted by the CJEU, such as Point 11 of Annex I UCPD, are not only relevant but also directly applicable to influencer marketing.

The consequence of this application is that hidden advertising, such as advertorials in the meaning of Point 11 of Annex I UCPD, are commercial practices which are in all circumstances considered unfair, and thus prohibited. It follows that advertising must always be disclosed, an obligation which is doubled by media regulation and/or self-regulation of the advertising sector at national level. Still, disclosure duties in the context of social media advertising by influencers will need to take into account the vast versatility and nature of such advertising (e.g. types of content – text posts, stories, videos, images; platform affordances for disclosures such as #paidpartnership on Instagram; cross-platform posting). It is, therefore, necessary to have better

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<sup>40</sup> Peek & Cloppenburg (fn 32), para 29.

insights into influencer advertising market practices and revisit the discussion of information duties in a fast-innovating digital environment.