

Integrative advertising: the marketing 'dark side' or merely the emperor's new clothes?

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ABSTRACT

This paper assesses the move towards more 'integrative advertising' methods which rely on the mixing of commercial and non-commercial content, and the suitability of the current EU legislative framework to deal with such developments. In essence, the paper examines the 'identification' and 'transparency' principles in the context of online advertising. This analysis allows for the drawing of conclusions *vis-à-vis* future policy initiatives and enforcement challenges. The paper states that for true advertising literacy mere identification of commercial communications is insufficient and that efforts need to be made in order to educate consumers (especially children) to allow for the continuing relevance and reliance on the notion of the average consumer.

Keywords: Advertising; consumer protection; AVMS; e-Commerce; data protection

INTRODUCTION

The recent instalment of the Star Wars saga, Star Wars Episode VII: The Force Awakens, was one of the most widely anticipated movies of 2015. Despite the enthusiasm of many fans, the plot remained largely a secret and was the topic of a plethora of message board threads, tweets and YouTube clips months in advance of the release date. The Star Wars marketing campaign is indicative of the increasing interest in what are referred to in this paper as 'integrative' forms of advertising as a means of reaching the consumer with commercial communications more effectively. [3]

It should be noted from the outset however, that integrative advertising (i.e. the mixing of commercial and non-commercial content) is hardly a new phenomenon. For instance, Star Wars has been incorporated into video games and toys and other merchandise for many years and the new film merely kicked added life into themed product sales and additional marketing off-shoots. Although the movies in themselves have a commercial nature, their appeal and iconic status have gained the love and sentimentality of fans. As such, characters and props have found their way into popular culture and can have a positive impact on brand awareness and effective market penetration.

In the lead up to the latest movie this sentimentality and emotional engagement was used to increase hype and was certainly a competitive advantage. The marketing for the film actively engaged with the online world and employed a social media correspondent to generate further interest by engaging with user generated content and also the creation of blogs, tweets and videos. [4] In addition, a number of cross-promotional partnerships were used. These partnerships allowed for mutual benefits between non-competing brands in order to increase user awareness of the film and the partnered product or service. [5]

Although the Star Wars example may be seen as a relatively benign use of integrative advertising techniques given, the obvious and transparent connections and economic interests, it illustrates the power associated with such campaigns and hence their capacity to capitalise on content mixing and user engagement commercially. In simple terms, such methods become problematic when used in a less transparent manner and where the consumer is less likely to be able to identify the commercial communication and the economic interest behind the delivery of the content. [6]

The fact that online businesses such as news websites are already adopting such qualitative advertising techniques as a means of generating revenue presents concerns. [7] Consumers already experience difficulties in recognising commercial messages which undermines their ability to process their appeal in a critical manner (i.e. advertising literacy skills). [8] The challenges posed by the further mixing of commercial and non-commercial content and hence the reliance on more integrated forms of advertising is a key point of contention as such techniques could arguably increase the deceptive nature of marketing campaigns and have an even more persuasive effect on consumers than currently more widely used marketing techniques. [9] Proponents for the adoption of such formats focus heavily on their capacity to improve the consumer experience. However, 'improving' experience may come at a risk to consumer decision-making capacity and therefore consumer autonomy.

The focus of the paper is therefore to assess the adequacy of the legal framework *vis-à-vis* the use of integrative advertising formats and to hence question the resulting challenges in the event of their more widespread adoption. Through this lens the article aims to explore legal requirements governing the mixing of marketing messages with non-commercial content

more generally in order to draw conclusions and recommendations. The research will examine the concept of power asymmetries online and use this to frame the effectiveness of the protections offered by the secondary sources of EU law designed to protect the online consumer.

The paper aims to have an impact upon the wider policy debate surrounding the use of personalisation techniques online and the role and positioning of consumer rights in relation to human rights more generally. The research will focus on a descriptive and evaluative analysis of the EU legislative framework in the areas of privacy and data protection, e-commerce, media law and consumer protection and aims to provide normative insights into the potential legal challenges presented by a move towards more integrated commercial content. The legal instruments have been selected based on relevance on the basis of their substantive and material scope. Although an analysis of the geographical scope of application of the selected frameworks is outside the remit of this paper, some references to national Member State competence are made in order to highlight its importance where relevant.

The paper is divided into four sections namely, 'Episode I - Asymmetries and the scoping of the applicable framework', 'Episode II - 'Identifying' requirements: A bit of grey between the Forces of Good and Evil', 'Episode III - Convergence of rights: Lacking force or will-power?', and finally, 'Episode IV - Restoring balance in an asymmetric universe?'. Episode I scopes the application of the legislative framework, Episode II outlines the legal requirements, Episode III analyses the difficulties associated with holistically protecting the online consumer and finally, Episode IV examines the potential means for resolving the problems outlined in the previous Episodes.

EPISODE I - ASYMMETRIES AND THE SCOPING OF THE APPLICABLE FRAMEWORK

The Star Wars example presented in the introduction highlights that integrative advertising should be understood as an expansive catch-all category. Indeed, for the purposes of this article 'integrative advertising' refers to advertising techniques/formats which aim to mix the commercial and non-commercial content in the delivery of a commercial message. [10] Therefore, any form of commercial communication which in any way relies on the mixing of commercial and non-commercial content online as part of its delivery in order to increase the likely engagement of the targeted consumer, will be referred to broadly as coming within the scope of this definition. A broad definition has been used as the focus of the article is on the integration or mixing of content types in itself rather than on the specifics of a particular technique. However, as will be highlighted in this Episode the broadness of this definition presents issues in terms of the determination of the applicable legislative framework.

1.1 AUDIOVISUAL OR JUST COMMERCIAL?

The distinction made between the form and delivery of commercial communications presents clear challenges regarding the scope of application of the relevant Directives and resulting substantive requirements. The distinction stems from the more detailed requirements for audiovisual media services falling within the scope of application of the *lex specialis* Audiovisual Media Services Directive 2010/13/EU (AVMS Directive). [11] More generally, commercial communications are defined under Article 2(f) of the e-Commerce Directive 2000/31/EC as 'any form of communication designed to promote, directly or

indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.' This broad definition acts as the *lex generalis* filter for the scope of application of the Directive but also the more general consumer protection mechanisms found in the Unfair Commercial Practices Directive 2005/29/EC (UCP Directive). The UCP Directive protects consumers from unfair business-to-consumer commercial practices [12] including commercial communications such as advertising and marketing by a trader. [13] It should be noted however, that the extent to which 'branding' is included within the terms of the definition of commercial communications is a matter of debate as it is clear from the Directive that they must be 'directly connected with the promotion, sale or supply of a product to consumers.' [14] Trzaskowski observes that although this exception does not appear to have been intended by the lawmakers, it complicates marketing regulation unnecessarily as it unwittingly appears to omit marketing that does not promote a specific product from the scope of application. [15] It should also be noted that recital 82 of the AVMS Directive negates the parallel application of the UCP and AVMS Directives. However, Cole observes that the relevance of this exception could be argued given their application overlap (i.e. depending on the services and practices concerned and taking into account media convergence). [16]

Although information society services (as regulated by the e-Commerce Directive) and audiovisual media services (as provided for by the AVMS Directive) are both classified as economic services falling within Articles 56 and 57 TFEU (as discussed *infra*), there is an important distinction in the scope of application with its interpretation often presenting complex challenges in the context of on-demand non-linear programming. This differentiation is significant as advertising techniques often stretch (or are simply outside) the scope of application of the definition of an audiovisual media service as provided for in Article 1(1)(a) of the Directive.

Importantly in the context of integrative advertising, this definition provides that audiovisual media services include audiovisual commercial communications as defined in Article 1(1)(h). This provides that:

'audiovisual commercial communication' means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes.'

It is clear from this definition that there are two cumulative criteria for establishing if a commercial communication of a natural or legal entity pursuing an economic activity fall within the scope of application namely; that they are (1) images [17] that are 'designed to promote' and (2) they accompany or are included in a 'programme'.

Images Designed to promote - This element of the definition corresponds to the classification of economic services as is evident from the reference to the direct and indirect pursuit of an economic activity. As such, although it is clear that the person or entity making the images (or on whose behalf the images are made) must have a promotional purpose, this may present challenges in the classification of some types of integrative advertising. The potential for difficulties is particularly evident in the context of so-called 'digital influencers' or individuals who promote products or services in the style of a review for their followers. [18] In this regard, circumstantial evidence may help in the identification of their commercial intentions. [19] For instance, a clear indicator can be found if the announcement is made in

return for financial compensation or if there are other financial ties between the programme maker and the advertiser (product owner).

Programme - The definition of a programme as contained in Article 1(1)(b) essentially comprises of three elements which require clarification in the context of on-demand non-linear services, namely: that a programme is (1) an individual item within a catalogue (2) established by a media service provider and (3) that it is comparable to the form and content of television broadcasting. [20] The first and third of these elements refer to the fact that access to this service should lead the consumer to reasonably expect regulatory protection under the scope of the AVMS Directive. [21] To clarify, it is not necessary for the catalogue to appear as a complete list but instead may be accessible via a search engine. Such a means of facilitating access would also satisfy the requirement and thus the interpretation of a programme should be dealt with in a practical and dynamic way in order to take technological developments into account. [22] Examples that are comparable in form and content to television broadcasting [23] include feature-length films, sports events, situation comedies, documentaries, children's programmes and original dramas. [24]

Nevertheless, this list of comparable content is very narrow and recent case law would suggest that it has in fact a broader scope of application. In the New Media Online case [25] the Court of Justice of the European Union (CJEU) assessed recital 28 of the AVMS Directive which excludes electronic versions of newspapers and magazines from the scope of application in light of recital 22, in order to interpret the meaning of a programme and an audiovisual media service so as to clarify whether newspaper and magazine websites hosting a video section should be subject to the requirements contained in the Directive. Recital 22 clarifies that audiovisual media services

'should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.'

In simple terms, the case confirmed that the length of videos is not the determining factor and that recital 28 does not exempt such service providers from the requirements provided in the Directive. Accordingly, the judgement seems to divide such newspaper and magazine websites between the video content and the other principal parts which would not be subject to the Directive. The judgement highlights the fact that the CJEU is conscious that consumers require protection in this regard given the potential for abuse.

As noted by Woods however, problems arise when one attempts to draw the boundaries between such content and that these difficulties would be compounded if deliberate structures separating video and editorial content were avoided. [26] Woods' observation highlights the problems associated with the practical interpretation of the scope of the AVMS Directive and the issue of legal certainty regarding the requirements for commercial communications on websites incorporating both audiovisual and editorial content. It appears clear from the New Media Online judgement that websites incorporating both content types are required to apply different frameworks for the same integrative advertising techniques depending on the medium in which the commercial communication is delivered. For example, the promotion of a good or service in editorial content (other than videos) will be required to respect the *lex generalis* provisions in the e-Commerce Directive whereas such a promotion in a video format would require compliance with the requirements provided in the *lex specialis* AVMS Directive. [27]

In addition, this is complicated further in the context of integrative advertising techniques such as advergames which offer audiovisual commercial content via an interactive game but have uncertain application in relation to the AVMS Directive notwithstanding their use of 'images'. Indeed, despite the fact that advergames could arguably fall within the definition of an audiovisual commercial communication (depending on the context), recital 22 clarifies that

'games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines... should also be excluded from the scope of this Directive.'

As a result, although one could propose that the advergame in itself is merely a means for the delivery of an audiovisual commercial communication (with the entire game constituting a service), it remains unlikely that such marketing mechanisms come within the scope of the Directive despite certain authors arguing in favour of its applicability. [28]

The second of the three elements requires that this programme be established by a 'media service provider'. In simple terms this refers to the concept of 'editorial responsibility' which can be essentially broken down into the exercise of effective control regarding both the selection and organisation of the programmes. [29] This seems to allude to the authority to make programmes available in terms of broadcasting rights. [30] As noted by Schoefs, in order to examine what is really behind this concept however, one is required to clearly define what is meant by 'selection' and 'organisation'. [31] The notion of 'selection' presents certain ambiguities when one considers large media platforms which encourage the uploading of user generated content along with highly edited professional content.

Although it seems well established that amateur user generated content falls outside the scope of application of the AVMS Directive, [32] the situation becomes more complicated when the same services also offer more professional content which has been provided and/or edited by the platform provider or a third party before the upload. [33] Several Member States find such professional content and channels to be within the scope of the AVMS Directive and assign the responsibility wherever the editorial power rests. However, given the emergence of 'digital influencers' this distinction presents clear challenges as such integrative advertising techniques render it difficult to identify each player in the value chain. In such circumstances, and given the capacity of individuals to influence social trends and, as a consequence the financial rewards being offered, it is arguable whether these business models and the individuals behind them should come under the scope of the AVMS Directive.

However, it would appear that finding the platform provider responsible in the context of digital influencers would be a clear break with the pattern of progression *vis-à-vis* the interpretation of 'selection' as a method of finding an exercise of control. This point is supported by the fact that the platform provider may remain outside the specific economic value chain (i.e. they would be just facilitating the delivery via the provision of the platform's services [34]) as their income in this situation would be generated through more traditional forms of advertising (e.g. text or display advertising units) accompanying the digital influencer's content. [35] If, however, it is the platform provider who engages the services of such influencers, the interpretation of editorial responsibility becomes extremely difficult. Another example is foreseeable in the context of a platform providing access to online games recommending an advergame uploaded to the platform to a user without being aware and/or acknowledging the commercial nature attached to the game.

Nevertheless, it is important to question the responsibility of such platform providers in relation to the interpretation of 'selection' given their increased use of profiling, complex recommender systems and automated content classification mechanisms. The difficulty surrounding the interpretation of 'selection' also relates to the second of the two elements highlighted namely, effective control over the 'organisation', which essentially refers to control over how the content is presented in the catalogue. The use of automated content classification mechanisms may arguably be deemed an example of such organisation. As noted by Schoefs, the increased usage of automated means of selection and organisation also potentially decreases the role of content providers as editors and strengthens the platform provider's role as algorithmic recommender systems may determine the accessibility (by varying prominence) thereby having a *de facto* influence over choice. [36] In this context one must also recognise the fact that platform providers also often extract value (in the form of advertising) which is then shared with the media provider/creator. To clarify the above, it is important to note that most integrative advertising formats (e.g. sponsored videos/text), will avoid the complications with determining applicability as the platform providers will be directly responsible. However despite this, the use of automated means of recommending content becomes particularly problematic if such algorithms recommend integrative advertisements merely hosted by the platform in the same way as non-commercial user generated content (e.g. content uploaded by digital influencers). This issue is compounded by the use of personalisation techniques in such recommender systems which arguably increase their influence even further. It should be noted however that this is an area in flux.

The proposed changes - In May 2016 the European Commission published their proposal to amend the AVMS Directive. In this proposal several key changes are significant to the current discussion on scope. Of clear importance here is the addition of another category of service to that of an audiovisual media service as provided for in Article 1(1)(a) (i.e. which includes linear and non-linear services and audiovisual commercial communications). In the proposal, Article 1(1)(aa) provides for video-sharing platform services as an additional category of services.

The introduction of this category of service aims to clarify the application of the Directive to video-sharing platforms, which is also reflected in the proposed modifications of the definition of a 'programme'. This definition removes the requirement that the content in question needs to be 'comparable to the form and content of television broadcasting'. The omission of this requirement is in line with the addition of the provisions on video-sharing platform services and is also reflected in the inclusion of 'videos of a short duration' as an example in the new definition of a 'programme'. A video-sharing platform service is defined as

'... a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets the following requirements:

- (i) the service consists of the storage of a large amount of programmes or user generated videos, for which the video-sharing platform provider does not have editorial responsibility;
- (ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;

(iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;

(iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC.'

As is clear for these four cumulative criteria, this provision aims to overcome the difficulties described *supra* associated with the interpretation of 'editorial responsibility'. Requirements (i) and (ii) of the definition aim to specifically cater for these problems and the increased usage of automated means of selection and organisation by platforms. Through the introduction of the category of video-sharing platform services the proposal aims to specifically include such services within the scope of the Directive. Therefore, the introduction of this category of service essentially targets the previous grey area. However, as is made clear in requirement (i) if the service provider has editorial responsibility they will not satisfy the requirements. As a consequence, those service providers which do have editorial responsibility will come under the scope of on-demand audiovisual media services. Moreover, as will be further clarified in Episode II, the actual impact of the clarified scope *vis-a-vis* the proposed inclusion of video-sharing platforms in the context of integrated advertising is limited under the proposed reforms given that the provisions on audiovisual commercial communication will not be applicable to such platforms. [37]

Another important addition is provided in requirement (iii) which stipulates that 'a dissociable section' dedicated to the provision of programmes and user-generated videos is sufficient to satisfy the definition. This clarification is also provided as a change to the definition of an audiovisual media service in Article 1(a)(i) of the proposal. As such, this appears to reflect the New Media Online case and the CJEU's interpretation of the notion of a programme under the current Directive.

1.2 'SELECTION', 'ORGANISATION' - BUT IS THERE AN AUTOMATED PERSONALISATION IMPACT?

It is particularly significant to assess the impact of personalisation on the notions of 'selection' and 'organisation'. As noted *supra*, such systems can increase the likelihood of viewing and interacting with content and are therefore an important element to be considered regarding their combined use with integrative advertising techniques. This observation is particularly significant in situations where the platform provider is aware of the commercial nature of the content and makes the recommendation for some form of compensation. As such, this reasoning would seem to suggest from the discussion *supra* and in line with the proposed changes, that unless the advergaming or digital influencer based model is arranged/facilitated by the platform either directly or indirectly (i.e. so that the platform is aware of the nature of the content), it may be difficult to find that the personalisation forms part of the 'selection' or 'organisation' process.

It should be noted however that platforms profit from increased usage and as a result propose content that is more likely to guarantee interaction based on user profiles. On this basis, integrative advertising techniques may attempt to create viral content as a form of transmitting commercial messages. [38] Hence, such content is beneficial both from the perspective of the integrative advertiser but also the platform provider. Indeed, as platform providers also offer content in the form of videos and editorial content, it is important to note that personalisation extends beyond content that is potentially subject to the *lex*

specialis provisions in the AVMS Directive and thus is also relevant for the more general commercial communications defined in the e-Commerce framework. As a result, given the significance of personalisation techniques it is important to consider the scope of application of the Data Protection Directive (to be replaced by the General Data Protection Regulation [39]) as supplemented by the *lex specialis* provisions contained in the e-Privacy Directive. [40] In essence, the application of the data protection framework requires the processing of personal data. [41]

Personal data as defined in Article 2(a) Directive 95/46/EC refers to 'any information relating to an identified or identifiable natural person ("data subject")...', with all methods 'likely reasonably' to be used to be taken into consideration regarding such identification. [42] Hence, in the context of online platforms, one must take registration and account activity data into consideration, which may incorporate information relating to items (including the subject matter of the content) that a user has liked, shared, read or purchased depending on the purpose of the platform.

In the debates surrounding the reform of the Data Protection Directive, so-called 'online identifiers' became a clear point of contention. As noted by Borgesius, this debate circled around the inclusion of pseudonymous data and the notion of identifiability. The final text of the Regulation through its definition of personal data (Article 4(1)), pseudonymisation (Article 4(5)) and the clarification regarding the interaction between these two definitions (provided in Recitals 26 and 28), indicates that any data capable of singling out an individual should be considered as personal. [43] This clarification must be considered as an important conclusion given that a failure to include such information as personal data would have completely undermined the protections afforded by the framework. Indeed, irrespective of the ability to identify the name of an individual, the capacity to single out nevertheless raises the same concerns requiring protection that the data protection provisions aim to safeguard.

However, although it is relatively straightforward to figure out that the Data Protection framework is applicable, it becomes far more difficult to identify the personal scope of application, especially in the context of integrative advertising online. The personal scope provided for in Directive 95/46/EC indicates a precise and clear separation in responsibility consisting of data controllers processing the personal data of data subjects with or without contracting the services of a third party data processor, with each role being easily distinguishable and where the data processors hold merely a passive function. [44] As noted by de Hert and Papakonstantinou, instead of modifying the data controller and processor definitions in the GDPR, the Commission decided to 'strengthen controlling instances by placing certain additional obligations upon data processors as well, and acknowledge the existence of "joint controllers".' [45] The addition of further obligations fits with the overall rise in significance and reliance on the accountability principle within the GDPR.

However, the decision to maintain the traditional separation raises concerns in the web 2.0 era and, more specifically, in our current context regarding the use of integrative advertising online. [46] Several authors have already highlighted the difficulties associated with the identification process in the context of inter alia online platforms and online behavioural advertising more general. [47] In brief, the application of the data controller definition is complex and although the role of an advertising network as a data controller is clear, actors such as platform providers/website operators (i.e. publishers), [48] analytics services providers, [49] advertisers [50] and even the data subjects/consumers [51] as distinct legal entities, all can potentially come under the scope of the definition if they have access to the personal data gathered and are permitted to determine the purposes of the

processing. [52] Given the above it is arguable whether the Commission would have been better served by abandoning the distinction between data controllers and processors and instead vesting the rights and obligations upon all parties processing personal data irrespective of their means, conditions or purposes. [53] However, there is no point arguing over spilled milk. Having weaved together the complex framework through an analysis of the scope of application of the various instruments, it is apparent that the deciphering of roles and applicability of frameworks is far from a simple process.

EPISODE II - 'IDENTIFYING' REQUIREMENTS: A BIT OF GREY BETWEEN THE FORCES OF 'GOOD' AND 'EVIL'

As highlighted in the previous section, the traditional separations provided for in the frameworks fail to acknowledge the convergence of media formats as facilitated by the development of technology and the online environment. The purpose of this section is to examine the legal requirements which stem from the applicable legal framework discussed above.

2.1 'IDENTIFYING' REQUIREMENTS - A BIT OF GREY BETWEEN THE FORCES OF 'GOOD' AND 'EVIL'

Aside from the analysis of the scope of application of the framework, it is significant to examine the difference in substantive requirements and obligations and thus why such divergences are problematic in a practical consumer protection sense. With this in mind, it is important to note the general provisions contained in the e-Commerce and UCP Directives regarding commercial communications in contrast with the *lex specialis* requirements of the AVMS Directive. [54]

More specifically, the e-Commerce Directive provides that commercial communications [55] 'which are part of, or constitute, an information society service' have clear identification requirements under Article 6 of the Directive. Article 6 requires that commercial communications and the natural or legal persons on whose behalf these communications are delivered should be made easily identifiable. In addition, the same is true for any promotional offers, competitions or games and their conditions for participation.

In contrast, the AVMS Directive provides a specific ban on surreptitious advertising (Article 9(1)(a)) and subliminal techniques (Article 9(1)(a)) and places certain requirements regarding the use of sponsorship (Article 10) and product placement (Article 11) methods respectively. In essence, the requirements contained in Articles 10 and 11 specify that:

- the content of the service should in no way be influenced so as to affect the editorial responsibility of the media service provider;
- no special promotional references should be made to directly encourage the purchase or rental of goods or services;
- viewers should be clearly informed of the existence of product placement [56] and/or sponsorship and finally (and specifically in the context of product placement);
- they should not give undue prominence to the product or service. [57]

These specific requirements are particularly important in the context of certain integrative advertising techniques. For example, the use of digital influencers and advergames could present clear issues in relation to the application of these requirements. This overview of obligations also clearly alludes to the importance of the principle of identification which is a clear connection between the e-Commerce and AVMS Directives. In interpreting what is meant by each of these concepts one can conclude that the method for respecting the ban on surreptitious and subliminal advertising and fulfilling the requirements regarding sponsorship and product placement, is to identify all commercial communications in a clear way so that consumers are informed. In practice, the principle of identification is respected through the use of labelling [\[58\]](#) or 'cues' to make commercial content recognisable.

Although both Directives rely on the application of the principle of identification it is arguable that the more specific examples provided for in the AVMS Directive deliver a degree of clarity in this respect. With this in mind however it is important to assess the proposed changes to the AVMS Directive. This is particularly significant in relation to audiovisual commercial communications given the stricter requirements imposed under the current AVMS Directive *vis-à-vis* traditional linear programming. [\[59\]](#) This distinction has been under stress for some time [\[60\]](#) and is an important point of contention regarding the debate between top-down and bottom-up harmonisation in the context of the protection of consumers. In this regard one can refer to Article 19 of the AVMS Directive which outlines the principle of separation of advertising and teleshopping which must be kept 'quite distinct' from the editorial parts of a programme. This separation may be achieved either 'by optical and/or acoustic and/or spatial means' and that isolated advertising spots should remain the exception. However, the implementation of a separation requirement to non-linear services would be extremely challenging [\[61\]](#) and in the proposed changes to the Directive identification remains the key requirement. Hence the separation principle as contained in Article 19 remains restricted in application to television advertising and is therefore unaffected by the proposed changes.

An area of reform worth highlighting however is the modification of Article 11 on product placement. As mentioned previously, Article 11 of the current Directive bans product placement but allows certain derogations. [\[62\]](#) In contrast the proposal reverses this standard and thus allows product placement and instead provides for certain exceptions. Although one could argue that the effect of this change may be limited as product placement is specifically prohibited in the proposal from 'news, current affairs, consumer affairs, and religious programmes, as well as programmes with a significant children's audience', the provision appears to allow for the product placement in a greater range of programmes than currently permitted under the Directive. [\[63\]](#) Furthermore, the proposal removes the requirements in Article 11(3) that there should be no 'special promotional references' and that the products or services should not be given 'undue prominence'. Arguably, '[t]his could lead to more overt product placement, rendering it, on the one hand, more 'recognisable' in line with article 9.1.(a)AVMSD, but also more intrusive and disruptive.' [\[64\]](#)

In the context of the distinct category of video-sharing platform services provided for in the proposed changes, recital 27 notes that 'As regards commercial communications on video-sharing platforms, they are already regulated by Directive 2005/29/EC of the European Parliament and of the Council, which prohibits unfair business-to-consumer commercial practices, including misleading and aggressive practices occurring in information society services.' Therefore, this provision clarifies that one must refer to the general provisions under the UCP Directive for the requirements relating to commercial communications in the context of video-sharing services.

The UCP Directive takes the average consumer who is 'reasonably well-informed and reasonably observant and circumspect' as the benchmark for assessment taking social, cultural and linguistic factors into account. [65] In order to establish unfairness of a particular advertising technique a two-step criterion must be satisfied, namely (1) the lack of professional diligence of the trader and (2) the influence on the economic behaviour of the consumer. [66] In line with the principle of subsidiarity, the application of this assessment is a matter left to the national courts and authorities. However, deception is given as an example in the Directive where unfairness on behalf of a trader should be assumed. [67]

The Directive distinguishes between two types of deception, misleading commercial practices and misleading omissions. A commercial practice will be deemed misleading if an average consumer makes an abnormal transactional decision on the basis of a deception. [68] Hence, the assessment of any such decision requires a case by case analysis of the individual circumstances and taking particular points such as the nature of the product, its main characteristics, and the price etc. into account. [69] In contrast, a misleading omission refers to a failure to provide material information needed by the average consumer to make an informed transactional decision. [70] As such, it must be understood that in contrast with the AVMS and e-Commerce provisions, the UCP Directive requires evidence of an actual influence on the economic behaviour of the consumer resulting in an abnormal commercial decision as assessed from the perspective of an average consumer. [71]

In this regard one should also note that the promotion of a product within editorial content in exchange for remuneration is viewed as *de facto* misleading and unfair, unless the commercial nature of the promotion is made clear in the content or by accompanying images or sounds that would be clearly identifiable for the user. [72] The general provisions contained in the UCP Directive are also reflected in the Misleading and Comparative Advertising Directive. Although this Directive is focused on the protection of traders in relation to the use of misleading or comparative advertising, in the provision specifically prohibiting misleading advertising in the internal market, it also lists certain factors which should be considered in determining the notion of misleading. This includes three categories of factors which help with such a determination namely, the good or service's characteristics (Article 3(a)), the price or the way in which the price is calculated (Article 3(b)) in addition to the advertiser's 'nature, attributes and rights' (Article 3(c)). This protection reflects the provisions discussed above relating to promotion and product placement under the AVMS Directive and seems to align the protections. [73]

Therefore, despite the fact that protections are spread across different legislative frameworks, the principle of identification is the common denominator and hence in relation to commercial communications the harmonised standards of protection are consistent across the different media formats. Nevertheless, given the convergence of linear and non-linear programming the alignment of consumer protections has become a major issue. Indeed, given the ability to combine advertising formats and delivery mechanisms and the inability of a large portion of consumers to distinguish certain types of commercial communications online (in particular integrative advertising formats), there may be a need for reforms in order to adequately protect the consumer.

Moreover, given the personalisation of online services and the ability to manipulate or nudge consumers towards certain decision, [74] the notion of an average consumer as the standard for assessing protection is under strain. [75] Given that the consumer-business relationship is often characterised as one with an asymmetric distribution of power, deregulation or minimalist levels of protection may not be the optimal policy outcome in a reform of the

analysed protections. Such asymmetry is problematic as it arguably devalues the legitimacy of user participation, presents a clear barrier to finding online companies accountable and also affects consumer bargaining power. [76]

The asymmetric consumer-business relationship is potentially worsened in the context of the personalised advertising campaigns as online businesses know far more about their consumers than consumers know about the business models and the form and delivery of personalised marketing. [77] With this in mind, the analysis will now turn to an assessment of the *ex ante* data protection requirements aimed at protecting consumers in the context of profiling and personalisation of advertisements.

2.2 CONTENT PERSONALISATION - PROTECTING AN 'INFORMED CONSUMER' *EX ANTE*?

The essence of the data protection framework aims to reduce the power imbalance between businesses and consumers regarding the processing of consumer personal data by providing a proactive tool to strengthen the data subject's position relative to the data controller and processor. [78] In the context of profiling for the delivery of personalised commercial communications, it is important to consider the application of the data quality principles (Article 6 Directive 95/46/EC) and how these principles have been transformed and transcribed into the final text of the GDPR. However, before this assessment it is important to first note the developments relating to Article 15 Directive 95/46/EC, which outlines the requirements regarding automated individual decisions. More specifically, this provision specifies that 'every person' has the right 'not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data.' During the development and negotiations surrounding the GDPR, the strengthening of this provision became a key issue of debate due to the increasing importance of profiling activities for a wide array of purposes.

Article 15 of the Directive has been consistently criticised as it has obvious limitations in scope, the rights it provides, the remedies that it makes available [79] and also due to the fact that the requirements it stipulates can be circumvented quite easily by simply including formal human intervention in the decision-making process without this actually having an impact on the outcome of the processing. [80] Article 22 of the GDPR updates this provision by introducing a series of changes. More specifically, the GDPR makes a reference to and provides a definition of the concept of profiling, indicates that explicit consent is the new legal basis for profiling activities, includes a clear obligation to inform data subjects about profiling activities, and finally prohibits the profiling of data subjects based on their sensitive personal data in the absence of a specific and explicit data subject consent.

In addition to the decisions producing 'legal effects' in Article 15 Directive 95/46/EC, Article 22 also stipulates that decisions which similarly significantly affect the data subject should be included in the scope of the Regulation. The addition of 'significantly affects' remains somewhat of an unknown quantity as similar to 'legal effects', it is left undefined in the GDPR. [81] Despite these improvements however the major disappointment with the provision is the inclusion of the phrase 'based solely on automated processing, including profiling'. This is further specified in Recital 71 which also refers to a lack of 'human intervention'. As such, despite the modifications arguably the major thrust of Article 22 remains constant and therefore in line with the key limitation of Article 15 Directive 95/46/EC. [82]

Despite the best intentions of the Commission's first draft of the GDPR, the requirements in Article 22 have been significantly watered down in the Parliament and Council texts and the trilogue negotiations. As such, in the context of personal data processing including human intervention (whatever this may mean precisely) the key data quality principles (Article 6 Directive 95/46/EC) as included in the Article 5 GDPR need to be satisfied. In our current context, it is important to highlight the principles of data minimisation and purpose limitation. The application of these principles present obvious challenges as data is often gathered in an unrestricted manner without a clearly identified and specific purpose and is instead mined for useful correlations and applications. [83] This problem is compounded by the fact that all information that cannot be presented in a machine-readable format is hidden from the users. [84] Despite the difficulties in application and the debate concerning their continuing relevance, both principles have been retained in the GDPR. More specifically in the context of data minimisation, although the CJEU [85] has repeatedly recognised the importance of this principle and that it is implicitly contained within Directive 95/46/EC, its inclusion in the GDPR represents the first time it has been expressly recognised in a legislative text. [86]

Furthermore, Article 6(4) of the GDPR provides further clarification of the purpose limitation principle. This article indicates the criteria to be fulfilled in order for an additional purpose to be found compatible with the original. Although the Parliament and Council texts included a reference to the use of the legitimate interests of the data controller as a potential grounds for this processing, significantly in relation to the effectiveness of this provision, this reference was removed in the final text in line with the original proposal. [87] This provision is particularly important as purposes are often formulated in a vague and non-specific manner [88] despite the fact that the Article 29 Working Party has previously stated that 'each separate purpose should be specified in enough detail to be able to assess whether collection of personal data for this purpose complies with the law, and to establish what data protection safeguards to apply.' [89]

The Working Party also observes that although it may (in certain situations) be beneficial to provide the data subject with a general purpose, this does not satisfy the legal obligation. Importantly, in the context of personal data processing for commercial purposes, informed consent will most likely be the required grounds legitimising the processing operation and hence without a clear indication of the purposes it is questionable whether consumers can ever be truly informed. [90]

However, given the limitations of a reliance on informed consent and the practical difficulties associated with effectuating any consumer choice outside those deemed by the industry as being consumer beneficial, the issue becomes whether such consent to data gathering and processing also effectively indicates the consent of the consumer to be targeted with personalised commercial communications which they may not be able to recognise and, as a result may call into question the reliance on the notion of an average informed consumer and the associated protections in EU law. Although the GDPR aims to shift more responsibility onto the shoulders of the data processors by *inter alia* introducing a focus on the accountability principle, it is uncertain whether this will result in any meaningful change in the value of consent in practice. [91]

This argumentation vis-à-vis consumer decision-making capacity reflects the view that standard form contracts erode the basic right to negotiate and, as a result, are a form of private law-making by large corporations. [92] The problems associated with informed consent are well documented. [93] Particularly in a privacy and data protection context there has been an

ongoing debate regarding consent's continuing relevance for some time given the clear importance of this legitimising ground in the context of commercial personal data processing for the provision of personalised content/services. [94] This debate is also reflected in the discussions surrounding the establishment of default settings [95] in response to and as a part of the challenges posed. [96]

Despite the above, in the reform of the Data Protection Directive, the reliance on consent as grounds legitimising the processing of personal data was retained in the GDPR. However, it is arguable that the Regulation will transform the role of consent via the reliance on the principle of accountability and the establishment of a burden of proof contained in Article 7 of the final text. Significant in this regard are Articles 7(1) and 7(4) which essentially provide that the data controller is obliged to be able to show that data subjects do in fact give their consent and that, in an assessment of the 'freely given' stipulation, whether consent is a condition upon which the provision of a service is granted where such data processing is not necessary for the performance of the contract. This is supplemented by the emphasis on user-friendly information dissemination in Article 12 [97] and also recital 43 which clarifies that for consent to be freely-given it should not provide a valid ground 'where there is a clear imbalance between the data subject and the controller' rendering it unlikely that consent was freely given 'in all the circumstances of that specific situation.' [98]

Although it remains to be seen how these requirements will be implemented by industry in practice and interpreted by the relevant authorities, it can be understood from an initial assessment that data controllers will have to interpret the notion of consent much more carefully. The shift in the burden of proof and the interpretation of the stipulation that consent be 'freely given' may render it difficult to persuade authorities of a correct implementation in the context of asymmetric business-consumer relationships where personal data processing is not strictly required for the performance of the contract. This argumentation will most likely revolve around the notion that personal data processing is integral to delivery of 'free' services and the economic underpinnings of the internet.

This alludes to the fact that under EU law, economic services include those financed by advertising and as a result a service, as defined by Articles 56 and 57 TFEU, does not necessarily require payment by the users themselves. [99] The viewing of advertisements as a payment (i.e. via user attention) is presented by the advertising industry as the key condition in an implicit contract upon which access to content and/or services is granted.

2.3 THE LURE OF THE MARKETING STRATEGY DARK SIDE - PERSUASION OR MANIPULATION?

In the context of the personalisation of integrative advertising the concerns regarding the protection standards and the benchmark of the average consumer are heightened due to the difficulties consumers experience in distinguishing between commercial and non-commercial content. The targeting of particular consumers on the basis of personal profiles can arguably have a manipulative effect. [100] For example, in examining advergames, the gamification of commercial communications and their integration with non-commercial content (and hence the emotive appeal of the game) render it difficult for consumers to adequately identify the commercial purpose. [101]

This example highlights the importance and use of emotive appeals which, although a cornerstone of the advertising business, is only now receiving increased attention given companies expanding emotion-detection capabilities. [102] This is also important in the

context of digital influencers and social media users who are targeted with (or hired to promote) certain forms of integrative advertising in the hope that this content will become viral via user-generated content.

The influence of emotions on decision-making is clear and the effectiveness of the Star Wars campaign for instance was in no small part aided by the consumer sentimentality *vis-à-vis* the franchise. In the 1970's the US academics Reed and Coalson wrote an article on the use of emotive appeals in advertising and concluded that excessive emotional appeals could consumer protection measures. [103] The authors observed that the traditional focus on misrepresentation and deception fails to adequately protect consumers from what they referred to as emotional conditioning. The protections discussed during the course of this analysis harbour strong links to the notions of deception and misrepresentation and as such may have questionable effect in any attempt to mitigate excessive emotive appeals due to personalised commercial communications.

In this regard one must also refer to the provisions relating to 'aggressive' commercial practices under the UCP Directive. Marketing techniques are classified as aggressive if they 'by harassment, coercion or undue influence significantly impair the freedom of choice or conduct of the average consumer'. [104] Although it is unlikely that harassment and coercion (including the use of physical force) would be applicable, undue influence as a seemingly milder form of the above may have an influence given the asymmetric power relationships described throughout this analysis. [105] The European Consumer Organisation (BEUC) has noted that this asymmetric relationship, the repetitive aspect of behavioural advertising putting pressure on consumers, and the restriction of informed commercial decisions due to the filtering and selection of advertisements based on profiling and presumed consumer choice, may be problematic. [106] This observation is particularly significant given the effectiveness of the integrative advertising and the potential for marketing campaigns to go viral. Indeed, in his analysis of viral marketing techniques, Trzaskowski observes that although transmissions, sent directly from the profiles of commercial entities to user feeds may also come under the scope of the e-Privacy Directive provisions relating to direct mailing, it becomes extremely problematic when such a transmission becomes viral. [107] The author goes on to note that such 'marketing buzz' can be problematic *vis-à-vis* undue influence and that the landscape is particularly complicated due to the fact that such endorsements/encouragements can emanate from enthusiastic private persons as well as commercial actors. [108] This 'marketing buzz' remains a sticky issue.

However, the fundamental observation is that integrative advertising, by its very purpose, aims to integrate itself seamlessly into the content of websites. Mixing raises clear concerns in relation to the deceptive nature of such designs as they are specifically created to attract user attention on the basis that they are not commercial content. [109] This technique appears to fly in face of much research which has focused on adequately identifying commercial communications and other relevant information such as the terms and conditions of use and privacy policies. [110] Therefore, this analysis raises key issues relating to various fundamental rights such as the right to privacy, the right to freedom of expression and the right to self-determination and the balancing of these rights in the context of business interests.

For the most part however, it has been illustrated that although there is a complex legal framework, the principles of transparency and (the related) identification are key. Nevertheless, the practical application of this framework to certain integrative advertising formats remains problematic.

EPISODE III - CONVERGENCE OF RIGHTS: LACKING FORCE OR WILL-POWER?

Despite the fact that this paper has questioned the value and capacity of these principles and the specific legislative requirements in the context of the benchmark of the average informed consumer, it must also be questioned whether the provisions are being implemented and interpreted by industry in a consistent manner. This point of inquiry is particularly significant given the convergence of human and consumer rights and the role that online companies are playing in the balancing of human rights with their own commercial interests. As such, this Episode will build upon the problems identified and will highlight the convergence of rights via an analysis of problems associated with the attribution of responsibility to various entities and how private companies are required to balance fundamental rights, provide a critique of the role of self-regulation and hence provide a brief assessment of self-regulatory best practice codes in order to better understand the state of play. To begin, it is necessary to highlight what is meant by the convergence of consumer protection and human rights protections, or more specific to our current analysis, the aligning of the data protection and consumer protection policy agendas.

3.1 CONVERGING RIGHTS - THE NEED FOR MORE HOLISTIC RESPONSES

In recent years fundamental rights have had an increasing impact on consumer protection, resulting in the progressive convergence of these different types of rights in EU law. [\[111\]](#) However, consumer protection is only implicitly a part of the key international human rights sources and the substantive rights contained therein. [\[112\]](#) The acknowledgment of an implicit link appears to be relatively uncontroversial as all individuals are at some point consumers who have certain rights that are individually assigned and effectively perform as a mechanism for the protection of human rights in a commercial setting. [\[113\]](#) In its assessment of the overlap between consumer protection, data protection and competition law, the European Data Protection Supervisor (EDPS) has noted that collaboration between these areas of law is far from clear and has hence called for further cooperation amongst the respective authorities. [\[114\]](#) The EDPS' conclusion is significant given private entities increasing role *vis-à-vis* the protection of personal data and the need for the development of more cohesive and holistic protections.

In 2012 the European Commission recognised the need to integrate consumer interests in relevant policies in order to provide a more systematic approach for the protection of consumers in the Commission Communication, A European Consumer Agenda - Boosting confidence and growth [\[115\]](#) which replaced the Consumer Policy Strategy 2007-2013. [\[116\]](#) The inclusion of Article 38 of the EU Charter [\[117\]](#) to a certain extent has already resulted in the more systematic consideration of the principle of consumer protection before the adoption of an EU measure. [\[118\]](#)

Important for the purposes of this article is that at the heart of the policy overlaps is the interaction between data protection and consumer protection. In the recent reforms of the data protection framework this issue came to the fore. As a supplement to the discussion provided supra in relation to the application of consent as a grounds for personal data processing in the GDPR, it should be noted that recital 42 explicitly refers to the Unfair Terms Directive. According to the recital a declaration of consent pre-formulated by a controller 'should be

provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms' in accordance with the requirements provided for in the Unfair Terms Directive. There is no specific mentioning of the UCP Directive however and its potential application *vis-à-vis* the application of consumer profiles created via personal data processing for marketing purposes (as described in section 2.3) remains vague.

The European Commission has recognised this vagueness in terms of the application of the UCP Directive and in a recently published working document aimed to clarify the interplay of this Directive with other EU legislation (including the Data Protection framework) and how it applies to emerging business models such as those highlighted in this article. Interestingly, this working document finds that social media platforms

'... can present increased risks for hidden and misleading advertising, given that commercial elements are often mixed with social and cultural user-generated content. Furthermore, consumers could experience social media just as services for the exchange of information between consumers and may not be aware that traders use social media for marketing purposes. For this reason, the prohibitions in Article 7(2) and point No 22 of Annex I UCPD against hidden marketing are particularly relevant. A similar requirement stems from Article 6(a) of the e-Commerce Directive.' [\[119\]](#)

Interestingly, the working document does not assess the potential impact of the personalisation of such advertising techniques. However, in an analysis of personalised pricing the report notes that 'Personalised pricing/marketing could be combined with unfair commercial practices in breach of the UCPD' and result in a breach of Articles 6, 8 and 9 of the UCP Directive. [\[120\]](#) Therefore, it is recognised in the report that personalisation can aggravate the deceptive nature of commercial practices.

Moreover, the precise overlaps between these legislative frameworks are particularly dependent on the application of the principle of fairness. [\[121\]](#) More specifically, the Unfair Terms Directive provides an indicative grey list of 'unfair terms' in contrast with the UCP Directive which outlines a mandatory blacklist of 'unfair commercial practices'. One must question how these standards of fairness interact with one another but also with the principle provided in the GDPR which stipulates that personal data must be processed 'fairly and lawfully'. Further analysis of this issue however, remains outside the scope of this article.

In addition to the above, the overlap between the data protection and consumer protection policy agendas is also evident in the recent proposed Directive on contracts for the supply of Digital Content (Digital Content Directive) which explicitly acknowledges the provision of data (including personal data) as counter-performance in consumer contracts. [\[122\]](#) Although this proposal appears to reflect the practical realities of online browsing it presents clear concerns from a data protection perspective in terms of the application of data subject rights (e.g. the right to erasure), the data quality principles (e.g. purpose limitation) and the determination of what is 'necessary for the performance of a contract' in Article 7(4) of the GDPR (and the application of correct grounds for personal data processing more generally) in the context of the right to withdrawal as provided for in the proposal.

Therefore, a large degree of uncertainty remains in terms of the precise overlap between the consumer protection and data protection framework which is largely linked to the uncertainty of how to regulate for the practical realities and thus the economic value associated with personal data. The proposed Digital Content Directive aims to reflect the practical realities

and recognise the value of personal data. However, for data protection purists this may undermine the fundamental right status attributed to data protection in the Charter. What is clear is that an assessment of integrative advertising raises clear issues in relation to the precise substantive overlap between the various relevant legislative frameworks. However, as we will see in the following section the uncertainty is also manifested in the more procedural aspects.

3.2 MANAGING A COMPLEX GALAXY THROUGH DISTRIBUTED NODES OF POWER

From the analysis provided thus far, the nature of integrative advertising presents clear challenges both in relation to the determination of the applicable framework and in terms of the substantive challenges it poses *vis-à-vis* the application of the transparency and identification principles. Regarding the former of these issues, it is important to acknowledge that the distributed nature of the requirements also presents practical issues related to their effective enforcement and the dispersed nature of competence amongst various bodies. [\[123\]](#)

Fragmentation potentially leads to legal uncertainty and may undermine user engagement and empowerment in addition to the associated enforcement difficulties. [\[124\]](#) Moreover, although it is not the focus of this paper, it is also important to note the issues related to the determination of the geographical scope and the identification of the competent Member State in relation to this issue. [\[125\]](#) The latter of the two challenges highlighted is indicative of the lack of qualitative requirements regarding online advertising and the problems associated with informing users via privacy policies. The lack of requirements must be seen as a major issue in relation to integrative advertising formats. Indeed, although the transparency and identification principles, as described in the previous Episode, indicate key elements which need to be highlighted and made visible for the consumer, it leaves a wide berth for interpretation and implementation. This issue is further complicated due to the complex value chain online.

Although in most contexts platform providers are directly responsible for the placement, and therefore the identification of commercial communications on their website, they may not be in control of all commercial communications distributed via their services (e.g. social influencers uploading content and app developers uploading advergames to app stores). This lack of awareness/capacity to be aware is reminiscent of the 'hosting' safe-harbour as provided for under Article 14 of the e-commerce Directive. [\[126\]](#) It appears that this exemption may have application in the context of integrative advertising formats such as the use of social influencers. [\[127\]](#) However, its application is conditional on the fact that the uploading of these commercial communications is not under the control of the platforms and, further, that these service providers do 'not have actual knowledge of the illegal activity'. This condition appears to reflect the notion of editorial responsibility contained in the AVMS Directive. With this in mind, it is important to remember the proposed reforms of the AVMS Directive and thus how such commercial communications may be affected by the introduction of video-sharing platform services. In this context one must refer to recital 29 which clarifies that the requirements for providers of video-sharing platform services are without prejudice to the application of hosting exemption provided for in Article 14 of the e-commerce Directive and the general exemption from the obligation to monitor provided in Article 15.

The policing of this issue is clearly problematic as requiring any intervention on behalf of the intermediary is specifically impermissible under the terms of the Directive, except in a reactive sense. [\[128\]](#) As a result, for the most part this leaves the balancing of the key fundamental

rights at stake in the hands of private entities (i.e. either the platform provider or the advertiser [\[129\]](#)). As shown in the previous Episode, certain advertising mechanisms can have a direct impact on consumer activity, especially when personalised, and this is problematic when consumers are unaware of the commercial nature of the communications. [\[130\]](#) Such mechanisms potentially have an impact on fundamental rights such as self-determination, autonomy, privacy and data protection. Moreover, and particularly in the context of digital influencers or commercial content which goes viral, this may need to be offset with the freedom of expression. [\[131\]](#)

3.3 SELF-REGULATION: ADDING COLOUR TO THE GREYNESS OF THE IDENTIFICATION PRINCIPLE?

The impact of corporate interests on individuals and their fundamental rights requires close scrutiny. According to Dine, 'big transnational corporations seem to be out of control, in the sense that individual states are unable to regulate them effectively'. [\[132\]](#) In this sense, it has been argued that companies should be made accountable as players in the international sphere, with responsibilities *vis-à-vis* fundamental rights. [\[133\]](#) As a result, there has been a shift towards the adoption of a philosophy of corporate social responsibility. The United Nations in their Global Compact [\[134\]](#) highlight that businesses have minimum responsibilities in this regard and are required to address any negative impact on human rights caused by their business operations. However, it should be acknowledged that this does not preclude the fact that companies can also make voluntary, positive contributions in support of human rights. [\[135\]](#) Parkinson has suggested that self-regulation could play a role in overcoming the inability of traditional command and control regulation to achieve corporate social responsibility. [\[136\]](#)

However, critics have argued that this concept is vague and that there are a number of drawbacks to self-regulation. [\[137\]](#) These include a lack of effective enforcement and a low level of transparency. It has also been questioned whether self-regulation should really even be a tool to safeguard human rights. [\[138\]](#) Despite this it is unquestionable that in some respects corporations have to a degree taken over the role of the government, not only by being social engineers and welfare providers [\[139\]](#), but also by participating in the regulatory process. [\[140\]](#) The role of government has changed from a unilaterally, hierarchical controlling entity to one positioned amongst a diversity of other regulating actors. [\[141\]](#) The advertising industry has participated in the regulatory process at national, European and international level, leading to a strong tradition of self- and co-regulation. [\[142\]](#) These alternative regulatory mechanisms recognise that advertising has a social responsibility to truthfully try to sell a product or service, in order to build trust with consumers.

For instance, at the international level, the International Chamber of Commerce has drafted a Code of Advertising and Marketing Communication Practice (ICC Code), and in many countries self-regulatory bodies observe compliance with these principles. The ICC Code contains *inter alia* an identification requirement (similar to the AVMS and the e-commerce Directives) for digital marketing communication, whatever their form and whatever the medium used (Article 10 ICC Code). Article 10 specifically mentions that advertisements promoting the sale of a product should not be misrepresented as market research, consumer surveys, user-generated content, private blogs or independent reviews. However, it does not provide any further clarification regarding the required disclosure or the form and delivery of the commercial communication.

In its Native Advertising Playbook, the IAB defines the core questions advertisers should ask themselves when evaluating native advertising options. These include *inter alia* questions regarding the form, function and integration of the commercial communication but also whether the disclosure is clear and prominent. [143] In relation to the latter, the Playbook contains recommended principles, regardless of the type of native advertising. More specifically, the IAB advocates the use of language that conveys that the advertising has been paid for, even if it does not contain traditional promotional advertising messages. Furthermore, the disclosure needs to 'be large and visible enough for a consumer to notice it in the context of a given page and/or relative to the device that the ad is being viewed on'. [144] Although the Playbook mentions several company practices for the different types of advertisements, it does not contain actual endorsements of any specific language or form and does not offer much practical guidance in relation to setting of minimum qualitative standards. As a result, implementation varies from platform to platform and this presents clear challenges for the consumer.

It should be noted however that as the online world (and hence advertising space) is largely dominated by a handful of large corporations it is also important to take company policy and terms and conditions into account. For example Facebook allows commercial content on its platform under certain conditions. According to Facebook's terms, all content on a Facebook Page that constitutes an advertisement must comply with Facebook's Advertising Policies. [145] In addition to certain specific content restrictions (e.g. explicit nudity content, alcohol, tobacco) the policies also define certain quality controls from a display advertisement perspective. [146] Failure to comply with these terms may thus be a breach of contract. [147]

Nevertheless, these policies relate to Facebook's official advertising practices which automatically include identification labelling and do not refer to integrative advertising techniques such as posts by social influencers. Indeed in the context of this type of integrative advertising technique although no clear guidelines regarding disclosures are provided by Facebook as a platform provider (thus reflecting the discussion in relation to platform responsibility above), [148] commercial entities such as Izea (which provides services linking social influencers with brand owners), specifically provide requirements for the disclosure of the commercial nature of content by their social influencers. [149] Nevertheless, one must question the attribution of responsibility where such a facilitator is removed.

Despite this, although current legal requirements may be potentially satisfied (e.g. if it is made clear that an integrative advertisement is 'commercial content'), it should be questioned whether existing protections require modification in order to sufficiently respond to the potential for abuse and the manipulative effect of such techniques (especially in situations where this facilitating middle-man is omitted). A more distributive justice/human rights rationale to protecting consumers in this context may therefore be needed.

EPISODE IV - RESTORING BALANCE IN AN ASYMMETRIC UNIVERSE?

The purpose of this final episode is to highlight to possible reforms which may aid the consumer in the move towards more integrative forms of advertising. This Episode therefore focuses on means of better catering for user awareness and empowerment and, given the role of self-regulation, how qualitative criteria for advertising can be provided in order to better safeguard the consumer interests given the asymmetric power imbalances.

4.1 RETURN OF THE 'AD-EYE'... BUT HOW?

Before assessing the specific reforms that may help the consumer recognise the commercial intent of integrative forms of advertising, it is important to consider how the more structural difficulties associated with the complex economic value chain outlined above may be addressed. It is clear that certain forms of integrative advertising present challenges from an enforcement perspective due to the involvement of multiple parties and the fact that platform providers may remain outside the specific value chain (i.e. merely acting as intermediaries facilitating the delivery of the commercial communication).

It should be understood that the role of online intermediaries has been discussed in detail regarding the application of the safe harbours contained in the e-Commerce Directive. This paper posits that this discussion also needs to be taken into account in the context of commercial communications. [\[150\]](#) This is significant given the distribution of responsibility *vis-à-vis* enforcement as highlighted above and is also indicative of the need for greater cooperation and consistency amongst the various groups protecting consumer interests at the national and supra-national level. Changes in this regard may be required in order to make any substantive recommendations implementable and effective.

Although it remains outside the scope of this paper to discuss the merits of the various options, increased platform responsibilities may be inevitable and indeed the only practical means of ensuring more effective compliance. This conclusion is in line with the emergence of 'new regulation' which shifts the role of the State from command and control to regulation concentrated on 'coordinating, steering, influencing and balancing interactions between actors' [\[151\]](#) with a focus on risk [\[152\]](#), responsiveness [\[153\]](#) and a focus on accountability. [\[154\]](#)

From a substantive perspective, we have seen in the analysis that integrative advertising presents clear challenges in relation to the identification principle. The legislative response to these practices requires the adequate signposting of commercial content. Although the industry has created labels or cues that indicate the commercial nature of advertisements to enhance transparency, in order for these tools to be effective it is crucial that during their development all relevant factors are taken into account. These could include elements such *inter alia* cross-media use (i.e. uniform labels across different techniques), adoption processes by users or viewers, specific cognitive characteristics and levels of advertising literacy of specific user groups (such as minors) and regular monitoring of efficiency.

Recent studies have shed some light on the effectiveness of the current standard of implementation of the identification requirement. More specifically, Wojdyski and Evans discovered significant effects of disclosure characteristics on visual attention and visual attention on advertising recognition. The authors' study discovered that the use of the words 'sponsored' or 'advertising' led to greater advertising recognition in comparison with vague disclosure language. [\[155\]](#) Moreover, a second study completed by the authors found that top-placed disclosure (a technique which is most often used by the industry) was seen as relatively ineffective in garnering visual attention by the consumer and that, as a result, a middle-positioned disclosure or a disclosure within the content could be a more effective means of increasing consumer awareness. [\[156\]](#) Aside from specifics, this analysis serves to highlight the need for a more structured and standardised approach to this issue. [\[157\]](#)

4.2 ARE CONSUMERS HUMAN OR RATHER SHOULD THEY BE?

A shift towards codes of practice incorporating qualitative advertising standards adopted in a collaborative way by the various regulatory groups protecting consumers may provide a more structured and flexible response to the challenges posed by the adoption of integrative advertising formats. More active participation and collaboration amongst the various responsible bodies needs to occur in order to achieve a definitive standard for implementation of the identification principle. This point is significant given the important role of self-regulation. As it is difficult to imagine a move beyond the identification requirements in the legislative framework, more effective guidance in the form of codes of practice as provided for by regulatory authorities acting together to deal with the complex issues associated with the evolving nature of advertising techniques, is needed. The balancing of fundamental rights with business interests arguably precipitates this need for increased involvement of regulatory authorities.

Moreover, this is also significant as, although regulatory tools such as labels or advertising cues may help individuals recognise integrative commercial messages, they merely constitute one aspect of advertising literacy. In order to be fully ad-literate, individuals must be able to not only recognise commercial messages, but also understand their persuasive intent and critically evaluate them. [158] As a result, this is a socio-economic issue and requires not only the involvement of bodies acting solely on the basis of business interests. The increasing importance of the role of consumer protection in EU law is significant in this regard. Indeed, the interaction between consumer rights and human rights and the use of consumer protection as a manifestation of human rights protection in a commercial setting, is an important foundational consideration for developments. Given the asymmetric business-consumer relationship some academics have called for a re-evaluation of consumer rights and their potential consideration as fundamental human rights at the international level. [159] Although this is a controversial issue it reflects the complexity of the problem and the need for more holistic responses.

The need for more holistic responses is also particularly important to ensure that the next generation of internet users is better educated and prepared for coping with new advertising techniques as reflected in the children's rights framework laid down in the United Nations Convention on the Rights of the Child. This Convention functions as a comprehensive framework against which legislative or self- and co-regulatory proposals that directly or indirectly affect children should be evaluated. [160] According to Willems, the central aim of the children's rights framework is to contribute to children's evolving capacities, i.e. their personal or psychological development. [161] This so-called 'right of the child to become an optimal person' governs the very foundation of the Convention and links to other relevant principles and rights including *inter alia* the best interest of the child principle, the principle of the evolving capacities of the child, the right to information, school and educational goals (i.e. the optimal personality), the right to participation in leisure and play. As children are constantly developing and maturing, their situation can always be perceived as one of education. The help (or lack thereof) they receive from their environment will shape the adults they become. [162] One important aspect of this development process relates to children's exposure to commercial communication. According to Fortin, children will be unable to make a successful transition to adulthood unless they are given opportunities to practice their decision-making skills and are provided with a dry-run of adulthood. [163]

Hence, in order to be in line with the underlying children's right to become an optimal person, they should be educated and empowered to cope with commercial communication (i.e. ad-

literate), so that they can grow up to be critical, informed consumers who make their own conscious choices in the new media environment. The integration of vulnerable consumers (including children) has been specifically noted as a policy objective of the EU legislator. [164] As transparency means little in relation to the self-determination of vulnerable consumers more proactive means of inclusion are necessary to ensure social participation. [165] Accordingly, in order to respond to the evolving nature of commercial communications and to ensure the protection of consumers, one must look towards more proactive methods of ensuring ad-literacy in the generations to come so as to better position the future 'average consumer' in the asymmetric business-consumer world. [166]

However, it should be acknowledged that in certain contexts merely being able to recognise the commercial nature of content may be insignificant. In this regard it is important to re-emphasise the fact that integrative advertising is a broad notion. Hence, the emergence of technologies may extend the problem beyond those associated with recognition and comprehension. For instance, augmented reality applications such as the Pokemon Go mobile game which allows for the purchasing of 'lures' to attract customers with an interest in the game to their premises may further complicate the problem. [167] Similar to the reference to the commercialisation of the Star Wars brand above, although the commercial connection between the companies may be obvious this will not prevent avid enthusiasts from indulging in the intended commercialisation.

One must therefore question whether such activities are merely clever marketing techniques or activities that require legislative intervention and thus whether consumer 'empowerment' is adequate to protect the consumer in this context. Although the concept of empowerment extends beyond the provision of information in the traditional consumer protection sense given the need for the additional need for consumers to have access to the 'tools to understand' the information provided [168] there may be cause for a more interventionist style approach given the potential inability of the provision of information to adequately protect the public interest especially in the context of vulnerable consumers. However, it is unclear how such practices would relate to the provisions contained in the UCP Directive.

CONCLUSION - A PLOT TO DESTROY THE GALAXY?

To conclude the analysis, the move towards more integrated forms of advertising raises several concerns regarding the continuing capacity of the legislative framework to cope given the asymmetric business-consumer relationship. From the analysis provided, it is clear that a more structured and coherent response is needed in order to protect consumer interests. The recent promotion of more integrative advertisements by self-regulatory bodies such as the IAB is an interesting development. 'Going native' is seen as the solution to the existing clutter of online advertisements, a boost to diminishing revenues [169] and a direct response to the threat posed by ad-blocking technologies. [170] However, these developments bring clear challenges in relation to the identification and transparency principles.

A more integrated and coordinated response is needed to counteract the potential effects given the rise in popularity of integrative advertisements. Traditional disclosure rules may not be adequate in this regard reflecting the need for more qualitative rules and standards regarding disclosure but also the need to increase advertising literacy and awareness. Although it is difficult to imagine a move beyond the identification and transparency principles in legislative texts, these need to be supplemented in order to support any

continuing reliance on the notion of the average informed consumer (if this is indeed even feasible). Such developments are necessary if we are to ensure that children, as the vulnerable consumers of today, become the average and informed consumers of tomorrow.

Moreover, given the development of technologies capable of commercialising every aspect of our daily lives and cajole us towards certain actions (e.g. such as going to a particular restaurant) and associate positive feelings with certain brands via the gamification of commercial messages (e.g. advergames), it is arguable that more distributive justice/human rights rationale-based interventions are needed in order to safeguard the public interest. Therefore, clarity in terms of substantive scope and a more harmonised approach to the interpretation of the requirements provided for in the UCP Directive are needed. In conclusion, although the mixing of commercial and non-commercial content is hardly a new phenomenon the technological developments are not merely the 'Emperor's new clothes' but instead reflect a new challenge which brings the effectiveness of the existing legal protections into question.

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[3] Indeed, according to a recent report by *Yahoo* and *Enders Analysis*, native advertising spending (as a form of integrative advertising) is projected to increase to up to 52% of the European digital display advertising budget by 2020. See press release: <http://yahooadvertisinguk.tumblr.com/post/139910461736/new-research-forecasts-native-advertising-will>

[4] See: <http://www.starwars.com/news/contributor/agutierrez>

[5] For example Google created a special themed version of applications see: <https://www.google.com/starwars/> Also Subway created Star Wars themed advertisements and merchandise.

[6] This is even worse in the case of vulnerable consumers such as children, people with disabilities or older people who might not have the same skills incorporating their advertising literacy.

[7] For instance, the editor in chief of Dutch newspaper NRC already announced a shift of focus to more qualitative forms of advertising such as native advertising due to adblockers. B. Vandeputte, 'Minder gratis nieuws als mensen adblockers blijven gebruiken' <http://deredactie.be/cm/vrtnieuws/cultuur%2Ben%2Bmedia/media/1.2468884> .-

[8] E. Rozendaal et al., 'Reconsidering advertising literacy as a defense against advertising effects' (2011) *Media Psychology* 338-344.

[9] It should be noted that the development of integrative advertising techniques has coincided with the battle that has been raging between the advertising empires and the ad-blocking rebels. Indeed in many ways the ad-blocking developments can be seen as part of the same broader argument as these developments are representative of the advertising industry's fear of the potential 'unbundling' of commercial and non-commercial content. To illustrate in November 2015 IAB Europe launched 'six new consumer-friendly formats in response to the rise of ad blocking'. See IAB Europe's launch of new advertising formats at: <http://www.iabeurope.eu/blog/blog-introducing-six-new-consumer-friendly-formats-in-response-to-the-rise-of-ad-blocking/>

[10] The decision to coin a particular term has been made as various buzz words are common (e.g. sponsored, promoted, native etc.) but from, a legal perspective, they all incorporate the mixing of content types and therefore challenge the existing protections in the same manner. This decision has also been taken as there is clear confusion between the overlap and delineation in scope of many of these integrated advertising techniques (i.e. such as the classification of what is native advertising and/or sponsored stories/links). Indeed this is reflected in the categories of native advertising the Interactive Advertising Bureau (IAB) identified in their Native Advertising Playbook and the inclusion of a 'custom' category. This inclusion clearly indicates the expansive nature of the classification of advertising format types and the somewhat futile nature of focusing on such methods given the need for an open-ended catch-all category see: <http://www.iab.com/wp-content/uploads/2015/06/IAB-Native-Advertising-Playbook2.pdf>.

[11] Audiovisual commercial communications constitute a sub-group of services governed by the Directive.

[12] Consumers are to be regarded as 'any natural person who is acting for purposes outside of his trade, business or profession'. Article 2 (a) Directive 2005/29/EC of The European Parliament and of the Council 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 ('Unfair Commercial Practices Directive') (2005) O.J. L 149/2.

[13] The commercial communication needs to be " *directly connected with the promotion, sale or supply of a product to consumers*". Article 2 (e) Unfair Commercial Practices Directive.

[14] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', *International Journal of Law and Information Technology* (2011) Vol. 19 No. 4, 348-380.

[15] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', *International Journal of Law and Information Technology* (2011) Vol. 19 No. 4, 348-380.

[16] M. Cole, 'The Current European Legal Framework: The Sets of Rules on Commercial Communication in a Converged World', *IRIS Special: New forms of commercial communications in a converged audiovisual sector* (European Audiovisual Observatory, Strasbourg 2012) 41-53.

[17] Sound not required so silent movies do fall under the scope of application.

[18] See: <https://izea.com/> as an example.

[19] This corresponds also to the similar term contained in the Directive in relation to TV Advertising.

[20] 'Programme' means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting.

[21] R. Chavannes and O. Castendyk (2008). Directive 2007/65/EC 'Audiovisual Media Services' Directive. Article 1 AVMSD. In: O. Castendyk, E. Dommering and A. Scheuer, A. (eds.), *European Media Law*, European Media Law. Alphen a/d Rijn: Kluwer Law International, 821-822.

[22] P. Valcke and E. Lievens (2009). Rethinking European broadcasting regulation. Unraveling Europe's policy for the digital landscape: critical analysis of the Audiovisual Media Services Directive. In: C. Pauwels, H. Kalimo, K. Donders and B. Van Rompuy (eds.). *Rethinking European Media and Communications Policy*. Brussels: VUB Press 127-164.

[23] See definition in Article 1(1)(e): (e) 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

[24] Article 1(b) AVMS Directive.

[25] Case C-347/14 *New Media Online GmbH v. Bundeskommunikationssenat*, 21 October 2015.

[26] L. Woods, 'Audiovisual Media Services Regulation and The "Newspaper Exception"' <http://eulawanalysis.blogspot.be/2015/10/audiovisual-media-services-regulation.html>

[27] As will be shown in section 2.2 these frameworks in essence both stipulate the same requirements as provided for by the principle of identification.

[28] See: Steiner for instance claims that the blanket exemption in the Recital is merely a means of interpretation, and not part of the enforceable text of the Directive. For more information see T. Steiner, 'Working Paper No 2008/3 - Advertising in Online Games and EC Audiovisual Media Regulation' (2008)

22 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101363 accessed 24.09.2015.

[29] Article 1(1)(c) of the AVMS Directive defines editorial responsibility as 'the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.'

[30] R. Chavanne and O. Castendyk (2008). Audiovisual Media Services Directive. In: O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law*. Alphen a/d Rijn: Kluwer Law International, 806.

[31] R. Schoefs, 'Connected TV: editorial responsibility in a converged media environment' *Droit des média - Mediarecht* 2014/5 346-359, 352.

[32] i.e. as the platform provider does not filter and decide upon what content appears on the site.

[33] R. Schoefs, 'Connected TV: editorial responsibility in a converged media environment' *Droit des média - Mediarecht* 2014/5 346-359, 352.

[34] This could be linked with the 'hosting' safe harbour found in Article 14 of the e-Commerce Directive.

[35] This could take the form of a pre-roll advertisement or an overlay see: L. Hellemans, E. Lievens and P. Valcke, 'Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats' (2015) *Info - The journal of policy, regulation and strategy for telecommunications, information and media*.

[36] R. Schoefs, 'Connected TV: editorial responsibility in a converged media environment' *Droit des média - Mediarecht* 2014/5 346-359, 352.

[37] Importantly it is the provisions on the protection of minors.

[38] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', *International Journal of Law and Information Technology* (2011) Vol. 19 No. 4, 348-380.

[39] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM (2012) 011 final.

[40] The e-Privacy Directive is significant in the context of cookies. Article 5(3) of the e-Privacy Directive as amended by the Citizen's Rights Directive stipulates that prior informed opt-in consent is required before the cookie can be placed or the information processed. More specifically, the *lex specialis* rules contained in the e-Privacy Directive rely on the definitions provided in the Data Protection Directive in order to satisfy the condition of prior informed consent, which must be free and informed in order to be valid. As it has been found that cookies constitute personal data their processing also invokes the application of the other provisions of the Data Protection Directive e.g. the data quality principles.

[41] Processing is defined in extremely broad terms in Article 2(b) Directive 95/46/EC the essence of which is kept in Article 4(2) GDPR. The definition basically includes almost anything that can be done with personal data and it is thus clear that the use of such data for the provision of personal services would come under the scope of application of the Data Protection Framework.

[42] The reading of this Article is aided by Recital 26 which mentions this 'likely reasonably' test. Also see: Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, Adopted on 22 June 2010 - Two reasons why behavioural advertising is under the scope of Data Protection namely (1) processing of unique identifiers such as cookies and (2) the information collected relates to individuals characteristics which is used to influence.

[43] See: F. Borgesius, 'Singling out people without knowing their names - Behavioural targeting, pseudonymous data, and the new Data Protection Regulation', *Computer law & Security Review* (Article in Press).

[44] D. Clifford, 'EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour' (2014) 5 JIPITEC 194.

[45] P. de Hert and V. Papakonstantinou, 'The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals' (2012 28) *Computer law & Security review*, 130-142.

[46] D. Clifford, 'EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour' (2014) 5 JIPITEC 194.

[47] See for instance: E. Kosta, 'Data Protection Issues Pertaining to Social Networking under EU Law' (2010) 4 *Transforming Government: People, Process and Policy* 193-201; B. Van Alsenoy, 'Allocating responsibility among controllers, processors, and "everything in between": the definition of actors and roles in Directive 95/46/EC', *Computer Law and Security Report*. vol.28 (1) 25-43; Orla Lynskey, 'Track[ing] changes: an examination of EU Regulation of online behavioural advertising through a data protection lens' (2011 36(6)) *E.L. Rev.* 874-886

[48] See for instance Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, Adopted on 22 June 2010, which describes the complicated nature of publishers' role. More specifically, that due to the way that websites are engineered, subject's browser that automatically transmits the IP addresses to the ad network provider in order to facilitate the sending/reading of the cookies and to present the tailored advertising. It is important to note that, although the data transfer is caused by the browser, it is the publisher's implementation that triggers the transfer, and the data subject has no input. As a result, the Article 29 Working Party states that publishers have certain responsibilities but that: 'This responsibility does not cover all the processing activities necessary to serve behavioural advertising, for example, the processing carried out by the ad network provider consisting of building profiles which are then used to serve tailored advertising.' Instead, their responsibility is limited in this context to the preliminary data processing activities and the initial transfer of the IP addresses. The Working Party came to this conclusion as 'the publishers facilitate such transfer and co-determine the purposes for which it is carried out, i.e. to serve visitors with tailored advertising.'

[49] This refers to services such as demand-side and supply-side platforms and other analytics tools providers that might be engaged by the Publisher, Advertiser etc.

[50] D. Clifford, 'EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour' (2014) 5 JIPITEC 194: 'one must also consider the influence of the advertiser. Following an ad click, the users' actions may be tracked for conversion statistics and potential retargeting. Although this may not be strictly linked to the initial ad serving, this information can also be shared (in fact, this is often a requirement under the Terms of service) with the ad networks, and used to improve on future targeted campaigns.'

[51] See for instance: B. van Alsenoy, 'The Evolving Role of the Individual under EU Data Protection Law' (August 10, 2015). ICRI Research Paper 23. Available at SSRN: <http://ssrn.com/abstract=2641680>

[52] As per the definition of a data controller contained in Article 2(d) Directive 95/46/EC "'controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...'

[53] P. de Hert and V. Papakonstantinou, 'The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals' (2012 28) Computer law & Security review, 130-142.

[54] The main objective of this legal instrument is to establish an internal market for information society services. One of the topics that required regulation and is necessary to achieve this objective is commercial communications in online services.

[55] Under Article 2(f) of the e-Commerce Directive, a commercial communication is defined as " *any form of communication designed to promote*". This definition should be interpreted broadly and entails both direct and indirect promotion, as a way to prevent circumvention

of the ban on commercial communications for certain products (e.g., tobacco, alcohol). See A. R. Lodder, 'European Union E-Commerce Directive - Article by Article Comments. Guide to European Union Law on E-Commerce' (2007) Vol. 4, 73, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945 accessed 24.09.2015. The commercial character of the communication entails that it promotes goods or services of a certain company or organisation. Excluded from this definition is the mere ownership of a website or e-mail address, linking to a commercial site without getting paid for it, providing information not constituting promotion, consumer-testing services, and price or product comparisons. See V. Verdoodt, E. Lievens and L. Hellemans, 'Mapping and analysis of the current legal framework of commercial communication aimed at minors - A report in the framework of the AdLit research project' <http://www.adlit.be/>.

[56] Specifically in relation to product placement Article 11 (d) goes on to state that: 'Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer. By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.'

[57] It should also be observed that although in the context of television advertising and teleshopping a clear distinction needs to be made between commercial and non-commercial content Recital 81 notes that " *[t]he principle of separation should not prevent the use of new advertising techniques* ." This would seem to imply that new advertising formats are not forbidden by default but rather that the commercial and non-commercial content would suggest that new advertising formats need to be easily recognisable. See: L. Hellemans, E. Lievens and P. Valcke, 'Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats' (2015) Info - The journal of policy, regulation and strategy for telecommunications, information and media.

[58] For instance, Facebook uses the term "sponsored" for advertising messages that appear in the newsfeed of Facebook users. A 'Sponsored Story' is a mix between user-generated content and promotional content. A user's action related to a promotional message is shown with a promotional message in 'News Feed', see B. Van Alsenoy, V. Verdoodt, R. Heyman, J. Ausloos and E. Wauters, 'From social media service to advertising network - A critical analysis of Facebook's Revised Policies and Terms' (2015) <https://www.law.kuleuven.be/citip/en/news/item/icri-cir-advises-belgian-privacy-commission-in-facebook-investigation> accessed 24.09.2015.

[59] More specifically according to Article 20(1) of the AVMS Directive also provides that in relation to the insertion of advertisements during programmes the 'integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme' must not be prejudiced. One should also take Article 20(2) in account which specifies that 'The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by

television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.' This is also supplemented by Article 23 which states that in total 12 minutes of advertising and teleshopping can be included within a one hour timeframe excluding self-promotional announcements.

[60] P. Valcke and J. Ausloos, 'What if Television becomes just an App? Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence', *ICRI Working Paper* (17/2013 20December 2013).

[61] In this regard one must also consider so-called hybrid advertising formats such as overlays that utilise a textual advertising format which is then layered on top of audiovisual content. The use of such techniques in non-linear on-demand services would require the identification of such communications. However, the situation becomes much more complicated in the context of linear services as the provisions for identification found in the e-Commerce Directive conflict with the stricter separation requirements in the AVMS Directive which would be potentially inapplicable given the textual format of the advertisement. In the context of integrative advertising formats, this would also present clear challenges as large campaigns often combine the use of textual and visual content. See: L. Hellemans, E. Lievens and P. Valcke, 'Playing hide-and-seek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats' (2015) *Info - The journal of policy, regulation and strategy for telecommunications, information and media*. Two excellent examples of integrative advertising comprising of the use of textual and video content are the 'Cocaineconomics' feature in the Wall Street Journal explaining Pablo Escobar's cocaine industry while as a method of advertising the Netflix original series *Narcos* see: <http://www.wsj.com/ad/cocainenomics> and the 'Women Inmates: While the Male Model Doesn't Work' where the Netflix original series *Orange is the New Black* was advertised through an analysis of women in US prisons see: http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html?_r=0. Both of these examples combine interesting and engaging editorial content with the promotion of the relevant Netflix show.

[62] It should be noted that this Article applies to both linear and non-linear services.

[63] R. Craufurd Smith, 'Liberalisation of advertising & product placement rules in the AVMSD: a step too far?', <http://blogs.lse.ac.uk/mediapolicyproject/2016/10/06/liberalisation-of-advertising-product-placement-rules-in-the-avmsd-a-step-too-far/>, the author notes that 'for example, documentary, history, nature, and science programmes, which only with some effort can be considered 'series' or 'light entertainment' programmes, where product placement is currently allowed (art.11.3(a)AVMSD).'

[64] R. Craufurd Smith, 'Liberalisation of advertising & product placement rules in the AVMSD: a step too

far?', <http://blogs.lse.ac.uk/mediapolicyproject/2016/10/06/liberalisation-of-advertising-product-placement-rules-in-the-avmsd-a-step-too-far/>

[65] Case C-210/96, *Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt*, EU:C:1998:369, para. 31. See: Commission, 'Commission Staff Working Document Guidance on the Implementation/ Application of Directive 2005/29/EC on Unfair Commercial Practices' (2009) 30 http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf accessed 28.08.2015.

[66] F. Henning-Bodewig, 'Directive 2005/29/EC & Directive 2006/114/EC' in O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law* (Kluwer Law International 2008, 1072).

[67] F. Henning-Bodewig, "Directive 2005/29/EC & Directive 2006/114/EC" in O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law* (Kluwer Law International 2008, 1073).

[68] Article 6 Unfair Commercial Practices Directive.

[69] See Article 6 (1) subparagraphs a-g Unfair Commercial Practices Directive.

[70] Article 7 Unfair Commercial Practices Directive.

[71] However, in this regard one should refer to Article 7(5) of the Unfair Commercial Practices Directive which states that 'Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.' Annex II of the Directive lists Articles 5 and 6 of the e-Commerce Directive. Therefore, the failure to correctly identify an advertisement could be deemed material necessary for the consumer to make an informed decision and therefore could amount to a misleading omission.

[72] Annex I, point 28 and 11 of the Unfair Commercial Practices Directive.

[73] M. Cole, 'The Current European Legal Framework: The Sets of Rules on Commercial Communication in a Converged World', IRIS Special: *New forms of commercial communications in a converged audiovisual sector* (European Audiovisual Observatory, Strasbourg 2012) 41-53.

[74] R. Calo, 'Digital Market Manipulation' (2014) Vol. 82 the George Washington Law Review 995-1051.

[75] H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising' in *European Consumer Law*, N. Reich and H.-W. Micklitz, P. Rott and K. Tonner (eds.) (2nd Edition, Intersentia)

[76] O. Lynskey, 'Deconstructing data protection: the 'added value' of a right to data protection in the EU legal order' 63 (2014) *International and Comparative Law Quarterly* 569-597.

[77] BEUC discussion paper, 'Data collection, targeting and profiling of consumers online' (2010) <http://www.beuc.eu/publications/2010-00101-01-e.pdf>

[78] O. Lynskey, 'Deconstructing data protection: the 'added value' of a right to data protection in the EU legal order' 63 (2014) *International and Comparative Law Quarterly* 569-597.

[79] I. S. Rubinstein, 'Big Data: The End of Privacy or a New Beginning?' (2012) New York University Public Law and Legal Theory Working Papers. Paper 357 http://lsr.nellco.org/cgi/viewcontent.cgi?article=1359&context=nyu_plltwp accessed 24.09.2015.

[80] Commission, 'Staff Working Paper Impact Assessment Accompanying the document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data' SEC(2012) 72.

[81] One can note Recital 71 which gives the example of online credit application or e-recruiting practices without human intervention.

[82] I. S. Rubinstein, 'Big Data: The End of Privacy or a New Beginning?' (2012) New York University Public Law and Legal Theory Working Papers. Paper 357 http://lsr.nellco.org/cgi/viewcontent.cgi?article=1359&context=nyu_plltwp accessed 24.09.2015. See also: Annex to the letters sent from the Article 29 Working Paper to LV Ambassador Ilze Juhansone, MEP Jan Philipp Albrecht and Commissioner Vera Jourová in view of the trilogue 17/06/2015 (2015) http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2015/20150617_appendix_core_issues_plenary_en.pdf accessed

[83] V. Verdoodt, D. Clifford and E. Lievens, 'Toying with children's emotions, the new game in town? The legality of advergames in the EU' (2016) Vol. 32 Issue 4 *CLSR* 599-614.

[84] F. Bosco, N. Creemers, V. Ferraris, D. Guagnin, and B.-J. Koops, 'Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and Perspectives from European Data Protection Authorities' in S. Gutwirth, R. Leenes and P. de Hert (Eds.) *Reforming European Data Protection Law, Law, Governance and Technology Series* (2014) 20 3-34.

[85] Case-274/99 *P. Connolly v Commission* [2001] OJ C173/13 see also more recently in Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] OJ C 212/4.

[86] See Article 5(1)(c) GDPR. See: A. Savin, *EU Internet Law* (Elgar European Law 2013) 190-218, L. Mitrou and M. Karyda, 'EU's Data Protection Reform and the right to be forgotten - A legal response to a technological challenge?' (5th International Conference of Information Law and Ethics Corfu-Greece, June 2012).

[87] S. Peers, 'Basic data protection principles in the proposed Data Protection Regulation: Back to the Future? (2015) <http://eulawanalysis.blogspot.be/2015/03/basic-data-protection-principles-in.html> accessed 24.09.2015.

[88] B. Van Alsenoy, V. Verdoodt, R. Heyman, J. Ausloos and E. Wauters, 'From social media service to advertising network - A critical analysis of Facebook's Revised Policies and Terms' (2015) <http://www.law.kuleuven.be/citip/en/news/item/facebook-revised-policies-and-terms-v1-3.pdf> accessed 24.09.2015.

[89] Article 29 Working Party, 'Opinion 03/2013 on Purpose Limitation', (2013) 16. (The Article 29 Data Protection Working Party is an advisory body comprised of representatives of the different EU Member States.)

[90] A *conditio sine qua non* for the processing of personal data is the existence of a legitimate ground see: Article 7 Directive 95/46/EC - Although there are additional grounds in the given context consent will generally be the only available one.

[91] The Article 29 Working Party discussed the benefits of an increased emphasis on the principle of accountability of controllers see: Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (2014) WP 217.

[92] This is certainly not a new observation, online technologies have further dissolved this notion of choice and provide a clear manifestation of power asymmetries see for instance: S. Deutch, 'Are consumer Rights Human Rights?', (1994) 32(3) Osgoode Hall L. J., pp. 537-578.

[93] See: O. Tene and C. Wolf, 'Draft EU General Data Protection Regulation: Costs and Paradoxes of Explicit Consent' (2013) Vol. 4 Issue 3 Information Security & Privacy News 19-28 'individuals explicitly consent to agreements all the time without such consent being informed, voluntary, or meaningful. Individuals sign boilerplate contracts (e.g., with banks or insurance companies), execute clickwrap agreements and end-user license agreements (EULAs), and download apps granting whatever permissions are asked of them.'

[94] Indeed in this context one can refer to the provisions of the Data Protection Directive but also regarding cookies one should refer to Article 5(3) of the e-Privacy Directive which stipulates that prior informed opt-in consent is required before the cookie can be placed or the information processed. More specifically, the *lex specialis* rules contained in the e-Privacy Directive rely on the definitions provided in the Data Protection Directive in order to satisfy the condition of prior informed consent which must be free and informed in order to be valid. See: Article 2 (h) Directive 95/46/EC states that 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed. For a detailed

analysis see for example: D. Clifford, 'EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour' (2014) 5 JIPITEC 194; E. Kosta, 'Peeking into the cookie jar: the European approach towards the regulation of cookies' (2013) Vol. 21 No. 4 International Journal of Law and Information Technology 380-406; Article 29 Data Protection Working Party, 'Opinion 2/2010 on online behavioural advertising' (2010).

[95] C.R. Sunstein, 'Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych' (2012) Harvard Law School Working Paper Series https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171343 accessed 24.09.2015; L.E. Willis, (2013) 'Why Not Privacy by Default?' (2014) 29 Berkeley Technology Law Journal 61.

[96] M.S. Kirsch, 'Do-Not-Track: Revising the EU's Data Protection Framework to Require Meaningful Consent for Behavioural Advertising' (2011) 18 Richmond Journal of Law & Technology 2.

[97] Article 12 of the GDPR states that 'The controller shall take appropriate measures to provide any information referred to in Article 13 and 14 and any communication under Articles 15 to 22, and 34 relating to the processing of the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child'.

[98] The recital goes on to further clarify the presumption that the 'freely given' criterion will not be satisfied if consent 'does not allow separate consent to be given to different data processing operations despite it is appropriate in the individual case, or if the performance of a contract, including the provision of a service is made dependent on the consent despite this is not necessary for such performance.' Regardless of the unclear wording this appears to be linked with the discussion on purpose limitation above.

[99] See: Recital 18 of European Parliament and of the Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L178; and also the cases: ECJ Case C-155/73 *Giuseppe Sacchi. Reference for a preliminary ruling: Tribunale civile e penale di Biella v Italy* [1974] ECR 409; ECJ Case C-352/85 *Bond van Adverteerders v the Netherlands* [1998] ECR 2085.

[100] R. Calo, 'Digital Market Manipulation' (2014) Vol. 82 the George Washington Law Review 995-1051.

[101] V. Verdoodt, D. Clifford and E. Lievens, 'Toying with children's emotions, the new game in town? The legality of advergames in the EU' (2016) Vol. 32 Issue 4 CLSR 599-614.

[102] In this context one can refer to several examples such as Facebook, Netflix, Apple and also some smaller companies such as www.sensum.com and www.realeyesit.com.

[103] L. Reed Jr. and J. L. Coalson Jr., 'Eighteenth-century legal doctrine meets twentieth-century marketing techniques: F.T.C. regulation of emotionally conditioning advertising' (1977) 733-782.11 4 Ga. L. Rev. 733.

[104] Article 8 Unfair Commercial Practices Directive.

[105] By undue influence is meant that the company holds a position of power in relation to the consumer and exploits this to exert pressure, in order to significantly restrict the consumer's ability to make an informed decision. Article 2 (j) Unfair Commercial Practices Directive.

[106] This filtering and selection of users' feeds also presents clear challenges in the context of media pluralism and the guaranteeing of a balanced media diet for consumers. In this context reference is often made to: E. Pariser 'The Filter Bubble: What the Internet is hiding from you, (Penguin Press, 2011).

[107] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', International Journal of Law and Information Technology (2011) Vol. 19 No. 4, 348-380: In essence these require prior consent (as provided for by Directive 95/46/EC discussed above) and also specific information requirements.

[108] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', International Journal of Law and Information Technology (2011) Vol. 19 No. 4, 348-380.

[109] E. Wauters, V. Donoso, E. Lievens & P. Valcke, 'D1.2.5: Re-designing & re-modeling Social Network terms, policies, community guidelines and charters: Towards a user-centric approach' EMSOC Project Deliverable www.emsoc.be (31-03-2014).

[110] N. Helberger, 'Form Matters: Informing Consumers Effectively' (2013) Amsterdam Law School Research Paper No. 2013-71.

[111] I. Benohr, *EU Consumer law and human rights*, (Oxford Series in European Law, P. Craig & G. de Burca eds., 2013) 45

[112] 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); Council of Europe, Convention on Human Rights 1950 and the European Social Charter 1961.

[113] In the context of online advertising, it is significant to refer to right of freedom of expression, the right to privacy, the right to non-discrimination, the right to freedom of thought, and the right to self-determination as specific human rights recognised by the international community which are significant to the debate.

[114] European Data Protection Supervisor, Preliminary Opinion on Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy [2014] accessed on 14/04/2015

at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf.

[115] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a European Consumer Agenda - Boosting confidence and growth, COM(2012) 225.

[116] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee EU Consumer Policy strategy 2007-2013 Empowering consumers, enhancing their welfare, effectively protecting them COM(2007) 99.

[117] As this refers to the importance of consumer protection in decision making (and thus at the policy level) rather than as a subjective right, one must note that this provision categorises consumer protection as a legal principle. Although this dilutes the provision's significance somewhat, the EU Charter must still be considered novel in relation to the integration of Article 38 as no other international source with binding force expressly mentions this notion. It should be noted that although the UN has adopted The United Nations Guidelines for Consumer Protection 9 April 1985 resolution 39/248 this instrument does not have binding force.

[118] I. Benohr, *EU Consumer law and human rights*, (Oxford Series in European Law, P. Craig & G. de Burca eds., 2013) 41. Indeed, this already appears to be the case in the context of EU Competition law in the assessment of whether a dominant undertaking has abused their position and thus whether this abuse can be justified, if on the whole, the effect is beneficial for the consumer see: European Commission, 'Antitrust: Consumer Welfare at the Heart of the Commission Fights against Abuses by Dominant Undertakings', in IP/08/1877, 3/12/2008

[119] Commission Staff Working Document Guidance on the Implementation/ Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses {COM(2016) 320}, 142-143.

[120] Commission Staff Working Document Guidance on the Implementation/ Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses {COM(2016) 320}, 149.

[121] See: EDPS Opinion 8/2016, Opinion on coherent enforcement of fundamental rights in the age of big data, (23 September 2016) https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf

[122] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final

[123] To highlight this issue one can take the examples of the UK, where such practices potentially come under the responsibility of several organisations such as the Office of Fair Trading, Ofcom, the Advertising Standards Authority and the Information Commission's Office.

[124] The notion of empowerment appears to go further than the provision of information in the traditional sense as it refers to the additional need for consumers to have access to the "tools to understand" the information provided. Therefore, empowerment appears to be an effort to render autonomy effective. In order to reach these objectives the European Consumer Agenda acknowledges the need to develop consumer laws to reflect the insights gained from the behavioural sciences. See: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a European Consumer Agenda - Boosting confidence and growth, COM(2012) 225.

[125] This is significant as it has been a clear point of contention in the reform of the Data Protection and AVMS Directives.

[126] This exemption from application has been used more for the protection of intellectual property rights and the prevention of the distribution of harmful content

[127] This assumption is based on the previous case law analysing this exemption in the context of violations of trademarks and Google's responsibility as an advertising network. More specifically, Google was found not to be responsible for trademark violations despite playing an active role in the placement of advertisements (through software it has developed) as it was not involved in the creation of the advertisement text. 4 Joined cases C-236/08 to C-238/08, Google vs. LVMH, judgment of 23.03.2010; available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0236:EN:HTML> f or more on this see: Staff Working Document on online services, including e-commerce, in the Single Market (2012) http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf

[128] See here Article 14(1)(a)-(b).

[129] This could either be an individual or potentially a company who acts as medium between the advertisers and the digital influencer provided they are involved in the creation of the advertising campaigns otherwise they may also come under the exemptions provided for intermediaries

[130] For instance in relation to children and youngsters, the AdLit risk assessment showed that the advertising literacy level for brand integration, advertiser funded programs, social media advertising and advergames is rather low, posing a greater risk for children and teenagers. See Vanwesenbeeck et al. 'Minors advertising literacy in relation to new

advertising formats - Identification and assessment of the risks' (2016) retrieved from www.adlit.be.

[131] For examples of such balancing see CJEU 13 May 2014, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12 . (Google Spain) and EctHR 16 June 2015, DELFI AS v. ESTONIA, Application no. 64569/09).

[132] J. Dine, 'Companies, International Trade and Human Rights' (2005) Cambridge University Press, Cambridge, 177.

[133] S. Bottomley and D. Kinley (eds.), 'Commercial Law and Human Rights' (2002) Dartmouth, Aldershot 356pp.; J. Woodroffe, 'Regulating Multinational Corporations in a World of Nation States' (1999) in M. Addo (Ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* , Kluwer, The Hague, 131-142; J. Dine, 'Companies, International Trade and Human Rights' (2005) Cambridge University Press, Cambridge, 167.

[134] The global Compact is not a regulatory instrument or a code of conduct, but a value-based platform designed to promote institutional learning. The goal is to identify and disseminate good practices based on universal principles. Two of these principles relate to the support of human rights and the <https://www.unglobalcompact.org/what-is-gc>. The UN Global Compact's human rights principles (Principles 1 and 2) are derived from the Universal Declaration of Human Rights.

[135] European Commission Green Paper, 'Promoting a European Framework for Corporate Social Responsibility (COM, 2001) 366 final, Brussels, 18 July 2001).

[136] J. Parkinson, 'The Socially Responsible Company' in M. Addo (Ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* , Kluwer, The Hague, 1999 42-62.

[137] D. Hirsch, 'The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?' (2007 34) Seattle U. L. Rev. 458.

[138] B.E. Baarsma, 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' (2010) Tijdschrift voor Toezicht, 2010, 12-15; E. Lievens, *Protecting children in the digital era: The use of alternative regulatory instruments* (2010) (Leiden: Martinus Nijhoff Publishers). When in fact researching case law, there seems to be no relevant case law so far regarding the form and the actual delivery of advertisements. Most cases that appear before self-regulatory bodies deal with misleading claims or product comparison.

[139] N. Hertz, *The Silent Takeover - Global Capitalism and the Death of Democracy* , (London: William Heinemann (2001), 229.

[140] E. Lievens, *Protecting children in the digital era: The use of alternative regulatory instruments* (2010) (Leiden: Martinus Nijhoff Publishers); European Commission (2001). European Governance - a white paper, COM(2001) 428 final.

[141] B.M. Hutter and C.J. Jones, 'From government to governance: External influences on business risk management', *Regulation & Governance*, 2007 27-45; H. Van der Voort, 'Naar een drie-eenheid van co-regulering. Over spanningen tussen drie toezichtsregimes.' (2014) Proefschrift ter verkrijging van de graad van doctor aan de Technische Universiteit Delft, 13-17.

[142] European Economic and Social Committee 'The Current State of Co-Regulation and Self-Regulation in the Single Market' (2004) EESC pamphlet series.

[143] IAB, 'The Native Advertising Playbook' (2013) <http://www.iab.com/guidelines/native-advertising/>.

[144] *Ibid*, 15.

[145] <https://www.facebook.com/policies/ads/>

[146] For instance, Facebook's text policy requires that ads cannot include added or excessive text that comprises 20% of the image.

[147] J. Trzaskowski, 'User-generated marketing - legal implications when word-of-mouth goes viral', *International Journal of Law and Information Technology* (2011) Vol. 19 No. 4, 348-380.

[148] Moreover, in its Statement of Rights and Responsibilities, Facebook indicates that users "understand that we may not always identify paid services and communications as such". The Nordic Consumer Ombudsmen addressed this issue in its opinion on social media. They argue that if a commercial communication is shown in a place that is normally not reserved for advertisements (including a user's News Feed on Facebook) there are more severe information requirements. Nordic Council of Consumer Ombudsmen, 'Position of the Nordic Consumer Ombudsmen on social media marketing of 3 May 2012', 4, accessible at <http://www.konsumentverket.se/global/konsumentverket.se/st%C3%A5ndpunkt%20version-eng.pdf>.

[149] See Section 3 Advertising Terms https://izea.com/terms_and_conditions

[150] This point is significant given the fact the European Commission is currently reviewing the role of online intermediaries see: <https://ec.europa.eu/digital-single-market/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>

[151] J. Black, 'Decentring regulation: understanding the role of regulation and self regulation in a "post-regulatory" world', *Current Legal Problems*, 54 (2001) 1, 103-146.

[152] J. Black and R. Baldwin, 'Really Responsive Risk Based Regulation', 32 (2010) *Law and Policy* 181-213.

[153] R. Baldwin and J. Black, 'Really Responsive Regulation', 71 (2008) *Modern Law Review* 59-74.

[154] See generally: M. Donnelly and F. White, *Consumer Law: Rights and Regulation* (Round Hall 2014), 37-42.

[155] B.W. Wojdyski and N.J. Evans, 'Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising' (2015) *Journal of advertising* 157-168

[156] B.W. Wojdyski and N.J. Evans, 'Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising' (2015) *Journal of advertising* 157-168.

[157] In this regard reference can be made to examples such as the self-regulatory adchoices initiative.

[158] E. Rozendaal et al. 'Reconsidering advertising literacy as a defense against advertising effects', (2011) *Media Psychology*, 338-344.

[159] See: I. Benohr, *EU Consumer law and human rights*, (Oxford Series in European Law, P. Craig & G. de Burca eds., 2013), however this has been a discussion that has been around for quite some time see: S. Deutch, 'Are Consumer Rights Human Rights?', (1994) 32(3) *Osgoode Hall L. J.*, 537-578.

[160] S. Ruxton 'Children's rights in the European Union: What about us? : Next steps' (2005) *Brussels: The European Children's Network* 162.

[161] J.C.M. Willems, 'Developmental and Autonomy Rights of Children: empowering children, caregivers and communities' (2007) *Intersentia*, 82-83

[162] J.C.M. Willems, 'Developmental and Autonomy Rights of Children: empowering children, caregivers and communities' (2007) *Intersentia*, 82-83

[163] J. Fortin 'Children's Rights and the Developing Law' (2003) *Cambridge University Press* 7.

[164] COM (2010) 2020 3 March 2010.

[165] N. Reich & H.-W. Micklitz, 'Economic Law, Consumer Interests, and EU Integration' In *European Consumer Law*, N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (Eds.) (2nd Edition, *Intersentia*) 9.

[166] N. Reich & H.-W. Micklitz, 'Economic Law, Consumer Interests, and EU Integration' In *European Consumer Law*, N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (Eds.) (2nd Edition, *Intersentia*) 9.

[167] World Health Organisation Report 'Tackling food marketing to children in a digital world: trans-disciplinary perspectives Children's rights, evidence of impact, methodological challenges, regulatory options and policy implications for the WHO European Region' (2016), available at < www.euro.who.int/__data/assets/pdf_file/0017/322226/Tackling-

[food-marketing-children-digital-world-trans-disciplinary-perspectives-en.pdf?ua=1](#) > The report also highlights the recent announcement that McDonalds have a partnership agreement with Pokemon Go in Japan so as to encourage game enthusiasts into their various restaurants as important game locations.

[168] Accordingly, empowerment appears to be an attempt to render consumer autonomy effective and in aiming to achieve these objectives the *European Consumer Agenda* recognises the need to develop law to reflect the insights provided by behavioural science see: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a European Consumer Agenda - Boosting confidence and growth, COM(2012) 225. Hence, consumer empowerment is founded on both market integration and distributive justice/human rights rationales. From a distributive justice/human rights perspective, empowerment aims to enhance consumers' ability to understand and therefore improve their capacity to act autonomously and effectuate choice. The market integration perspective on empowerment works from the assumption that empowered consumers will be better able to 'actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced' (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a European Consumer Agenda - Boosting confidence and growth, COM(2012) 225). See generally: M. Donnelly and F. White, *Consumer Law: Rights and Regulation* (Round Hall 2014) 14.

[169] J. Benton, 'Like It or Not, Native Advertising Is Squarely Inside the Big News Tent,' Nieman Lab, September (2014) 15, <http://www.niemanlab.org/2014/09/like-it-or-not-native-advertising-is-squarely-inside-the-big-news-tent/>.

[170] Indeed advertisers to some degree attribute the popularity of ad-blocking technologies to the rise of advertising fatigue. The solution, as presented by the IAB for instance, is to opt for more integrative and 'engaging' advertisements that provide a higher entertainment value for the consumer, see: <http://www.iabeurope.eu/blog/blog-introducing-six-new-consumer-friendly-formats-in-response-to-the-rise-of-ad-blocking/>