European Commission

BEHAVIOURAL STUDY ON ADVERTISING AND MARKETING PRACTICES IN ONLINE SOCIAL MEDIA

Annex 1.5 Legal assessment of problematic practices

Consumers, Health, Agriculture and Food Executive Agency

Behavioural Study on Advertising and Marketing Practices in

Online Social Media

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1   Introductory remarks

One of the main objectives of the Online Social Media study is to identify which are the most common practices to which the consumer is exposed on Online Social Media (OSM) platforms and, amongst those, the ones that raise issues of compatibility with consumer legislation. The present legal analysis examines the identified online social media practices in light of the applicable consumer legislation. The contracts concluded between consumers and OSM platforms, and OSM platforms and third party traders are not an object of this study.

The scope of the legal research was set to cover predominantly the Unfair Commercial Practices Directive, and to some extent the Consumer Rights Directive, the Unfair Contract Terms Directive, and the E-commerce Directive. The focus of the study is on the assessment of the compatibility of the identified practices with these Directives.

A number of other legal instruments of potential relevance for practices on online social media are not covered by this study, notably the new General Data Protection Regulation and the Directive on Privacy and Electronic Communications, and specific legislation such as the Services Directive and the Audiovisual Media Directive.[1]

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[1] See for a discussion of the link between these instruments the DG Justice Guidance Document on the Consumer Rights Directive (2014), available at http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf.

2   Review and analysis of the legal framework

The following section briefly reviews the EU legal instruments that are used in the legal assessment of the OSM platform practices.

2.1   The Unfair Commercial Practices Directive (UCPD)

The UCPD prohibits unfair commercial practices by traders towards consumers. Commercial practices are, in particular, considered unfair under this Directive if they are misleading, aggressive or contrary to the requirements of professional diligence.

The definition of "trader" under Article 2(b) UCPD covers "any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader". OSM platforms will generally qualify as traders under the UCPD, because they are acting towards consumers "for purposes relating to" their "business", for example if platforms provide paid services to users; obtain revenues through the operation of the platform, such as charges for advertisement or commissions on transactions; or the use and sale of data generated on the platform.[2] Also platforms that only generate data but are linked to other platforms qualify as traders if they transmit their data to the latter (such as Whatsapp or Facebook messenger, which provide data to Facebook, in turn generating revenue from the sale of data). Thus, very few OSM platforms are likely to fall outside of the definition of "trader" under the UCPD.
Further, third-parties operating on OSM platforms qualify as "traders" under the UCPD if they engage in commercial practices towards consumers on the platform. In addition, natural persons, as soon as they are acting, for example through their personal social media profiles, "on behalf of a trader" will fulfil this definition.

Business-to-consumer commercial practices are defined in Article 2(d) UCPD as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers". Annex I of the UCPD contains a black list of commercial practices which are considered unfair in all circumstances and therefore prohibited per se (Article 5(5) UCPD). The Directive further has general provisions on misleading commercial practices in Articles 6 and 7 UCPD, and on practices violating "professional diligence" requirements under Article 5(2) UCPD, as defined in Article 2(h) UCPD. Whether or not a commercial practice is unfair under these general provisions must be assessed on a case-by-case basis.[3]

The UCPD was adopted at a time when internet usage was less widespread and extensive than it is today. Therefore, in interpreting the Directive, its general and principle based concepts may need to be interpreted in a way that takes into account the current internet environment.[4] For example, the updated Commission guidance on the application of the

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[2] Commission Staff Working Document. Guidance on the Implementation/application of Directive 2005/29/EC on Unfair Commercial Practices. COM(2016) 320 Final, p 122.
[3] Ibid, p 5.
[4] See for example on the interpretation of Annex I, point 11 Hans Micklitz, UGP-Richtlinie, in: Muenchener Kommentar zum Lauterkeitsrecht, 2nd edition 2014, C.H. Beck, rn 117-118.

UCPD contains a specific chapter regarding its application in the online sector, including social media (see section 5.2.9 UCPD Guidance 2016).

2.2 The Consumer Rights Directive (CRD)

The CRD covers distance contracts, i.e. consumer contracts that are concluded without the simultaneous physical presence of the trader and the consumer with the use of a means of distance communication, such as the internet. The Directive lays down pre-contractual information requirements for traders. It also includes other provisions, such as on the right of withdrawal, delivery and payment, which are less relevant in the case of Online Social Media practices as examined in this study.

The CRD will be relevant to practices that enable the conclusion of a contract between a consumer and an Online Social Media platform or third-party trader (for whom the Online Social Media platform acts as an intermediary). Online contracts qualify as distance contracts for the purposes of the Directive, and traders have to comply, notably, with the pre-contractual information requirements under Article 6(1) that contains a general obligation to provide information on specific elements related to the contract in a "clear and comprehensible manner". Article 8(4) further stipulates that if contracts are concluded through a means of distance communication that "allows limited space or time to display the information", specified core pre-contractual information must nevertheless be provided to the consumer.

While the CRD and the UCPD may overlap on the required pre-contractual information, the UCPD has a wider scope, in that it also applies at an earlier stage in which a contract is not yet intended by both parties (i.e. the advertising stage), which is not the case for the CRD. As concerns practices by OSM platforms identified in this study, the relevance of the CRD is limited to practices occurring at the pre-contractual stage.

2.3 The Unfair Contract Terms Directive (UCTD)

The UCTD approximates the Member States' laws on unfair terms in contracts concluded between a seller or supplier and a consumer. The Directive contains general rules on which kind of contractual terms shall be regarded as unfair, and contains a non-exhaustive list with examples of contract terms that may be regarded as unfair.
The practices observed that take place on OSM platforms are used before the consumer actually enters into a contract with third parties. In the absence of specific contract terms, the UCTD is not relevant.

2.4 The E-Commerce Directive

The e-Commerce Directive[5] applies to information society services, which can include the services provided by operators of OSM platforms. Article 5 of the e-Commerce Directive lays down general information requirements for service providers, while Article 6 lays down information to be provided in commercial communications. The lists of items set out in these two articles are minimum lists. Article 6 in particular requires Member States

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[5] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17/08/2000.

to ensure that traders clearly identify promotional offers, such as discounts, premiums and gifts, where the service provider is established, and the conditions to qualify for such promotional offers.

The e-Commerce Directive applies to "information society services", defined in Article 2(a) as services within the meaning of Article 1(2) of Directive 98/34/EC, which in turn defines 'service' as "any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".[6] The Directive will be relevant if a commercial practice involves the provision of a service and with respect to the OSM platform as a service provider itself.

The e-Commerce Directive and the CRD apply in parallel: the CRD includes similar or more detailed requirements with respect to the description of the product (main characteristics, functionality and interoperability of digital content) and price. Generally speaking, providing this information in accordance with the Consumer Rights Directive is therefore sufficient to comply with the requirements of the e-Commerce Directive. There are exceptions as the e-commerce Directive additionally requires specific information about promotional offers (Article 6).

The link between the e-Commerce Directive and the UCPD, in particular the 'safe harbour clause', are discussed where applicable throughout this report.

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[6] The CJEU clarified that this does not require the service to be paid for by those for whom it is performed Case C-352/85 Bond van Adverteerders [1988] ECR 2085, an important precision for the mostly free of charge OSM platforms.

2.5   The average consumer threshold

EU consumer law, in particular the UCPD, relies heavily on the concept of the "average consumer". According to the case-law of the CJEU, the average consumer is a person "who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors".[7]

The relevance of empirical and behavioural studies in determining the average consumer threshold is currently debated.[8] The UCPD states in a recital that the "average consumer test is not a statistical test" and that a case-by-case analysis is necessary "to determine the typical reaction of the average consumer in a given case."[9] The UCPD Guidance elaborates "that national authorities and courts should be able to determine whether a practice is liable to mislead the average consumer exercising their own judgment by taking into account the general presumed consumers' expectations, without having to commission an expert's report or a consumer research poll"[10]. At the same time, the European Commission pays increasing attention to behavioural sciences in the consumer policy making process.[11] Some academic literature suggests that recent judgments of the CJEU indicate a greater willingness to establish a scientific basis for the analysis of the concept of the average consumer.[12]

For several practices, a number of behavioural experiments were conducted in order to study consumer behaviour in relation to OSM. The legal assessment reflects on the results reached and analyses the practices in light of the behavioural experiments.

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[7] Judgment of 6 July 1995, Mars, Case C-470/93, ECLI:EU:C:1995:224 established a "reasonably circumspect consumer", later in Judgment of 16 July 1998, Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt, Case C-210/96, ECLI:EU:C:1998:369 this was extended to the "reasonably well informed and reasonably observant and circumspect" formula and as such applied in Judgment of 13 January 2000, Estée Lauder Cosmetics GmbH & Co. ORG, v Lancaster Group GmbH Case C-220/98, ECLI:EU:C:2000:8. The formula was later included in recital (18) of the UCPD and has been applied in other areas of law, for example Judgment of 10 September 2009, Alberto Severi v Regione Emilia Romagna, C-446/07, ECLI:EU:C:2009:530. On the notion of the average consumer, see also B. Duivenvoorde, The Consumer Benchmarks in the Unfair Commercial Practices Directive (New York et. al.: Springer 2015).

[8] C. Poncibò , and R. Incardona, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution", (2007) Journal of Consumer Policy; A.-L. Sibony,. "Can EU Consumer Law Benefit From Behavioural Insights?: An Analysis of the Unfair Practices Directive" in K. Mathis (ed), Behavioural Law and Economics: American and European Perspectives (New York et al.: Springer, 2015); J. Trzaskowki, "Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive", (2011) Journal of Consumer Policy.

[9] Recital (18) UCPD.

[10] Commission Guidance (2016), supra note 1, p 42.

[11] As evidenced, for example, by the Chafea Consumer Programme and the attention to behavioural studies, see also Joint Research Centre, Behavioural Insights Applied to Policy (2016), available at http://publications.jrc.ec.europa.eu/repository/bitstream/JRC100146/kjna27726enn_new.pdf.

[12] Schebesta and Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne', European Law Review (2016) 595.

3   Legal assessment of the identified commercial practices

This section provides the legal assessment of the identified commercial practices, covering: (a. native advertising; b. influencer marketing; c. advertorials); (a. artificial boosting of social proof indicators; b. extrapolation of social endorsements; c. other practices linked to social proof); Data gathering and targeting practices (a. user tracking; b. custom audience targeting; c. social media logins); and other problematic practices. The sub-sections examine these practices under the provisions of EU Consumer law.

3.1   Disguised advertisement practices

"Disguised advertising" is defined as any form of commercial communication that presents itself as authentic, non-commercial communication, in a way that it 'blends in' with other content published by users on the OSM provider. As such, disguised advertising takes on the formal characteristics of non-commercial content. With regards to the formal aspects, disguised advertising aims to *look* like non-commercial content, and appear in the same places on the platform where non-commercial content appears.[13] With regards to content, traders also aim to make it appear as non-commercial as possible by ensuring that it shares characteristics with content posted by non-commercial users.[14] The added value for traders in disguising an advertisement as non-commercial content is that it prevents OSM users from recognising it as commercial, filtering it out, ignoring it or even from evaluating it negatively.[15]

During this study, we identified three key types of disguised advertising practices that can be considered as potentially problematic for consumers: **native advertising**, **influencer marketing** and **advertorials**. The sections below concretely describe and exemplify these practices.

3.1.1 Native advertising

One of the most common types of disguised advertising adopted by traders who wish to advertise their products or services through OSM providers is **native advertising**. Native advertising is a type of marketing practice that aims to blend in with non-commercial content to the highest extent possible (Wojdynski, 2016). The key distinguishing characteristic of native advertising content is that it aims to mimic user-generated content in order to increase the likelihood of capturing consumers' attention. As such, native advertising is usually displayed on OSM providers following the same format, adopting the same characteristics and occupying the same space or position (e.g. a user's personal newsfeed on Facebook) as user-generated content to allow full integration. This practice differs from direct or display advertising, which is often displayed in a different

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[13] For example, disguised advertising on Facebook would take the form of a post that appears on a user's 'timeline' (the space where content and experiences are shared) between other posts from non-commercial users.
[14] For example, instead of explicitly promoting a specific product, the advertisement may contain a user experience, an evaluation, or an image that displays the product in a realistic usage context, avoiding cues that would help consumers to identify the content as commercial (e.g. price, product specifications).

format and is spatially separated from non-commercial content, making it easier for consumers to identify it as commercial in nature.

Native advertising content is developed by the advertisers themselves. They can use the publishing options within each platform to present their content creatively to users. Such practices of "blending in" advertisements with non-commercial content have clear advantages for traders. First, a native advertising puts the ad into "a natural content flow", making effective use of the way users scroll through user-generated content on many OSM providers. This significantly increased the change for exposure to the native advertising content. Secondly, in mobile environments, native ads are more prominent because each piece of content typically takes up the full display of a smartphone, as opposed to desktops where several pieces of content are displayed simultaneously (Fulgoni and Lipsman, 2014).

On all three platforms, the native ads mimic the format of user-generated content and occupy the same space on the platform. Users can interact with native ads in the same way they interact with other content.[16]

3.1.2 Influencer marketing

Influencer marketing is a form of marketing that relies on promoting and selling products or services through individuals who have high reach or influence within a specific community.[17] An influencer has been defined as a person who has a greater than average reach or impact through word of mouth in a relevant marketplace. The practice involves the creation and promotion of authentic content that features specific brands or products, with the aim of tapping into the positive impact influencers are likely on consumer perceptions of what is being promoted. As such, influencer marketing relies on the influencers themselves to create and publish specific content. A common practice in influencer marketing is to design the content to focus on the influencer's positive experience with the product, and to have them recommend the product to their connections or followers through the OSM provider.

In comparison to native advertising, the advantage of influencer marketing is that it bears even fewer of the characteristics that make it possible for consumers to identify an advertisement. First, the content is published by an actual person. Second, it is typically presented as a personal endorsement rather than the direct and clearly identifiable promotion of a product. As such, influencer marketing often appears to consumers as an authentic, non-commercial post. Furthermore, influencers usually have a high number of followers, which allows them to reach a large target audience. For instance, Cristiano Ronaldo can reach up to 60 million consumers who follow him on Twitter as pictured in the example below.[18] By linking the advertised brand or product to the profile of the influencer, traders can also reach specific groups of consumers without using complex targeting options offered by the OSM provider. The key added value stems from the

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[16] Native ads on Twitter can be retweeted, liked, or commented on; Facebook native ads can be reacted to, commented on, shared, while Pinterest native ads can be pinned, shared and commented on. If an ad contains pictures, advertisers will often encourage users to tag themselves or others in these pictures.

[17] https://www.huffingtonpost.com/global-yodel/what-is-influcner-marketing_b_10778128.html

[18] Based on the follower count of the Twitter account @Cristiano on 18 January 2018.

association between the influencer and the product, which can positively impact consumers' evaluation of the product.

3.1.3 Advertorials

Advertorials represent a form of editorial content created to promote a product without making it clear that the content is sponsored in a way that is clearly identifiable by the consumer. They are often created to appear to consumers like an objective, informative publication (e.g. a news article or report).

It is uncommon for advertorials to be created directly on an OSM provider and OSM providers are normally not involved in their publication as most OSM do not have the functionality to produce content in this format on their platforms.[19] Instead, advertorials are often created and published externally (e.g. a blog, a news website etc.) and hosted outside the OSM provider. These external producers can then promote the content on an OSM provider through their business account. As such, the commercial practice takes place outside of the platform but is promoted through the platform.

When content is being hosted externally, automated disclosure mechanisms are also not available for this type of practice.[20] Instead, OSM providers are highly reliant on voluntary disclosure by external publishers. Thus, no clear mechanism exists for the automatic or manual detection and monitoring of advertorials on most OSM providers.[21] Even when the content is hosted on the platforms, the existing mechanisms of presenting commercial partnerships between OSM providers and other sites are inconsistent across different platforms.[22] The example below shows a disclosure mechanism on Facebook, which is part of the platform's strategy to fight undisclosed commercial content. In this example, Buzzfeed is required to disclose their partner (Samsung) and the post is tagged as 'paid'. Other platforms, however, do not have such an automated disclosure tag for this kind of content.[23] As a result, advertorials are likely to leave OSM users unaware with respect to their commercial nature.

3.1.4 Disguised advertisement practices: the blacklisted practices

In relation to disguised advertisement practices, 'disguised trading' is directly prohibited in the blacklist (Annex I, point 22 UCPD), and is defined as "[f]alsely claiming or creating

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[19] Exceptions are LinkedIn, which offers the possibility to create 'publications', and Wikia, which arguably has the production of texts as one of its core functionalities.

[20] On Facebook, advertorials can be monitored, detected and automatically disclosed but only if the content is created and hosted on the platform itself.

[21] Some OSM providers do have limited control mechanisms in place. For example, for content published through the OSM's in-house advertising system, the approval process standardly includes a review of an ad's external landing page.

[22] For example, Facebook offers external publishers the possibility to upload their content on the Facebook platform. This allows for content to open much faster and ensures it is properly formatted for mobile environments. For this feature, which hosts the content internally, Facebook requires (as of March, 2016) disclosure of the promoted brand or trader to the user in the same way as other branded content, such as native ads or influencer posts.

[23] For example, on Tumblr, Buzzfeed often adds a "presented by [trader name]" tag to the content title, but also regularly uses only hashtags that make it difficult to identify that the content is sponsored.

the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer". This blacklist item is the most important legal provision targeting native advertising, influencer marketing and advertorials.

Native advertising blends commercial content with non-commercial content. The practice does not by definition imply that a trader disguises its trading purpose: the commercial content may be placed within non-commercial content in an identifiable way, while benefiting from other advantages, such as the 'natural content flow' effect. An assessment of whether the blend of commercial with non-commercial content is sufficiently identifiable therefore depends on a case-by-case assessment of the post content in combination with the eventual use of any standardised disclosure tag offered by the OSM platform.

In the examples of Twitter, Facebook and Pinterest[24] the commercial purpose was sometimes not at all indicated in the post content, while other indicators of commercial intent ranged from ostensible product placement over price indication and names reflecting commercial traders. Many examples provide some disclosure, for example by being linked to a trader's account that is clearly identifiable as such, but the nature and extent of such non-standardised disclosure varies largely.

The native advertising examples in the Final Report[25] used a platform standardised disclosure tag as part of the post format: the Twitter and Pinterest content is "promoted", while the Facebook ads are "sponsored". Often, the 'house-style' of a given OSM platform determines disclosure standards: ads that may be considered 'native' in terms of post content are marked as being "sponsored" or "promoted" by a tag. This tag, while visible, can be very small and even limited to a specific icon. From a legal point of view it may therefore be questioned in how far even standardised advertisement disclosure tags designed by OSM platforms always fulfil the disclosure requirements under the blacklist. However, as will be argued, this is more a question to be discussed under the horizontal prohibitions of the UCPD.

In native advertisement posts, where a standard OSM disclosure tag has been used, traders do not violate to blacklist item of 'disguised trading' since the tag communicates the commercial purpose of a given post to consumers. Where this is not the case, the extent of the required disclosure appears as a central legal concern. Generally, disguised advertisement practices can be captured by the blacklist prohibition on 'disguised trading' (Annex I, point 22 UCPD), although the required extent of the communication about commercials purposes must be regarded as legally uncertain.

Influencer marketing relies on personal posts by individuals with a high societal reputation. Practices wherein posts are not marked by any disclosure, such as covert placement of products in pictures posted by apparently private accounts or by a celebrity as endorser, constitute a false representation of acting as a consumer, where in reality individuals are acting in the name of or behalf of a trader.

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[24] See Annex 2.0: section 3.1.1 Native advertising
[25] See Annex 2.0: section 3.1.1 Native advertising

The commercial intent is not always clear or established, as is the source of revenue. The wide definition of trader under Article 2 (b) UCPD also has the consequence that natural persons who act on behalf of a trader are considered as traders themselves.

Such practices of influencer marketing are therefore prohibited under the blacklist as disguised trading (Annex I, point 22, together with the definition of a trader under Article 2(b) UCPD). However, various types of disclosure are often used, for instance a link to the commercial partner. This is the case for the example of Ronaldo on Twitter[26], the tweet includes a picture of the celebrity prominently shown to wear Nike shoes, above which the text "@Nikesportswear" appears. Here, similar considerations apply as to native advertisement, in that influencer marketing can be captured by the blacklist prohibition on 'disguised trading', but that the extent of the required communication of acting on behalf of a trader is legally uncertain.

Advertorials are explicitly prohibited in the blacklist (Annex I, point 11 UCPD). However, the definition of advertorial is quite specific, defined as the use of "editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)." The legal definition of advertorial is considerably more narrow than what is considered an advertorial from a marketing perspective.

In the case of online social media, it is questionable which type of design and content of social media posts can be regarded as editorial content on online platforms. Some literature takes a narrow view of the objective of Annex I point 11, namely the protection of organised editorial media activity. This view would exclude blogs, review portals and internet fora posts from being classified as editorial content.[27] It is unclear whether a 'modern' reading in light of the internet context of Annex I, point 11 prohibiting advertorials for editorial content could be used for specific native advertising practices.

Practically, the significance of the advertorial blacklist prohibition is limited by the fact that advertorial practices that are not captured by Annex I, point 11 can still be captured by the general prohibition on disguised trading in Annex I, point 22.

The UCPD blacklisted prohibition on disguised trading has the potential capacity to tackle the identified problematic practices that relate to disguised advertisement, i.e. native advertisement, influencer marketing, and advertorials. The evaluation of what is 'disguised', i.e. aimed at creating the impression that one is not acting for the purposes of trade/representing oneself as a consumer is intrinsically linked to the extent of disclosure that may be required in order to sufficiently signal trading purposes to consumers. There is not a legal gap, but legal uncertainty about the extent of disclosure required.

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[26] See Annex 2.0: section 3.1.2 Influencer marketing
[27] Alexander, 'UWG § 3 Abs. 3 Nr. 11', in Münchener Kommentar Lauterkeitsrecht, rn 23-26, also with reference to German case law.

3.1.5 Disguised advertisement practices and the general prohibitions of the UCPD (Articles 6 and 7)

Next to the blacklisted prohibition on disguised trading (Annex I, point 22 and possibly 11), native advertising, influencer marketing or advertorials may be captured by the general prohibitions of the UCPD in Articles 6 and 7 UCPD, and possibly an analysis of the professional diligence required under Article 5 UCPD. This depends on a case by case analysis, in particular of the context in which the practice is placed, and the extent and types of disclosure used.

Article 6(1)(a) to (g) UCPD prohibits misleading actions that are capable of deceiving the average consumer regarding the product, the commercial practice or the nature of the trader. Article 6 UCPD therefore requires the trader to be clearly identifiable. Similarly, practices are misleading if material information is omitted or is provided in an inappropriate way.

Under Article 7 UCPD a practice is misleading if "in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information", or if "a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information (…) or fails to identify the commercial intent of the commercial practice if not already apparent from the context" (Article 7(1) and (2) UCPD). Article 7(3) UCPD states that "Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted."

These prohibitions use a benchmark of whether a given practice causes or would be likely to cause the average consumer to take a transactional decision that he would not otherwise have taken.

There is some overlap in the provisions of the UCPD and the provisions of the e-commerce Directive concerning information duties in commercial communication. The e-Commerce Directive covers "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." (Article 2(f) e-Commerce Directive). The transparency requirements mandate that "(b)oth the commercial communication and the natural or legal person responsible for it must be clearly identifiable, and any conditions attached to the offers, discounts etc. must be easily accessible" (Article 6(1) e-Commerce Directive) For instance in the case of fake-accounts or pages, the identity of the responsible person is not clearly identifiable, and therefore a violation of both the UCPD and Article 6(1) e-Commerce Directive occurs.[28]

The individual assessment of the practices must be done on a case-by-case basis. A failure to identify the commercial intent can be potentially captured by the general prohibitions under Article 6 and 7 UCPD, although in this context the influence on the

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[28] See also in this line Micklitz/Schirmbacher, Telemediengesetz, 'TMG §6', rn 45.

transactional decision must be taken into account which is not the case for the blacklist. The underlying challenge remains the same under the blacklist and the overarching prohibitions, namely the definition and delimitation of what amounts to sufficient disclosure practices in order to enable the consumer to understand the commercial intent of a trader.

In case of limited disclosure, Article 5(2) UCPD on practices contrary to professional diligence requirements and materially distorting consumer behaviour may be useful in order to determine the extent of disclosure that is required (see also above).
In the US, the Federal Trade Commission has issued useful guidelines on online disclosure[29], highlighting the following elements: is the disclosure integrated or separate from the claim? Is the disclosure in close proximity to the claim to which it relates? Is it clear and conspicuous? Further, what is the prominence of it, and is it unavoidable; whether or not other parts distract the consumers' attention from the disclosure; the possible necessity to repeat disclosure; and general noticeability to consumers, based on size, colour, and graphic treatment of the disclosure in relation to other parts of the platform. In other words, the question is whether disclosure is effective.

In applying these criteria to the one of the examples identified (reddit.com - Star Wars Rogue One), key words are displayed next to each other: 'hot', 'new', 'rising', 'controversial', 'top', 'gilded', 'promoted', 'advertising'. All these keywords are displayed in the same inconspicuous way. The formulation 'advertising' is not entirely clear to mean that the account below is, in fact, sending an advertisement message. The legality of the words used in terms of graphical impression hides the disclosure. This kind of disclosure seems to violate the professional diligence required in an online practice.

In a similar example from the same provider (reddit.com – cat shirt), tabs are displayed next to each other 'hot, 'new', 'rising', 'controversial', … 'promoted', but in this case the 'promoted' tab is visually highlighted. This attracts consumers' attention much more. At the same time, here the 'promoted' tab is not in very close proximity to the claim it refers to, and therefore likely to slip from the consumers attention. These cases are grey areas for which current UCPD legislation and interpretation does not provide detailed guidance, thus illustrating the challenge of deciding the extent of disclosure required.

Disclosures must be evaluated on a case-by-case basis. However, the disclosure practices identified vary significantly between OSM providers, an indicator for the fact that although most OSM providers try to enable disclosure, there is no consensus on how this must be done. One way to develop a standard for disclosure, and what – in practice – is to be considered misleading is by reference to industry guidelines. In the context of Article 5 industry guidelines may reflect a consensus or standard on what constitutes diligent online behaviour for the purposes of Article 5 UCPD. Several initiatives have tried to establish best practices with respect to disguised online advertisements, for instance

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[29] Federal Trade Commission, .com Disclosures. How to Make Effective Disclosures in Digital Advertising, March 2013, available at: https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf

EASA established best practices for example on online behavioural advertising[30] or ICPEN's Digital Influencer Guidelines.[31] However, their industry acceptance is unclear; they are dispersed across different sources at different organisational levels; and sometimes are not specific enough to provide clear guidance.

3.1.6 Disguised advertisement in light of the behavioural experiments

In assessing whether or not disclosure is effective in identifying the commercial intent to consumers, behavioural insights can usefully be taken into account.[32] This would be a second way in order to establish a standard to test whether disclosure is sufficient.

Two experiments were conducted among 9631 consumers in 6 countries (approximately 1600 per country) to examine consumers' ability to identify **native advertising** as such as well as the effectiveness of remedies to improve ad identification (see Annex 2 for the detailed methodology).[33] In the experiments, respondents scrolled through a newsfeed on a social media website, which was either a Twitter or a Facebook mock-up, which contained native ads and non-paid, user-generated posts. The native ads represented different ad types observed in reality, namely article and photo album ads on Facebook and photo ads and text ads on Twitter (see examples below). After examining the news feed, the individual posts were shown again, and respondents were asked to indicate whether the post was an ad or not (for more detail regarding this and other outcome measures used, please refer to Annex 2).

It is misleading if a trader fails to identify the commercial intent of the commercial practice if not already apparent from the context, (Article 7(1) and (2) UCPD) when this may cause the consumer to take a transactional decision otherwise not taken. In the behavioural experiments[34], the commercial intent was not apparent to 30-40% of the consumers, a significant number in comparison to regular advertisement. The results of the behavioural experiment shows low correct advertisement identification percentages in consumers of 60-70%[35], compared to that typical, non-native, ads that can be identified with over 80% accuracy after a single exposure of a mere 100 milliseconds.[36] The behavioural experiment evaluated effects of ad identification on consumer evaluation

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[30] EASA http://www.edaa.eu/wp-content/uploads/2012/10/EASA-Best-Practice-Recommendation-on-Online-Behavioural-Advertising_1.pdf

[31] The International Consumer Protection Enforcement Network (ICPEN) consists of consumer protection law enforcement authorities from across the globe, https://www.icpen.org/sites/default/files/2017-06/ICPEN-ORE-Guidelines%20for%20Digital%20Influencers-JUN2016.pdf.

[32] See also Commission Guidance (2016), supra note 1, section 3.3 "It is for the national courts and administrative authorities to assess the misleading character of commercial practices by taking into account the most recent findings on behavioural economics."

[33] All comparisons presented in this report refer to differences that are statistically significant (p<0.05).

[34] For more detailed results, see Annex 2.0: section 2.2 Native advertising

[35] For all results, See "Table 13. Accurate identification of ads as being ads" in Annex 2.0: Section 2.2.1 Native advertising

[36] Pieters & Wedel, 2012.

and behavioural responses, finding an effect on post evaluations, but not on choices in the strict marketing sense.[37]

These results indicate that there is a problem of consumers to identify certain commercial advertisement; however, the design of different types of disclosure mechanisms should be studied further.

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[37] For more detailed results, see Annex 2.0: section 2.2.2 Experiment 4: Promoting identification of native advertising as such

3.1.7 Outcome of the legal assessment

Disguised advertising practices are often clear cases of deception – practices, in which the specific commercial intent was not apparent to consumers.

Under the UCPD, some types of clear-cut failures to indicate commercial intent can be considered as covered by the prohibition for traders to falsely represent themselves as consumers (Annex I, point 22) or by the prohibition of non-disclosed advertorials (Annex I, point 11). Such commercial practices are prohibited in all circumstances (per se). They may also be misleading under Article 6 and 7 UCPD, provided that the influence on consumer behaviour remains fulfils the criterion that the 'transactional decision' of an average consumer may be influenced.

Native advertisement, influencer marketing, and advertorials are practices that can all be tackled through the legal framework in theory. The main legal challenge, as apparent from the diversity of examples studied, is that there is an abundance of disclosure practices, fragmented across devices, jurisdictions, and providers, while the legislative framework fails to provide clear directions on the questions of *how* and *how much* disclosure must be provided.

The UCPD allows for two avenues of disclosure duty clarification: on one hand, clarification of disclosure rules in guidelines or best practices that reflect an industry standard is an option that could then be used as a yardstick for responsibilities of 'trader diligence' under Article 5(2) UCPD. Secondly, consumer behaviour studies can deliver relevant insights into the consumer effects of different types of disclosure.

3.2   Social proof practices

On OSM, there are numerous ways in which users can assess the social value of a certain product, brand or behaviour – for instance how many of their friends like or share certain content, how often this content is discussed, how many users follow the content of a certain trader, etc. Social proof in OSM contexts usually takes the form of indicators such as likes, views, followers, fans, shares, retweets, reviews, up-votes, etc. through which the platform users learn about other users in the platform (including their preferences about places, people, and trends).[38] Although social proof indicators differ across OSM providers, they rely on a common social foundation. Key examples include:

- Facebook: likes (including emotions), shares, comments, fans, followers, friends and views
- YouTube: views, likes and subscribers Twitter: likes, retweets, replies and followers
- Instagram: likes, followers and comments
- Reddit: up-votes and karma
- Tumblr: shares, reblogs, likes and comments, combined as "notes"
- LinkedIn: connections, likes, comments and shares
- Pinterest: likes, shares and repins
- Twitch: (live) views, comments, likes and followers
- Imgur: up-votes (points), views and comments
- Odnoklassniki: likes, shares, comments, friends, fans and views
- Vkontakte: likes, shares, comments, friends, fans and views
- Xing: connections, likes, comments and shares
- Draugiem: likes, shares, comments, friends, fans and views

User-generated content (e.g. user comments, status updates, tweets, etc.) and social proof indicators are both forms of online social information. Compared to user-generated content, however, social proof indicators typically constitute much less specific information which is more open to interpretation, and hence represent more subtle cues of social proof (Peter et al., 2014; Winter et al., 2015). While the literature on effects of social proof indicators is relatively scarce (Peter, Rossman & Keyling, 2014), there is some evidence that social proof indicators are perceived as indicators of the credibility of specific user-generated content (Jin et al., 2015). Furthermore, users may also rely on perceived social activity or social proof indicators for decision-making.[39] Thus, social proof indicators can be advantageous to enhance impact of content and sales for traders promoting a brand, product or services.[40]

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[38] Unknown. n.d. Social Proof: Your Key to More Magnetic Marketing. Available at: https://blog.kissmetrics.com/social-proof/

[39] Grahl, Jörn, Franz Rothlauf, and Oliver Hinz. 2013. How do social recommendations influence shopping behaviour? A field experiment. Available at: https://www.emarkets.tu-darmstadt.de/fileadmin/user_upload/download/Working_Papers/Value-of-Social-Recommendation-2013-04-30-Working-Paper.pdf

[40] Allen, Ed. 2014. How To Use the Psychology Of Social Proof To Your Advantage. Available at: https://www.fastcompany.com/3030044/how-to-use-the-psychology-of-social-proof-to-your-advantage

Social proof information can be classified into **individual information** (e.g. one person's like or share) and **aggregate information** or summary statistics (e.g. the number of likes a post received), which is anonymous. We identified two key techniques, linked this distinction that are used to boost the perceived popularity or social value of commercial content on OSM providers:

1) artificial boosting of social proof indicators, based on anonymous, aggregated information;
2) the extrapolation of social endorsements, based on individual information and social ties between OSM users.

The following two subsections define these practices, exemplify them and describe in more detail how they can be used as information cues to create a false perception of popularity or value for certain OSM content, which can impact user evaluations and engagement with that content.

3.2.1 Artificial boosting of social proof indicators.

The digital and often anonymous nature of the social proof indicators makes them vulnerable to exploitation. In particular, traders can artificially boost social proof indicators for specific content on a large scale to create the perception that the content is more popular than it actually is. Different types of social proof indicators can be boosted artificially: likes, views, followers, fans, shares, retweets, reviews, up-votes and more. This practice does not aim to get actual users to interact with content, but merely aims to give them the *wrong impression* that there has been strong engagement with a particular profile or certain content. It is usually paid for or otherwise compensated, depending on the channel used.

Artificial boosting is often achieved by using automated programs (so-called "bots") or by hiring firms (also known as "clickfarms") to manually like, share or follow certain content.[41] These companies facilitate the direct acquisition of fake social proof indicators. The main activities of "clickfarms" consist of creating numerous fake user accounts and using them to execute actions that simulate real users' behaviour through automated scripts. Several online micro job sites contain vacancies for farming social proof indicators.[42] Another way of boosting social proof indicators includes the use of automated programs, often referred to as bots.[43,44] The method is similar to that adopted by "clickfarms" but the process is fully automated and interested parties pay for the software to help them boost social proof indicators rather than for specific services. A different technique used by marketers as well as individual users are share for share (S4S) and like for like (L4L) networks.[45] These services allow individuals to connect to a network of users who wish to boost their social presence through social proof indicators

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[41] http://digitaltohuman.com/viral-content/click-farms-help-fake-online-popularity/
[42] https://www.fiverr.com/categories/online-marketing/social-marketing?source=category_tree&page=1&filter=rating
[43] http://moobots.com/
[44] https://documents.trendmicro.com/assets/white_papers/wp-fake-news-machine-how-propagandists-abuse-the-internet.pdf, p.24
[45] https://www.like4like.org/

for free. Users offer unauthentic likes or shares to other users that are connected to the network, in order to receive them in return.

The practices listed above can distort social proof indicators, creating artificially high numbers of likes, shares, followers, etc. To the extent that users and OSM algorithms cannot distinguish between sincere interactions from bona-fide users with content, and artificial or paid-for interactions from bots, "clickfarms" or L4L networks, they may mistakenly perceive the latter as added proof of the value of that content.

3.2.2 Extrapolation of social endorsements

OSM providers have developed specific services in order to maximise the value and impact of social proof indicators. Facebook, in particular, applies a technique that links interactions with content from their users to create a social proof effect for other related content. Whenever an advertisement is shown to an OSM user who has at least one Facebook friend who has engaged in a certain way with the advertiser, social information is added to the advertisement. Four types of connections are used to show in socially wrapped advertisements, namely page likes, post likes, comments on a post and post shares. The addition of social information in advertisements does not require additional payment and is automatically added to all advertisements. There is no option available to not use social information on advertisements. However, users can edit their permission in order to not have their profile shown in socially wrapped ads. Thus, when someone likes a commercial content page, Facebook will not only use this in an aggregated form by adding it to the total number of likes for that page, or by showing it as an activity at the time of the actual interaction, but it will also use this like by specifically referring to it in specific sponsored advertisements published by the trader who manages the page. For example, if someone like a specific brand's page, an ad sponsored by the page owner would contain "[Friend's name] likes [brand name]" when presented to a user whose friend liked the brand's page. Facebook refers to this option as "adding a social story" and it can be seen as a form of the wrapping of social behaviour within related commercial content.

The second (potentially) problematic practice related to social proof is based on the use of individual rather than aggregated social proof. It relies on the strength of existing social ties between OSM users. Within the context of this study, we have labelled this practice the "extrapolation of social endorsements". The extrapolation of social endorsements happens when a user's positive interaction with specific OSM content is linked or transferred to different but related content, creating the appearance that that user also takes a positive stance towards the related content. As such, by **extrapolation** we refer to a kind of transfer of information and by social endorsements we refer to individual actions that link a specific OSM user to brands, products, pages or other content on OSM providers. After OSM users engage with a piece of commercial content, for instance by liking or sharing it, this interaction is "translated" as an endorsement of

related content. [46,47] For instance, people can be asked or individually choose to connect to the profile of a specific company via a social endorsement (e.g. a like). In consequence, this connection can be used as a social endorsement of commercial content displayed through the OSM provider. The extrapolation of such endorsements happens, for example, when they are linked to specific products of that company, even though the user who endorsed the company has never specifically endorsed, or interacted with these products.

Thus, even though the original like does not apply specifically to the content, in the advertisement, the "social story" is presented in close visual proximity to that content, which may create the impression that the user not only endorses the page itself, but also the specific content shown. These types of social endorsements focus on close network connections rather than strangers because they are likely to have a stronger impact on users' perception and evaluation of the commercial content (Aral & Walker, 2014; Bakshy et al. 2012; Bapna & Umyarov, 2005).

The example below shows how an authentic endorsement of a close network connection (a friend on Facebook) can be presented to the user in such a way that it creates the impression that the friend endorsed something else than (s)he did. In addition, the timing of this endorsement is not specified so users may assume the endorsement is recent. In other words, real endorsements are extrapolated to related content as well as in time.[48]

3.2.3 Other practices linked to social proof

The benefits of social proof indicators strongly depend on consumers' actual interactions with a trader's published content. The key goal of publishing commercial content is to generate consumer interactions (e.g. likes, shares) but paying the OSM provider to advertise that content is not the only way in which traders can do this. In fact, traders and advertising intermediaries have developed concrete strategies to increase interactions with their commercial content that is being advertised. One such tactic is stimulating direct communication between the trader (or those acting on behalf of the trader) and platform users. Inviting **c**omments on content not only creates a more personal way of engaging between traders and their followers on OSM providers, but also causes content to be disseminated among these users' own followers. Thus, traders sometimes actively encourage their followers to comment on their content, for instance by asking them questions. Such invitations for comments can be made more attractive by offering benefits. One specific example of this practice is when traders ask users to

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[46] Daily Mail Online (2013). Is Facebook 'impersonating' users to promote stories they've never seen to all their friends? From: http://www.dailymail.co.uk/sciencetech/article-2267575/Is-Facebook-impersonating-users-promote-stories-theyve-seen-friends.html

[47] Forbes (2013). Facebook is recycling your likes to promote stories you've never seen to all your friends. From: https://www.forbes.com/sites/anthonykosner/2013/01/21/facebook-is-recycling-your-likes-to-promote-stories-youve-never-seen-to-all-your-friends/#79652aaa17aa

[48] See Forbes (2013). Facebook is recycling your likes to promote stories you've never seen to all your friends. From: https://www.forbes.com/sites/anthonykosner/2013/01/21/facebook-is-recycling-your-likes-to-promote-stories-youve-never-seen-to-all-your-friends/#79652aaa17aa; Daily Mail Online (2013). Is Facebook 'impersonating' users to promote stories they've never seen to all their friends? Retrieved from http://www.dailymail.co.uk/sciencetech/article-2267575/Is-Facebook-impersonating-users-promote-stories-theyve-seen-friends.html.

interact with content in a certain way in order to gain access to other content or specific benefits. Most often, these benefits refer to being allowed entry into a prize winning competition.

3.2.4 Social proof practices: the blacklisted practices

Some commercial practices related to social proof indicators will be captured by the blacklisted practice of disguised trading/falsely presenting oneself as a consumer (point 22 of Annex I to the UCPD), which prohibits "(f)alsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer." Whether or not practices involving non-authentic social proof indicators constitute disguised trading depends on the type of indicator and/or the mechanism that are used, and the way the information is presented to the users. For instance, "clickfarms" create numerous fake user accounts and using them to execute actions that simulate real users' behaviour through automated scripts. Such practice provides a clear example of a trader 'representing oneself as a consumer' and is therefore prohibited under Annex I, point 22 UCPD.

3.2.5 Social proof practices: the UCPD general prohibitions

Practices involving social proof practices can constitute misleading information about the product or the reputation of the trader if they are used in the context of a social media practice that is connected with the promotion, sale or supply of a product to consumers.

Practices are misleading if they contain false or deceitful information and are likely to cause consumers to take transactional decisions they would not have taken otherwise. Particularly relevant on OSM platforms will be information about the nature and the main characteristics of the product or service, or attributes of the trader (Article 6(1) (a),(b) and (f) UCPD). In practice, social proof indicators may qualify as being false or deceitful if they are generated artificially through the mechanisms discussed above, because consumers may falsely believe them to be from other users, be subject to 'a one user, one like' mechanism, or be based on actual views rather than automatically generated ones. Social proof indicators can constitute information about the *nature* (Article 6(1) (a)) or *main characteristics* (Article 6(1) (b)) of the product. To take the example of a photo or story that prominently features a specific model of shoe with visible branding: a high number of social proof indicators (many 'likes' or 'views') conveys the message that this is a popular model, which for some consumers may be important information about the nature of the product. On the other hand, one may argue that the fact whether a picture of a shoe has been viewed a certain amount of times does not relate to the nature of the product. Further, social proof indicators may also deceive consumers as to the *reputation* (f) of a trader, a view put forward in the Commission Guidance (2016).[49] For example, a high amount of likes may mislead the consumer to think that a trader has a good reputation or is at least well known.

Residually, social proof practices that disguise the commercial intent of a trader would also be captured under the general prohibition on disguised trading under Article 7(2) UCPD, but the blacklist item point 22 of Annex I has the advantage of being *per se* unfair and is therefore the more immediate legal basis.

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[49] Commission Guidance (2016), *supra* note 1, p 144.

If consumers' transactional decisions could be shown to be likely to be influenced, practices involving non-authentic social proof indicators may be misleading under Articles 6 and 7 of the UCPD.

Further, certain practices relating to the authenticity of social proof indicators may violate the UCPD requirements on traders' duty to act according to professional diligence. Article 5(2) UCPD prohibits practices as unfair if they are 'contrary to the requirements of professional diligence' *and* are 'likely to materially distort the economic behaviour" of the "average consumer'. The two conditions must both be met for a practice to qualify as unfair under Article 5(2). Within the system of the UCPD, this provision is usually regarded as a safety net in order to capture misleading practices that are not covered by the blacklist or Articles 6 and 7.

'Professional diligence' is defined in Article 2(h) as a standard of care that is "commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity". The concepts of honest market practice and good faith are open norms and require interpretation.[50] Arguably, if it can be shown that a practice generally deceives consumers, then it does not conform to 'honest' market practices. As Article 2(h) UCPD refers to the trader's field of activity, industry-accepted practices can be taken into account when assessing whether a trader is acting in good faith.[51] E-reputation management is a widely and openly available service, and must therefore be presumed to be common practice. However, based on the legislative history of the UCPD it is clear that the provision does not excuse trader behaviour because it conforms to 'normal' industry practice.[52] Purposefully exploiting social proof indicators by buying fake endorsement or using like-for-like mechanisms therefore could also violate the professional diligence that can be expected in the online sector.

Under Article 2 (e) 'to materially distort the economic behaviour' is defined as "using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise". Social proof indicators are influential in that algorithms used by OSM platforms often rely on these indicators (among other criteria) to determine e.g. the ranking of search results or the prominence of display (for example, to be listed on the Popular page in Instagram a certain amount of likes must be harvested in a given time). If the neutrality of social proof indicators is not given, consumers are also not able to make informed decisions, as they will often not see content with a lower but authentic social proof indicator ranking. Since a 'transactional decision' means "any decision taken by a consumer concerning whether, how and on what terms to purchase (…)", social proof indicators can conceivably influence the 'transactional decision' a consumer would take.

Practices relating to the use of unauthentic social proof indicators must be assessed on a case-by-case basis, but will generally risk being contrary to the requirements of professional diligence under Article 5(2) UCPD. In addition, commercial practices that

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[50] M. Djurovic, European Law on Unfair Commercial Practices and Contract Law (2016). The author identifies two main sources for identifying fair practices, namely case law rendered under Trademark law and private regulation such as industry codes of conducts.

[51] For instance, in assessing the necessary diligence of a trader, codes of conduct might be a relevant indicator.

[52] Ibid, p 73-74 in which the author traces the legislative history of the UCPD. The European Parliament expressly amended the wording of this provision to prevent 'normal business practices' from becoming a defense for traders.

generally deceive consumers would in any event be likely to be unfair under Articles 6 and 7 UCPD.

3.2.6 Social proof practices: behavioural insights

The function of social endorsements for consumers is an open question, notably whether they must be regarded as information about the product or the trader for the purposes of Article 6, and in how far they influence the transactional decisions of consumers, a requirement for the non-blacklisted practices to qualify as unfair.

An experiment was conducted to examine the effects of the number of anonymous likes in social media advertising. Participants in the experiment were presented with a product ad, embedded in a social media site. The presence of the number of likes systematically varied from no, few, many or very many likes and the type of product (two types, for generalisability). After ad exposure, immediate responses to the ad and the advertised product (i.e. ad evaluation, product evaluation, product interest, and purchase intention) were measured. In a – seemingly unrelated – task, participants indicated their preferred choice among a set of product alternatives, which included the advertised product (Annex 2 provides more detail regarding the experimental design and outcome measures).

The findings of the behavioural experiment regarding social endorsements[53] show no clear effect of the number of social proof indicators that are generic (specifically, the number of "likes" on Facebook) on consumer responses to commercial content. From a behavioural point of view, this would indicate that consumers do not consider generic social proof indicators (e.g. numbers) without immediate related content or conceptual reference, as part of the main characteristics or nature of an advertised product. For some practices it is questionable whether they raise sufficiently important consumer concerns to fall under consumer law. For example, the experiment on *anonymous likes[54]* did not provide (consistent) evidence that generic social endorsements have an impact on consumer *attitudes* or *choice*, thus failing to provide conclusive support for a (likely) effect on consumers' transactional decisions exists.

In addition to the behavioural point of view, however, the exposure effect of increased likes must be factored in. This depends on the effect of artificially boosted social proof indicators on the likelihood of the commercial content they refer to being displayed to specific consumers. If an OSM algorithm factors in such metrics (e.g. a high number of unauthentic likes), the relevant effect on the consumers' transactional decision may not be extracted from the behavioural study. Rather, consumers' decision-making processes may be impacted simply through increased exposure and the familiarity with the advertised product that such exposure can produce. By analogy one may consider the CJEU case law that considered the decision to enter a shop as a 'transactional decision'.[55]

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[53] For more detailed results, see Annex 2: section 2.1 Social endorsements
[54] For more detailed results, see Annex 2: section 2.1.1 Experiment 1: Effects of the number of anonymous likes
[55] Case C-281/12 Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato, 19 December 2013, paragraphs 35, 36 and 38. See also Commission Guidance (2016), p. 37 albeit in slightly different context.

The question remains, whether such generic social proof indicators can significantly impact the advanced algorithms of top OSM providers.

Unlike the artificial boosting of social proof indicators, the extrapolation of social endorsements represents a very specific commercial practice. When shown extrapolated likes, for example, 65% of participants in the behavioural experiment[56] wrongly believed that their friend had liked the specific product advertised rather than the brand, in general. This may be a misleading action, as it shows a majority of the consumers to be deceived (Article 6) in relation to a characteristic of the good. The results do not provide evidence for the interpretation whether the social endorsement of a friend can be regarded as a 'main' characteristic of a product (Article 6(1)(b)). Certainly, given the demonstrated confusing effect on consumers, the information can be regarded as unclear or ambiguous (Article 7(2)UCPD).

The study shows some support that light users are positively influenced by the friend's like in terms of purchase intention, although the findings did not translate to choice behaviour. The studies also indicate that the consumer effect is strongly dependent on the specific consumer response examined (attitudes or behavioural intentions) and it differs for different types of products. For a practice to qualify as misleading, it must additionally be 'likely to cause the average consumer to take a transactional decision he would not have taken otherwise'. The legal question is therefore how encompassing the concept of 'transactional decision' is. If we accept product evaluation and purchase intention results as an indicator of a transactional decision, then the evidence supports that social endorsements influence transactional decisions. This would render extrapolated likes a misleading omission under Article 7(2) UCPD and possibly a misleading practice under Article 6.

3.2.7 Outcome of the legal assessment

The most pertinent legal instrument for assessing practices relating to the authenticity of social proof indicators is the UCPD, which requires that the commercial information consumers are exposed is not misleading. Some commercial practices related to social proof indicators will be captured by the blacklisted practice of disguised trading/falsely presenting oneself as a consumer (point 22 of Annex I to the UCPD).

Other practices, even where not a *per se* prohibition under the black list, can be reasonably tackled under the existing umbrella provisions of the UCPD, i.e. clearly under Article 7(2) UCPD, and possibly under Article 6(1)(b) UCPD and Article 5(2) UCPD.

However, the potential of the UCPD to tackle this practice depends on the interpretation of the influence on the consumer's 'transactional decision', a requirement for the non-blacklisted practices to qualify as unfair. For some practices it is questionable from a behavioural perspective whether they raise sufficiently important consumer concerns to fall under consumer law. For example, the study on *generic likes* did not provide (consistent) evidence that generic social endorsements have an impact on consumer

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[56] See Annex 2.0: Section 2.1.2 Experiment 2: Effects of extrapolated friends' likes

attitudes or *choice*. An example of endorsements that did flag consumer concerns is the use of *extrapolated likes*. The practice was shown in the experiments to confuse and deceive consumers. From a legal perspective not only behavioural results should be taken into account in order to examine the effect on the 'transactional decision'. Practices relating to social proof indicators (in particular artificially boosted endorsement rates) may also result in artificially higher exposure rates to consumer. The legal concept of 'transaction decision' cannot be examined on the basis of behavioural research alone, but must capture the manipulation of consumer choice achieved through exposure effects, an issue that would merit additional study and further research.

3.3   Data gathering and targeting practices

The End-User Licence Agreement (EULA) of all OSM providers identify data collection from the users as a business practice and obtain users' consent for using the data. The large amounts of data gathered about users' interactions with the content that is created and shared allows OSM providers to obtain valuable information not only about a range of socio-demographic characteristics of their users, but also of their interests and preferences. Specifically, commercially relevant information is gathered from users' logged activity on OSM providers, and often combined with data from other sources, to reveal details about their taste and personality, purchase intentions, spending habits and more. A lot of this information is not provided by users directly, but can be inferred from the different actions and interactions with specific content that OSM users engage with. Furthermore, this type of data is gathered not only within the OSM provider's own platform, but also from external sources.

OSM providers use this data to create very specific and detailed user profiles for advertising purposes to enable traders to target advertising and other commercial content to selected profiles, depending on their business needs. The algorithms that enable this profiling and targeting are arguably the most complex, but also the least transparent aspect of social media marketing. We will not provide a full overview of user data gathering and data use practices on social media as this lies outside the concrete objectives and scope of this study. Instead, we will focus mainly on the two most relevant practices when it comes to advertising: **tracking** and **custom audience targeting**, within which we can distinguish between custom audiences and lookalike audiences. In addition, we will briefly examine the practice of **social log-ins**.

3.3.1 User tracking

We discuss the practice of tracking first as it provides a view of the extent of data gathering by OSM providers and will serve as an introduction to the more custom practices. As an advanced option for traders who advertise via OSM in-house advertising platforms, OSM providers offer, at no cost to traders, a piece of HTML code, commonly known as a "Pixel". A Pixel is used to gather data about users' behaviour outside social media (i.e. after a consumer clicks on an advertisement within OSM and is redirected to

the trader's website) and provide traders with advanced analytics.[57] The tracking Pixel must be placed in the header section of the trader's website, allowing it to appear on all pages of that specific website and track a user's behaviour by leaving a "third-party cookie".[58] The term "third-party cookie" refers to a cookie that tracks users on a specific website and does not originate from the website itself (i.e. originates from the OSM provider). All data that is being gathered by the tracking Pixel is sent to the OSM provider that created it. OSM providers use the information gathered to provider traders with access to more complex metrics, mainly referred to as "events". Events are actions that a specific user has taken on the trader's website (after the user clicked on the advertisement of the trader). The most common use of a tracking Pixel is for retargeting. Because tracking Pixels father information about the product pages a user has visited, OSM providers are able to send users targeted ads displaying products recently viewed by that user. Certain OSM providers also own advertising networks (e.g. Google and Facebook), through which users can also be retargeted when visiting third-party websites that are linked to the OSM provider's advertising network. In addition, a trader can choose which event to track, as the tracking Pixel can record several pieces of information related to the purchasing process:

- Which pages on the website does the user visit?
- How much time do they spend on the website and on individual pages?
- Is the purchase process fully completed (i.e. is there a purchase, if this is possible on the website), or at what point is it broken off?
- Which path does the user take through the website?
- Which articles do they look at, and which do they eventually buy?
- How much money do they spend, and how do they pay?
-

Lastly, the tracking Pixel allows OSM providers to see which users are most likely to purchase something on a trader's website, allowing them to define a much more concrete target audience based on observed consumer behaviour.[59]

3.3.2 Custom audience targeting

Enhanced user profile information obtained by tracking is not only used by the traders themselves but is also reused by the OSM providers. For the latter, the information obtained from trackers is an essential input for further profiling and audience targeting, which is the core value proposition to traders by OSM providers who have their own in-house advertising system. **Custom audience targeting** aims to ensure that commercial content is shown only to those OSM users who appear to match the trader's target audience. This targeted strategy substantially decreases the costs and increases the effectiveness of the trader's online marketing campaign. The possibilities linked to custom audience targeting make OSM providers a preferred online advertising channel for small traders with limited marketing budgets, especially if they need to target a niche audience. Custom audience targeting provides a very high level of granularity in targeting OSM users by collecting data not only through their own social media platform (users'

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[57] For example, the Facebook Pixel: https://www.facebook.com/business/help/952192354843755
[58] https://www.whatismybrowser.com/detect/are-third-party-cookies-enabled
[59] For example, the Facebook Pixel: https://www.facebook.com/business/a/pixel-best-practices

preferences, content interactions, connections etc.), but also by tracking user behaviour and spending patterns through external sources and linking these data sources.

With this wealth of profiling data at their disposal, OSM providers with in-house advertising systems can offer some custom options to traders who wish to target a specific audience on their platform. The most basic option is to manually select target preferences along a large set of variables. Traders can choose for their sponsored content to be targeted based on specific socio-demographic characteristics such as age, regions, income, education, marital status etc. There is a high level of granularity available within these targeting options as the majority of users provide some type of information to the OSM provider themselves. In addition to socio-demographic targeting options, traders can further refine their target audience by including or excluding users based on their preferences and interests, either explicitly recorded by the OSM provider and inferred by its targeting algorithms based on available information.

A second, more advanced option, is to target OSM users based on **custom-created audiences**, which allow advertising that directly targets specific OSM users by means of personal information, such as their email address, phone number, user ID or mobile advertiser ID. For this purpose, traders can use their own client database (e.g. a CRM database containing e-mail addresses or phone numbers) to target specific OSM users by matching the clients included in their database with OSM users with the same personally identifying information.[60]

Finally, the most data-intensive and automated form of targeting is the practice of "**lookalike audiences**".[61] This practice starts from the information that is available about existing consumers who have engaged with or purchased a trader's brand and/or products in the past. The first step is for the trader to choose a source audience. For example, a source audience can be based on an already created custom audience, on pixel data obtained from tracking, on mobile app data or on business page/profile fans/ followers within the OSM provider. The OSM provider's algorithms will use the available information from these sources to create a lookalike audience by identifying OSM users that match most closely the profile of a trader's existing customers. The reasoning is that the characteristics of the source group are predictive of what potential new profitable consumers would look like. Smaller audiences are usually more efficient as they match the source audience more closely, while larger audiences are characterised by higher potential reach.

3.3.3 Social media logins

Social logins are buttons that make it easier for users to create accounts on third-party websites based on the account information available on their existing social media

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[60] For example, here is an explanation on how custom audiences work on Facebook: https://www.facebook.com/business/help/341425252616329

[61] "Lookalike audiences" is the term used by Facebook. The practice is referred to as "tailored audiences" on Twitter, "matched audiences" on LinkedIn, "actalikes" on Pinterest and "similar audiences" on Google OSM platforms (YouTube and Google+).

account.[62] These social logins are based on scripts made and provided at no cost by the OSM providers themselves. The use of social logins has benefits for all parties. Users are able to skip registration and login forms, traders receive additional information from their existing of potential customers, and OSM providers can track user behaviour across external websites that have social logins.[63] The data gathered via social logins can be viewed on the OSM provider connected to them. Traders can use this data to enhance their target audiences. In addition, users may be more pro-active in updating their social media profiles (compared to traders' website profiles), making the gathered user data more reliable over time. The data that can be shared with traders via the use of social login buttons are very diverse.[64] In addition, the trader can always require an additional data points if needed.

3.3.4 Data gathering and targeting practices: the blacklist

Under Point 22 of Annex I UCPD, "[f]alsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession" is prohibited. Where data is gathered, with a view of then commercialising it while the consumer is not under the impression that this is the case, the per se prohibition of the blacklist may be pertinent. This assessment depends on individual case constellations, in particular about how clearly OSM inform consumers about the usage of data for their own business purposes.

Under the UCPD, traders may not falsely describe a product as free. The blacklist prohibits "(d)escribing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item." (Annex I, point 20 UCPD). It is open for interpretation whether the fact that the consumer provides data in exchange for access to the online social media platform satisfies the condition that the consumer "has to pay anything other than the unavoidable cost". Data are widely regarded as "a new currency"[65] and certainly "an economic asset"[66]. However, costs may be interpreted as purely monetary, in which case the provision of data does not qualify as payment of a price, i.e. monetary consideration.[67] Under the wider view of what constitutes costs, the

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[62] http://info.gigya.com/rs/672-YBF-078/images/Gigya_WP_Social_Login_101_US_WEB.pdf
[63] https://fieldguide.gizmodo.com/all-the-ways-facebook-tracks-you-that-you-might-not-kno-1795604150
[64] These can include (depending on the OSM platform): First name, Last name, Nickname, Email, Address, Birthday, Gender, City, State, Country, Location, Profile, Photo, Likes, Languages, Education, Work, History, Religion, Political view, Relationships, Friends, Friend info, Followers, Age, Contacts, Phone number, Interests, Honours, Publications, Certifications, Bio, Industry, Skills, Favourites, Connections, etc.
Source: http://info.gigya.com/rs/672-YBF-078/images/Gigya_WP_Social_Login_101_US_WEB.pdf
[65] M. Rhoen, 'Beyond consent: improving data protection through consumer protection Law' (2016) Internet Policy Review, 5(1).
[66] Natali Helberger, Frederik Zuiderveen Borgesius And Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54: 1427–1466.
[67] E.g. Articles 1 and 2 Consumer Rights Directive only covers contracts where the consumer pays a price, see Natali Helberger, Frederik Zuiderveen Borgesius And Agustin Reyna, 'The Perfect

blacklist may apply, if the data is later commercially used by the online social media platforms.

3.3.5 Data gathering and targeting practices under the UCPD general prohibitions

Certain forms of profiling, might go as far as to be considered an aggressive practice[68], which would be against Article 8 UCPD that prohibits any practice that "significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct".

The general prohibitions of the UCPD in Articles 6 and 7 will be of main relevance to the issue of awareness of consumers about the treatment of personal data. Article 6(1) UCPD prohibits actions that are likely to deceive the average consumer, *inter alia* regarding (b) the main characteristics of the product. Similarly, Article 7(2) prevents traders from hiding their commercial intent, for example by failing "to identify the commercial intent of the commercial practice if not already apparent from the context". Data treatment of online social media platforms is often not clearly disclosed, and the precise nature of the data gathered and its further treatment is largely hidden from the consumer although a commercial intent with respect to the data is systematically part of platforms' business models. Arguably, insufficient disclosure by online social media platforms about the commercial use of user data and the extent thereof, could qualify as a misleading omission, to the extent that such an omission is likely to lead the consumer to take a transactional decision he would not have taken otherwise.[69]

This would depend on the lack of consumers' understanding about their data treatment, an issue that might benefit from further behavioural insights: consumers may not be aware that social media platforms that advertise themselves as 'free' often use consumers' data as a business model. Further, the extent to which consumer data is ultimately used by online social media platforms is probably not well understood by consumers.

3.3.6 Outcome of the legal assessment

Article 7(2) and point No 22 of Annex I prevent traders from hiding the commercial intent of a commercial practice. The European Commission considers that data has "a 'de facto' economic value", and that, consequently, "under Article 7(2) and No 22 of Annex I UCPD if the trader does not inform a consumer that the data he is required to provide to the trader in order to access the service will be used for commercial purposes, this

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Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54: 1427–1466.

[68] Natali Helberger, Frederik Zuiderveen Borgesius And Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54: 1427–1466,

[69] Natali Helberger, Frederik Zuiderveen Borgesius And Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54: 1427–1466, also discussing German case law in this line.

could be considered a misleading omission of material information"[70]. Whether this is the case must be assessed on a case-by-case basis, taking into account the actual information practices of OSM.

Article 6 UCPD (prohibiting deception) and 8 UCPD (prohibiting aggressive practices) are less discussed in the Guidance 2016 (section 1.4.10) on the interplay between data protection and the UCPD, although they could, according to the concrete circumstances of each case, possibly be used against some practices relating to data gathering and targeting.. A debate by national and EU authorities about the role of these provisions in relation to enforcement policies targeting OSM platforms could be encouraged.

A specific practice is that where OSM platforms advertise their services as free while commercialising collected data. Whether the 'free' nature of a service where data is provided in exchange is contrary to No 20 of Annex I UCPD is left open in the Commission Guidance (2016), while some literature suggests that the blacklist may usefully apply in such case. The interpretation of the 'free' nature of a service where data is provided in exchange is controversial, and has been rejected for instance by a German court that found that intangible consideration (ie data) cannot be regarded as a cost.[71] Different national courts may risk a different interpretation on this point, which should, however, conventionally be resolved through a preliminary reference to the CJEU.

In practice, the UCPD is hardly used in order to enforce data privacy[72], which is mostly based on the sector specific legislation (to date the Data Protection Directive, now replaced by the GDPR). Data protection will increase with the General Data Protection Regulation that applies from 25 May 2018 and grants natural persons (therefore also consumers) extensive rights in the area of data privacy. The GDPR regulates issues that would fall under the UCPD more specifically, i.e. regarding the information to be provided where personal data are collected from a data subject.[73] Overall, the GDPR is expected to vastly improve data protection of consumers. Although it is expected that the UCPD can take an important complementary role in critically evaluating commercial practices also falling under the General Data Protection Regulation[74], from a policy perspective it will first be important to assess the impact of the application of the GDPR before it is possible to evaluate in how far the UCPD can be expected to provide added value.

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[70] Commission Guidance (2016), supra note 1, p 27.
[71] Judgment of the Berlin Regional Court dated 16 January 2018, Case no. 16 O 341/15, see https://www.vzbv.de/sites/default/files/downloads/2018/02/14/18-02-12_vzbv_pm_facebook-urteil_en.pdf, see also Commission Guidance UCPD (2016), ch 4.4. last part, including German and Italian cases and 1.4.10.
[72] Eijk, N., Hoofnagle, C. J., & Kannekens, E. 'Unfair Commercial Practices: A Complementary Approach to Privacy Protection' (2017) European Data Protection Law Review, 3(3), 325-337.
[73] Eijk, N., Hoofnagle, C. J., & Kannekens, E. 'Unfair Commercial Practices: A Complementary Approach to Privacy Protection' (2017) European Data Protection Law Review, 3(3), 325-337.
[74] The GDPR emphasises processing of personal data, while the consumer legislation in the UTD and the UCPD extends to a broader notion of   unfairness M. Rhoen, 'Beyond consent: improving data protection through consumer protection Law' (2016) Internet Policy Review, 5(1), also Weatherill (2013). On the complementarity of Consumer and Data Protection Law, see 1) Natali Helberger, Frederik Zuiderveen Borgesius And Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54: 1427–1466.

3.4 Other problematic practices

Many of the practices found (for instance, use of false limited offers, false expiring offers, false free offers, false prize winning offers) are clearly prohibited under the UCPD Black List of misleading practices.
OSM platforms, on the other hand, are regarded as information society service providers within the scope of the e-commerce Directive. This means they may benefit from an exemption of liability under the e-commerce Directive. The E-commerce Directive provides an important prohibition on Member States to require service providers "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity" (Article 15), where these engage only in 'mere conduit' (Article 12), 'caching' (Article 13), and 'hosting' (Article 14).

It is questionable whether all OSM platforms' activities remain confined to mere hosting, so that the exemption is not a blanket exemption from liability. It is contentious how far this exemption stretches. The European Commission takes the view that the e-commerce Directive is complementary to the UCPD, and that both regimes apply in parallel: "The professional diligence duties of these traders vis-à-vis consumers under the UCPD is different from, whilst complementary to, the regime on exemptions from liability established under Article 14 of the e-Commerce Directive for illegal information hosted by service providers at the request of third parties".[75] Given that OSM platforms are themselves traders for the purposes of the UCPD, they are held responsible to comply with unfair practices law, and in particular to comply with the requirements of professional diligence under Article 5 UCPD.

The line of both the European Commission and the CPC Network authorities is to generally accept the liability exemption under the e-commerce Directive; framed by the residual duty to cooperate and take down notified illegal content under the e-commerce Directive, and acting in accordance with standards of professional diligence under Article 5 UCPD.

Although the illegality of these practices is often clear, the responsibility of OSM providers in this regard is not. In order to check compliance of advertisements displayed with the requirements of EU Consumer law, OSM platforms would in such instances have to monitor the content of all third-parties' websites. Taken together with the e-commerce exemption for 'general monitoring' of intermediaries, OSM platforms do not seem to have a duty to monitor the advertisements placed on their site that link to third-party websites. This is different for OSM platforms that incorporate actual sale elements on their website and it only applies as long as the OSM platform qualifies as a hosting service provider under the e-commerce directive.

The European Commission recommends OSM platforms to design "their web-structure in a way that enables third party traders to present information to platform users in compliance with EU marketing and consumer law – in particular, information required by Article 7(4) UCPD in the case of invitations to purchase."[76]

[75] See Commission Guidance (2016), supra 1, p 123.
[76] Commission Guidance (2016), supra note 1, p 126.

4   Conclusions

4.1   Disguised advertising practices

4.1.1 Options for regulatory action

Consumers' lack of awareness of marketing practices on OSM and data gathering and use practices of OSM and the failure of OSM providers, social influencers and traders' to correctly disclose commercial intent are the key risks identified across all types of **disguised advertising practices.**

In theory, native advertising, influencer marketing, and advertorials are practices that can be tackled through the existing legal framework on unfair commercial practices. While advertorials without disclosure of commercial intent is a practice that is explicitly blacklisted (prohibited), similar practices that have developed in social media i.e. native advertising and influencer marketing, are not always caught by the black-listed provisions.

A challenge, as apparent from the diversity of examples documented during the desk research, is that there is inconsistency and fragmentation of disclosure practices across devices, jurisdictions, and providers. The legislative framework is open as to *how* **and** how much disclosure must be provided. More clarity on this would facilitate both compliance and enforcement.

Options to provide legal clarity would therefore be the inclusion in the blacklist or in guidelines of specific problematic commercial practices prevalent in social media. This could make compliance more likely and enforcement easier and includes:

Updating the blacklist of the UCPD to include items covering problematic disguised advertisement practices, by:

- modifying the wording of the advertorial blacklist prohibition;
- creating a prohibition of native advertisement;
- and specifically prohibit web-structures that do not allow traders to comply with the required Union disclosure.

Clarification in the Guidance to the UCPD, by:

- by establishing elements to test the salience and clarity of the meaning of the disclosure and real-life examples;
- clarify in how far the existing UCPD requirements impose a duty on OSM to technically enable adequate disclosure;
- publication of a self-standing dedicated guidance document targeted at the OSM market.

4.1.2 Options of enforcement action.

In terms of enforcement, problematic disguised advertisement practices would require stepped up, targeted enforcement. Specifically for disguised advertisement, effective enforcement policy may require to move beyond targeting regular traders, to include, in the case of influencer marketing and advertorials, individual persons, and in the case of native advertising, OSM platforms. To enhance consumer protection in relation to

disguised advertising practices, **enforcement options can be considered specifically against influencers, i.e. by imposing penalties on important influencers**, and **against OSM providers by imposing penalties and ordering them to remove infringing content.**

4.2   Practices involving social proof practices

4.2.1 Options for regulatory action.

Social endorsements are a key distinguishing feature of OSM and did not exist in their current pervasive form when the UCPD was drafted. The most pertinent legal instrument for assessing practices relating to the authenticity of social proof indicators is the UCPD, which requires that the commercial information consumers are exposed is not misleading. Some commercial practices related to social proof indicators will be captured by the blacklisted practice of disguised trading/falsely presenting oneself as a consumer (point 22 of Annex I to the UCPD). Other problematic practices relating to social proof that are not covered by the blacklist may be prohibited under the existing umbrella provisions, i.e. clearly under Article 7(2) UCPD, and possibly under Article 6(1)(b) UCPD and Article 5(2) UCPD.

As a policy option, **an update of the blacklist to reflect specific online practices** could be considered:

- a specific and explicit prohibition targeting artificial boosting of social endorsements;
- inclusion of other problematic practices, such as extrapolated likes.

Next to this, the Guidance (2016) could be clarified, in particular on the following points:

- explaining the applicability of Annex II, point 22 (misrepresentation as a consumer) to other social practices, notably bot or click-farm generated social endorsements
- by amending the wording and updating it to clearly list business practices that generate 'fake likes' (bots and click-farms);
- analysed practices should extend to cover more social proof examples and practices, such as extrapolated likes.
- The Guidance should mention the relevance of exposure effects in assessing the 'transactional decision' of consumers;
- clarify the responsibilities of online marketing businesses under the due diligence requirements

4.2.2 Options of enforcement action.

Problematic practices related to social proof can benefit from enhanced and targeted enforcement. Specifically in social proof practices, the role of some online marketing businesses is may require **enforcement action at systematic abusers of social proof mechanisms**, by imposing penalties on this type of infringers in order to send a market signal. To enhance consumer protection, in specific cases **penalties may be imposed**

on OSM platforms for violation of traders' duties and the removal of infringing content may be ordered.

4.3   Data gathering and targeting practices

4.3.1 Options for regulatory action

Policy options with respect to data issues are determined by the interplay between data protection and consumer law. Under the UCPD, traders may not falsely describe a product as free (Annex I, point 20 UCPD). It can be argued that it is legally not clear whether the fact that the consumer provides data in exchange for access to the OSM platform satisfies the condition that the consumer "has to pay anything other than the unavoidable cost" under this provision. Personal data is also relevant under Articles 6 and 7 UCPD, which state that traders should in general not mislead consumers. In particular, under Article 7(2) and No 22 of Annex I, traders may not hide the commercial intent behind commercial practices. If the trader does not inform consumers that the data he or she is required to provide in order to access a service will be used for commercial purposes, this could be considered a misleading omission of material information (possibly in addition to a breach of the General Data Protection Regulation).

- Clarify whether "costs" in the sense of No 20 of Annex I UCPD may cover also the provision of personal data or including a specific provision to this respect.
- Including a more conclusive prohibition of advertising as 'free' where data is monetized by a trader

Given the imminent entry into force of the GDPR, the impact of the GDPR on data related practices must first be studied in order to determine the complementary role that consumer law may play.

4.3.2 Options of enforcement action

The GDPR enhances the possibility for enforcement in data related practices in several respects. Data Protection Authorities to impose high administrative fines on non-compliant businesses77 and allows the user, inter alia, to lodge a complaint with the supervisory authority and to receive compensation for damages suffered.78 The EC's New Deal for Consumers is also designed to strengthen the protection of consumer rights.79 A **systematic evaluation of the effectiveness of the new enforcement regime in relation to data gathering and targeting practices** is needed to evaluate further enforcement actions at the interface of data and unfair commercial practices.

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77 See Article 58 (2) lit. i in connection with Article 83 GDPR.
78 See Articles 77 and 82 GDPR.
79 http://europa.eu/rapid/press-release_IP-18-3041_en.htm

4.4   Other problematic practices

4.4.1 Options for regulatory action

Many problematic but recurring practices discussed are already covered under the UCPD black list of commercial practices which are in all circumstances considered unfair. Nonetheless, they are still common online and appear on social media. The fact that widespread violations persist despite a clear prohibition is an indicator that more enforcement action is needed in order to safeguard compliant market behaviour.

4.4.2 Options for enforcement action

Remedies concerning these issues would first and foremost involve facilitating the enforcement of existing laws, and encouraging the relevant actors (individual consumers, governments, industry organisations, other companies) to initiate lawsuits based on observed breaches of the rules.

Some content is hosted on third-party advertising networks, or on external websites, OSM providers themselves may only have limited control. In addition, Article 14 of the E-Commerce Directive prohibits a general monitoring duty on OSM that are mere "hosting providers". Nevertheless, OSM providers can be required to remove illegal content, even where they act as mere hosting services, as regulated in the new CPC Regulation.

Concretely, if OSM providers are notified of the presence of illegal content on their website (and that includes illegal commercial practices), they are required to take them down as foreseen under the eCommerce Directive. The most obvious points of contact in these cases would be the OSM provider, a non-governmental consumer organisation, or a government law enforcement body. It is the responsibility of OSM providers to be aware of the relevant legal requirements and their potential liability in case of infringements, and/or whether they are required to act in case of infringement reports.[80]

4.5   Non-practice specific legal policy recommendations

The **legal concept of the 'transactional decision' is incongruent with marketing notions about consumer behaviour**. In marketing terms, and in empirical consumer studies in particular, the methodological rigour results in a strong distinction between consumer choice behaviour, product interest and evaluation, purchase intentions and changing attitudes. The studies also indicate that the consumer effect is strongly dependent on the specific consumer response examined (attitudes or behavioural intentions) and it differs for different types of products.

The main possible future obstacle may be that the influence of an effect on consumers' transactional decisions risks to become an additional hurdle to bringing consumer claims. Although legal scholarship[81], CJEU case law[82] and the Commission Guidance 2016[83] have a wide interpretation – is the practice capable of influencing consumer behaviour *in*

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[80]   https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms
[81] Keirsbilck (2011), Micklitz (2014),
[82] Case C-281/12 Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato, 19 December 2013, paragraphs 35, 36 and 38.
[83] Commission Guidance (2016), p 40.

abstracto, the new behavioural turn in consumer law might give rise to rejecting this idea due to impossibility of measuring consumer *choice* effects. The notion of transactional decision could be clarified in a modification of the wording.

It is unclear how these much more refined categories of consumer behaviour translate into the legal doctrine of influencing the transactional decision of a consumer. The legal question is therefore how encompassing the concept of 'transactional decision' is. If we accept product evaluation and purchase intention results as an indicator of a transactional decision, then the evidence supports that social endorsements influence transactional decisions in some cases. For instance, the study shows some support that non-users are positively influenced by the friend's like in terms of product evaluation and purchase intention level, but also these findings did not translate to choice behavior in the marketing sense. Paradoxically, increasing reliance on behavioral science with its sophisticated choice framework translated to a simplistic static transactional decision legal concept could then lead to lower overall consumer protection.

- Clarify, for instance in a Commission Guidance, that the legal concept of 'transactional decision' is not congruent with consumer behaviour concepts, although behavioural studies can be indicative of a transactional effect.

In addition, it is paramount to note that the 'transactional decision' should not be understood as a reference to the impact on *consumer behaviour* only. The concept can also be seen to cover exposure effects, i.e. where misleading practices result in an exposure without which the consumer would potentially not have entered a transaction.

- Clarify, for instance in a Commission Guidance, that the legal concept of 'transactional decision' captures practices that manipulate the opportunity to take a 'transactional decision' in the first place

In addition, observations have been made in other studies that consider a purchasing decision as process rather than instantaneous decision.[84] The effect achieved through amplification and continuous exposure in relation to the interpretation of the transactional decision, as well as through targeting. Many studies on the effects of social media and social endorsements created few consumer exposures only, while in reality one of the special features of OSM is the high frequency and spread out (in time) repetition with which users are exposed to the influence of commercial content and the fact that this content is often very specifically targeted (linked) to consumer behaviour and demographic characteristics. With social media, the exposure is more pervasive and happens with a much higher frequency.

- The legal concept of 'decision' should be interpreted in a way that can take into account insights about transactions as a process rather than a momentaneous single instance; reflecting for instance the effects of repeated exposure. Further study on these effects may be necessary.

The current **blacklist items** part of the UCPD are clear prohibitions that have shown their usefulness due to the precision with which they target specific prohibited practices,

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[84] Misleading "free" trials and subscription traps for consumer in the EU
https://publications.europa.eu/en/publication-detail/-/publication/bf621260-9441-11e7-b92d-01aa75ed71a1/language-en/format-PDF

a precision that also creates legal certainty. Social endorsements are among the key characteristics of Online Social Media platforms, and did not exist in their current pervasive form when the UCPD was drafted. As a general option, an update of the blacklist to reflect specific online practices could be considered, specifically:

- An update of the prohibition of advertorials in Point 11 to online content
- Although Point 22 covers many practices concerning undisclosed commercial intent, specific and explicit prohibitions targeting undisclosed influencer marketing, native advertising, artificial boosting of social endorsements might provide greater legal clarity

Enforcement of consumer law can be undertaken by 'public enforcers', at national level, possibly with some coordinative involvement of the European Commission. Other options include the enforcement by individual consumers, consumer organisations or in class actions.

A specific non-legislative action can be taken in the form of **soft-harmonisation measures to extend the currently existing common position within the CPC Network**. Following up the cooperation within the European Enforcement Network and using CPC Regulation mechanisms can help bring together national authorities on the topic to survey the market, the number of infringements and complaints, and to monitor developing industry trends. Under the new CPC Regulation, the European Commission can take on a specific coordinating role.

Individual consumers usually have little incentive to engage in costly litigation. The **role of consumer organisations and collective redress in consumer law is therefore large**.[85] However, whether or not consumer organisations independently may pursue infringements is a mandate of Member States. These issues have been widely discussed[86], and are non-specific for OSM issues. Even Article 80 of the new GDPR merely allows Member States to open this option, which is indicative of the lack of political will to legislate in this direction, nevertheless

- Member States could be encouraged to allow consumer organisations to pursue infringements and to allow collective redress by consumers

4.6 General discussion of the current legal context

Using new CPC Regulation mechanisms can help bring together national authorities on enforcement concerning problematic practices in OSM for widespread infringements with a Union dimension. The CPC Regulation enables a network of national enforcement authorities to ensure effective enforcement and greater cooperation, including minimum powers of authorities, address widespread violations of consumer law, and surveillance. This is also in line with the 'New Deal for Consumers' adopted in April 2018.

The CPC Regulation allows for the following enforcement mechanisms, all of which could be leveraged as instruments targeting commercial practices in OSM. **The competent**

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[85] Peter Rott, 'Data protection law as consumer law – How consumer organisations can contribute to the enforcement of data protection law' EuCML Issue 3/2017.
[86] For instance, http://www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf.

authorities at national level can impose penalties. Further, the competent authorities can order the **removal of problematic content**, they may also order the removal of infringing content from OSM platforms that are mere hosting service providers.

Sweeps, to be coordinated by the European Commission, can be undertaken to check compliance with, or to detect infringements of Union laws that protect consumers' interests. A sweep in the OSM sector is an enforcement action that will provide greater clarity about the extent of ongoing infringements, and to substantiate the extent of infringing practices in OSM.

Further, within the CPC, coordinated investigation and enforcement mechanisms for widespread infringements with a union dimension, include the **launch of a coordinated action**. Given the global reach of OSM platforms, such practices must be qualified as intra-Union infringements, i.e. infringements that harm the collective interests of consumers of more than one Member State; even wide-spread infringements harming at least two-thirds of the Member States.

Other activities that can be explored relate to **the coordination of other activities contributing to investigation and enforcement**. These include the training of their officials; the collection, classification and exchange of data on consumer complaints; the development of sector-specific networks of officials; the development of information and communication tools; and the development of standards, methodologies and guidelines concerning the application of this Regulation.

Overall, effective enforcement policy may require to **move beyond targeting regular traders**, to include, in the case of disguised advertising, individual persons, and in the case of social proof practices extend regulatory scrutiny to shadow businesses making profit from artificial boosting. National competent authorities can impose targeted sanctions on specific types of infringers in order to send a signal to the market. Penalties, such as fines or periodic penalty payments, must be sufficiently dissuasive.

Enforcement against OSM platforms is subject to the 'safe harbour clause' of the E-Commerce Directive that prohibits a general monitoring duty on mere "hosting providers", i.e. OSM platforms acting as a "neutral" platform that does not interfere with the user's communication. The line of both the European Commission and the CPC

Individual consumers usually have little incentive to engage in costly litigation against powerful tech giants. The **role of consumer organisations and collective redress in consumer law could therefore be crucial for the enforcement of consumer law**.[87] On 11 April 2018, the European Commission adopted the "New Deal for Consumers" package, which included proposals to strengthen individual and collective consumer redress across Europe. One the one hand, the New Deal envisages giving consumers that have been harmed by unfair commercial practices EU-wide rights to individual remedies. These new rights would be added to the UCPD. On the other hand, the New Deal proposes a new Directive on Representative Actions, which aim at ensuring efficient mechanisms

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87 Peter Rott, 'Data protection law as consumer law – How consumer organisations can contribute to the enforcement of data protection law' EuCML Issue 3/2017.

for collective redress for European consumers. This proposal will require Member States to appoint "qualified entities" that will be empowered to instigate collective redress actions. Member States will be free to decide to which extent consumer associations will be included among qualified entities in their national law. The proposal is now in the legislative process and it will be for the Member States and the European Parliament to finally adopt it to make the proposed rules binding European law.

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