Evaluation of the current regulatory framework on commercial communication, in light of emerging trends.

A report in the framework of the AdLit research project.
This document forms part of the ‘AdLit’ (Advertising Literacy) research project. AdLit is a four-year interdisciplinary research project on advertising literacy, which is funded by IWT (Agency for Innovation through Science and Technology). The main goal of the AdLit project is to investigate how we can empower children and youth to cope with advertising, so that they can grow up to be critical, informed consumers who make their own conscious choices in today’s new media environment.

The AdLit consortium comprises of the following partners:

University of Ghent: Research group CEPEC, Department Education and Research Group CJS

University of Antwerp: Research group MIOS and Department Marketing

KU Leuven: Research group Centre for IT and IP Law (CiTiP)

Free University Brussels: Research group CEMESO

For more information in relation to the project, visit our website (www.AdLit.be) or visit us on Facebook (www.facebook.com/reclamewijs) or Twitter (@AdLitSBO).

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EXECUTIVE SUMMARY

AIM. This report provides a legal evaluation of a selection of new forms of commercial communication that are particularly popular or effective when targeted at children: advergames, targeted advertising and vlogging advertising. More specifically, the report looks at how these forms fit within the current regulatory framework (i.e. regarding scope and substantive requirements) in order to discover any gaps or overlaps. The results of the evaluation will be used as a basis for the development of recommendations for a future-proof regulatory framework for commercial communication aimed at children.

METHODOLOGY. The analysis in this report is based on desk research. Relevant legal texts, texts related to alternative regulatory mechanisms, policy documents, case law of self-regulatory organisations, doctrine and literature at the international, European and national have been applied to the specific use cases in order to produce an evaluative gaps-analysis.

IMPORTANT RESULTS. The mapping of international, European and national legislative (Deliverable 1) and self-regulatory (Deliverable 2) provisions has confirmed that a myriad of obligations are imposed on advertisers. More specifically, the current regulatory framework provides certain specific protections for children related to their autonomy and commercial decision-making in this context. These protections include *inter alia* the principles of identification and separation of the commercial message from the non-commercial content, information requirements and the reliance on consent as one of the main grounds legitimising the processing of personal data. However, the effectiveness of these new forms of commercial communication targeted to children calls the existing protections into question:

- **Recognising the limits of identification and improving advertising cues.** The development of self-regulatory instruments containing more specific qualitative standards for advertising, could present a more flexible answer to new advertising formats that form a significant obstacle for children’s advertising literacy. It is argued that a more structured and coherent approach is needed in order to protect children’s consumer interests. This could include harmonised, evidence-based, qualitative requirements for disclosure cues, for instance through alternative regulatory mechanisms (self- or co-regulation), combined with advertising literacy education from an early age.

- **Precaution is better than cure.** Even though there is currently little evidence for a causal link between the emergence of new means of advertising and targeting (such as advergames) and negative sociological developments (e.g., the obesity epidemic amongst children), it is perhaps necessary to consider a precautionary
approach in the context of children. The importance of this matter extends well beyond a purely legal analysis and requires a balancing of socio-economic interests, which a legislative framework should reflect, in order to align itself with children’s rights and the best interest principle.

- **Need for better and stronger enforcement.** In practice, many questionable advertising practices have so far escaped scrutiny. The reason as to why this has happened is complex in nature. The fragmented regulatory framework and the distributed nature of competences plays an important role in this. In this regard, a more coordinated and collaborative approach is advised to tackle current and future commercial practices. In addition, to effectively monitor and enforce the rules regulatory authorities need to have access to sufficient resources, especially if their tasks were to expand (e.g. new tasks for media regulators regarding video-sharing platforms).

- **A holistic approach.** New advertising formats often combine several persuasive tactics and the protections for children against such tactics are spread across different regulatory instruments. Therefore, rather than looking at instruments in isolation, a holistic interpretation of the existing regulatory framework on commercial communication is needed. The potential role of consumer protection law as an additional layer of protection for children should be emphasised in this regard.

- **Balancing protection vs. empowerment.** A balance should be struck between on the one hand empowering children as young consumers and protecting them against harmful commercial practices.

- **Sharing responsibility amongst all actors.** With the entrance of non-state actors (such as industry players) into the regulatory process, a new kind of regulation has emerged which focuses on accountability, risk assessment and responsiveness. While it is still recognised that intermediaries have limited control over content and commercial communications uploaded by third parties, they will need to foresee appropriate measures such as flagging mechanisms, age verification mechanisms, parental control systems, mechanisms to increase media literacy. In this regard, it has been argued that increased responsibilities are inevitable and the only practical means of ensuring more effective compliance.
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<tr>
<td>ASA</td>
<td>Advertising Standards Authority</td>
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<tr>
<td>AVMS Directive</td>
<td>Audiovisual Media Services Directive</td>
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<td>CAP</td>
<td>Committees of Advertising Practice</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EDPS</td>
<td>European Data Protection Supervisor</td>
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<td>NMA</td>
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CHAPTER 1: EMERGING TRENDS IN THE AREA OF COMMERCIAL COMMUNICATION AND CHILDREN

1. Background

Children are an important target group for advertisers. Children grow up in a commercialised environment in which they, from an early age, come across advertising for a multitude of products and services.1 Throughout their childhood, they learn how to cope with the overload of such commercial information and develop critical decision-making skills.2 Scholars refer in this regard to children’s ‘advertising literacy’, which includes their advertising-related knowledge, attitudes, and skills, such as the ability to recognise commercial messages, to understand the persuasive intent of such messages, and to critically evaluate them.3 Children already display some level of brand consciousness at a very young age (even starting from the age of 2 years old).4 This is part of the reason why advertisers and marketers target children from the earliest stages of their lives, essentially transforming them into young consumers. Moreover, the digital environment, in which children spend a lot of their time,5 is increasingly permeated with

1 Barrie Gunter, Kids and Branding in a Digital World (Manchester University Press 2016).
sophisticated, interactive and personalised forms of advertising. Children have difficulties understanding the persuasive tactics employed by these new forms of advertising, which raises important questions from both a societal and legal perspective.

**New Persuasive Tactics.** The most significant difference between traditional and new forms of commercial communication lies in the persuasive tactics that are employed. Traditional formats (e.g. TV commercials) primarily spread factual or propositional messages, for instance by focusing on the product quality and characteristics. In addition, certain persuasive tactics are used, including *inter alia* repetition and linking them to positive stimuli such as humour. Conversely, new formats (e.g. advergames, sponsored content on social media) employ more subtle tactics. According to De Pauw et al., these tactics function at preconscious level, and rather than aiming to inform consumers about products and services they attempt to effectuate a better brand recall and attitude. This is achieved through constant exposure to brands or products, as well as through implicit persuasion by what Nairn and Fine define as a ‘positive affect transfer’ of amusing and captivating media content to the brand or product it integrates.

**Children’s Advertising Literacy.** The specific tactics of new forms of commercial communication, including their (1) immersive, (2) interactive, (3) personalised nature as well as (4) their emotive appeal, are particularly appealing to children. As such, they allow for a more effective persuasive commercial message, as they positively influence children’s attitudes towards products or brands and have a real impact on their purchasing decisions. Indeed, many children have great difficulty applying their advertising literacy skills when it comes to these new tactics or advertising trends.

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8 Esther Rozendaal, Moniek Buijzen and Patty Valkenburg, ‘Children’s Understanding of Advertisers’ Persuasive Tactics’.


Accordingly, it remains crucial for children to be able to recognise and understand the persuasive tactics of these new forms of commercial communication.

**AIM OF THE ASSESSMENT.** Two earlier research reports on the current regulatory framework on commercial communication (including both legislation and self- and co-regulation) showed that a myriad of provisions across different instruments exist. In this regard, it was argued that the fragmentation of the framework could lead to gaps or overlaps when it comes to new advertising formats, ultimately calling into question children’s ability to make informed commercial decisions. In turn, this would raise important questions from a children’s rights perspective, most importantly concerning children’s fundamental right to development and right to protection against economic exploitation. Therefore, the aim of this assessment is to identify and describe the precise gaps or overlaps in the current regulatory framework with regard to new advertising formats, and to clarify to what extent the hypothesis can be confirmed or rejected. Before going into the actual assessment of specific advertising formats, it is important to discuss the major trends that have emerged in the area of commercial communication.

### 2. Emerging trends

#### 2.1 Integration

**Types of Integration.** A first widespread persuasive tactic in this area is the fluid integration of commercial messages into non-commercial content (i.e. a programme or editorial content). Although this convergence has started quite some time ago, it reached new heights within the digital environment. The idea behind integration is that commercial communication is most effective when the consumer does not recognise it as such. According to Buizen et al, there are three types of integration: (1) format, (2) thematic and (3) narrative integration. Format integration relates to the embedding of


15 Various other terms are used when talking about this trend in commercial communication, such as “sponsored”, “promoted”, “native”, etc.


17 Sandra L Calvert, ‘Children as Consumers: Advertising and Marketing’ 205.

18 Buijzen, Van Reijmersdal and Owen (n 11).
a commercial message into a specific editorial context (e.g. an advertisement in the same style as a news article, a sponsored story in a person’s social media newsfeed). Thematic integration entails that commercial messages are integrated into thematically congruent content, for instance sport brand logos at football games. Finally, narrative integration entails that the commercial message is integrated in the narrative of certain media content (e.g. product placement in a television program or vlog). Aside from these types of integration, commercial communication may also be integrated in different media at the same time. Advertisers nowadays tend to make use of a holistic marketing or advertising strategy, targeting children with the same commercial message through different media. By combining the effects of the different media platforms, the campaign may achieve a viral effect.

**Persuasive Tactic.** When children are exposed to branded environments for an extended period of time, the lines between advertising and programme content are blurred. By seamlessly integrating the commercial message in the storyline and the images of the media content, potential irritation or resistance on the child’s behalf may be bypassed. Particularly for younger children, their ability to engage with integrated forms of commercial communication in a critical manner is less developed. According to the OECD, “Children have insufficient understanding of how Internet content is produced and financed, which is also a reason why they have difficulty critically assessing advertising messages.” The societal impact of the blurred lines between commercial and non-commercial content is significant. Indeed, integrated advertising techniques avail themselves of the fact that consumers are unable to entirely ignore the commercial message, as it is inherently linked with the informational element. Consumers may experience greater difficulties when it comes to recognising the persuasive commercial messages, which undermines their ability to process the message critically. This trend in commercial communication has become even more popular due to consumer fatigue.

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19 ibid.
20 Daems and De Pelsmacker (n 11).
22 Daems and De Pelsmacker (n 11).
26 Cauberghe and others (n 2); Rozendaal and others (n 2).
and immunity to traditional digital advertising (such as display ads)\(^27\) and the increased use of ad blocking technologies\(^28\).

**Children’s Advertising Literacy.** Research has shown that children can better recognise traditional television commercials as a form of commercial communication than compared to the following new formats relying on integration: advergames, sponsored content and brand placement.\(^29\) Although children could easily recognise and understand the concept of advertising banners, they had less understanding of the persuasive intent of commercial communication after being exposed to advergames and sponsored content. They also found it more difficult to recognise these new forms of commercial communication as advertising, compared to television and online banners. According to De Pauw et al., children in general do not actively look out for commercial communication that is embedded into entertaining or interactive media content. This also entails that children do not reflect on the tactics such new forms of commercial communication employ (e.g. positive affect transfer, the collection of personal data).\(^30\) According to Nairn and Fine, these techniques are particularly likely to persuade young consumers implicitly.\(^31\) Similar to children, teenagers find it more difficult to recognise integrated forms of commercial communication than compared to traditional television commercials.\(^32\)

### 2.2 Interaction

**Interactivity.** Another important trend in the area of commercial communication is the use of *interactivity* or in other words the involvement of the consumer in the advertising campaign. McMillan and Hwang identified three dimensions of interactivity, namely user control, direction of communication, and time.\(^33\) User control relates to the ability of the user to search for and control the amount of information online. The direction of

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\(^29\) Ini Van Wezenbeeck and others, ‘Minors’ Advertising Literacy in Relation to New Advertising Formats - Identification and Assessment of the Risks’ (2016) <www.adlit.be> accessed 16 November 2017. This is also in line with earlier research An, Seung Jin and Hae Park (n 12).


\(^31\) Nairn and Fine (n 10).


communication in a digital context will often be two-way, as internet users are able to communicate and interact with others online. The third dimension, time, refers to synchronisation, as interaction may take place simultaneously or delayed. Aside from these three dimensions, scholars have argued that interactivity in the context of commercial communication can be characterised by different features. For instance, modern commercial communication campaigns or strategies make use of the constant connectivity of young people and their extensive use of digital media. Furthermore, interactivity is often connected to other trends, such as personalisation and integration (e.g. social games where the advertising message is placed in a context in which peers play a central role, targeted ads on social media).

**Persuasive tactic.** Interactive advertising formats such as advergames or branded mobile applications have proven to be an extremely useful tool for advertisers and in particular when targeted towards children. Such techniques allow for the development of a positive product or brand association through the delivery of fun interactive content. As a result, children are no longer merely passive receivers of commercial communications. Instead, they become actively involved in the advertising process for instance by creating or sharing content themselves or by networking with peers. Advertisers stimulate young consumers to share and create content in order to promote their own brands, products and services within children’s personal networks (e.g. through likes, comments).

**Children’s advertising literacy.** Children experience lots of difficulties when applying their advertising literacy skills to interactive and social advertising. It is generally recognised that peers such as friends or classmates play an important socialisation role in shaping children’s commercial decision-making. Banerjee and Dittmar clarify that when children grow up, they start believing that the possession of certain products and brands determines the quality of their friendships. In this sense, the peer group sets the standard for the brands and products that are cool and desirable. According to Rozendaal...

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37 Daems and De Pelsmacker (n 11); Kathryn C Montgomery and Jeff Chester, ‘Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age’ (2009) 45 Journal of Adolescent Health S18.
38 Daems and De Pelsmacker (n 11).
et al., peer influence also plays an important role in the context of social games, making children more susceptible to the persuasive effects of advertising integrated within these games. In line with these findings, Zarouali et al. discovered that online peer communication on social media generally leads to lower advertising literacy amongst teenagers towards commercial communication that appears on their newsfeeds.

2.3 Personalisation

Personalisation. A third trend that has emerged in recent years is the personalisation of commercial communication. The significant technological progress, globalisation and the emergence of new business models have contributed to the collection and processing of personal data on an ever-increasing scale. Children’s personal data is being collected in unprecedented quantities, by businesses, governments, schools, and other organisations, leading to children’s lives being increasingly ‘datafied’. Children’s online behaviour is being tracked by means of cookies and plug-ins; joining a social media platform or downloading an app usually involves a transfer of personal information; advergames offer content tailored to the age or sex of the child; and interconnected toys interact with children and even record conversations. On the basis of the collected data, advertisers are able to target children with personalised advertisements and tailor their marketing campaigns.

Persuasive tactic. It has been argued that personalised advertising techniques allow a more effective transmission of the commercial message, as advertisers can respond explicitly to a specific user's developmental level and knowledge base. This is a distinct advantage when it comes to building a strong and lasting personal interaction and

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41 Rozendaal and others (n 35).
42 Zarouali and others, ‘The Impact of Online Peer Communication on Adolescents’ Persuasion Knowledge and Attitudes toward Social Advertising’ (n 32).
45 In 2015, an international network of data protection authorities conducted a privacy sweep of 1494 children’s websites and apps, which showed that 67% of the websites and apps was collecting children’s personal data and 50% shared this personal data with third parties. Global Privacy Enforcement Network, ‘Children’s Privacy Sweep’ (2015) <http://194.242.234.211/documents/10160/0/GPEN+Privacy+Sweep+2015.pdf>; Nairn and Fine (n 10).
47 Calvert (n 17); Cauberghe and others (n 2).
connection with the child consumer. Indeed, studies have shown that commercial messages that correspond with the interests and behaviour of consumers will lead to a more positive brand attitude, as the message is perceived as less intrusive, more relevant and useful, ultimately increasing consumers’ purchase intentions.\(^{48}\) In addition, YAN et al. found that the click-through rates of advertisements employing behavioural targeting techniques increased enormously.\(^{49}\)

**CHILDREN’S ADVERTISING LITERACY.** With regard to children’s advertising literacy, several important considerations can be made. First, the tracking of consumers’ online information and activities often happens covertly. BOERMAN et al. argue that this covertness may be harmful as well as unethical, since consumers are not aware of the persuasive techniques used.\(^{50}\) Furthermore, although the advertising sector has rapidly adopted personalisation techniques, research on the effects thereof on children’s advertising literacy remains scarce.\(^{51}\) DE PAUW ET AL. recently found that while children between 9 and 11 recognised a personalised advertisement (not integrated in the media content), few of them immediately understood that the advertisement was based on previous browsing behaviour. In general, children’s commercial literacy increases gradually as they get older. For instance, research has shown that children between 12 and 16 years old have less knowledge of social media advertising and are less critical than youngsters above 16 years.\(^{52}\) However, studies on personalised advertising and adolescents, a group of avid social media users who are frequently exposed to such advertising, paint an interesting picture. The level of personalisation of advertising may be different depending on the types and amount of personal data used.\(^{53}\) If the level of personalisation of a commercial message is too high, consumers may view this as a breach of their privacy.\(^{54}\) ZAROUALI et al. confirmed this in a recent study on the impact of

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\(^{50}\) Boerman, Kruikemeier and Zuiderveen Borgesius (n 7).


\(^{52}\) Cauberghe and others (n 20).

\(^{53}\) Boerman, Kruikemeier and Zuiderveen Borgesius (n 7).

First, the direct effect of retargeted advertising on adolescents’ purchase intention was indeed higher than for non-retargeted advertising, meaning that in general adolescents responded quite favourably to this advertising technique. However, the study also found that a retargeted ad indirectly leads to a negative effect on the purchase intention when adolescents are made aware that their personal information was being used to target the commercial message at them. In other words, personalisation techniques may also trigger scepticism and privacy concerns. In addition, ongoing research by Zarouali et al. uncovered rather worrying findings about adolescents’ understanding of personalised advertising techniques employed in social media. Preliminary results of the study show that although the level of advertising literacy of children for these techniques gradually increases when they get older, almost half of 17 year olds have a really low understanding of persuasion tactics and most of them do not understand the data processing practices behind the advertisements.

2.4 Emotional appeal

Consumers are emotional creatures. To a certain extent, it can be argued that all commercial communications aim at triggering an emotional response of consumers. More specifically, marketers aim to evoke emotional responses in order to create awareness, positive brand association, and an emotional desire for a product or service. Already in 1957, Martineau argued that

“Psychologists unhesitatingly state that the main appeal which advertising uses and the one which we can place our main reliance is the emotional, in the sense that we are trying to create suggested association with strong motive power.”

In this regard, both positive and negative appeals may be used to elicit an emotional response. Whereas positive appeals promise positive emotions as a result of the use or purchase of the advertised product or service, negative appeals associate negative consequences for those who fail to comply with the marketing message. In 1977, Reed and Coalson tracked the historical increase of emotional appeals in advertising and


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55 Zarouali and others, “Do You like Cookies?” (n 51).
56 Brahim Zarouali and others, ‘Adolescents’ Advertising Competences and Institutional Privacy Protection Strategies on Social Networking Sites: Implications for Regulation’.
57 Verdoost, Clifford and Lievens (n 6).
60 Reed and Coalson (n 58).
61 Verdoost, Clifford and Lievens (n 6).
attributed technological development as a key-determining factor in its rise. More recently, due to major technological advancements and increased computational capabilities, emotions have now become detectable in the online world and have raised the interest of a broad variety of commercial entities. For instance, a leaked internal Facebook document revealed that the platform allows advertisers to target users during moments when they feel insecure and worthless. Furthermore, an emerging trend is the use of neuroscience techniques to shape advertising and marketing strategies, which allows advertisers to connect at an even deeper level with consumers.

PERSUASIVE TACTICS. In the words of Lerner et al., “emotions constitute potent, pervasive, predictable, sometimes harmful and sometimes beneficial drivers of decision making”. Emotions can shape decision-making in two important ways: (1) certain emotions are associated with different patterns of cognitive assessments that allow to predict the outcome of the decision-making process (e.g. anger or joy) and (2) emotions influence how individuals process information and whether they do so superficially or in detail. According to Clifford, the use of these techniques for advertising and marketing purposes undermines a person’s rationality and, as such, individual autonomy. Advertisers aim at inducing emotional responses with consumers to create awareness and positive brand associations. In turn, this will evoke an emotional desire for the advertised product or service. Emotional appeals can be used both for the content and the delivery of the commercial message. With regard to the latter, gamification elements are often used to exploit cognitive biases, including when a marketing campaign is targeted at children. For instance, by using elements such as countdowns, marketers make use of people’s loss aversion and their tendency to evaluate potential losses as larger and more significant than equivalent gains. Considering the new trends in emotion detection and targeting (i.e. personalisation and neuro-marketing), the potential capacity to personalise the link between positive moods and the effect of an advertising campaign raise clear legal–ethical

62 Reed and Coalson (n 58).
68 Clifford (n 63).
issues.\textsuperscript{70}

**Children’s Advertising Literacy.** Specifically with regard to children, it has been recognised that highly affective media content does not motivate children to process the content critically. Indeed, as children need all their cognitive capacities to process and understand the media content, they do not have the capacity to critically evaluate the commercial message.\textsuperscript{71} Furthermore, the affect-based nature of new advertising formats not only limits children’s motivation and ability to process an advertising message elaborately, but also to apply their advertising literacy skills as a defence against the persuasive message.\textsuperscript{72}

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\textsuperscript{70} A. D.I. Kramera, J. E. Guillory and J.T. Hancock, ‘Experimental evidence of massive scale emotional contagion through social networks’ (2014) Vol. 111 No. 24 PNAS.


\textsuperscript{72} E Rozendaal, *Advertising Literacy and Children’s Susceptibility to Advertising* (9789491211065 2011) <https://dare.uva.nl/search?identifier=59a96c2a-1dd8-4fb-8ac1-1c0cf4836420> accessed 8 February 2018.
CHAPTER 2: EVALUATION

SELECTION OF CASES. The cases included in this report are based on research conducted by different partners of the AdLit project. First, initial assessments were made by AdLit partners of children’ and youngster’s media use and the forms of commercial communication that are employed the most in these media. Second, a risk assessment was conducted, to determine which of these advertising formats were perceived as highly risky for children and youngsters. On the basis of this research the following (both popular and risky) forms were selected: (1) advergames, (2) personalised advertising and (3) digital influencers and vlogging advertising. The trends described above are also reflected in one or more of these formats.

CHILDREN’S RIGHTS PERSPECTIVE. Children are increasingly confronted online with sophisticated advertising practices, which significantly impact children’s ability to make carefully considered and critical commercial decisions or decisions concerning their privacy and personal data. This raises important issues from a children’s rights perspective, particularly for their rights to development, privacy and protection against economic exploitation. Therefore, this report evaluates for each of the use cases how they fit within the current regulatory framework, while looking through the lens of the children’s rights framework. Each section will first conceptualise the specific advertising format, the persuasive tactics employed and the impact thereof on children's advertising literacy. Second, the regulatory framework that is applicable to the specific use case or advertising format is evaluated. The aim of the analysis is to discover any gaps or overlaps in the current regulatory framework in light of children’s rights with regard to new forms of commercial communication.

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74 Daems and De Pelsmacker (n 11).
75 Van Wezenbeeck and others (n 29).
1. Advergames

THE CONCEPT. A prime example of an advertising format in which all four trends could potentially occur is ‘advergaming’. This is an online phenomenon wherein the commercial message is immersed into the digital gaming content through brand or product placement. Contrary to simple in-game advertisements, advergames are fully bought and paid for by a singular brand. This allows the brand to dictate important editorial elements such as storylines and character design. Advergames are omnipresent in children’s online environments as they are inexpensive and cost only a fraction of the expenses required to launch television advertisements. Once the game is created (e.g. a website or a mobile app), there are no further distribution costs unless the game is updated. They are highly effective in capturing children’s attention, which would otherwise be hard to reach these days. More specifically, advergames present stimulating and motivating content, appealing lay-outs, fantasy-world aspects and gaming elements which are all attractive to children and especially suited to trigger an emotional response from them. In addition, advergames may also be personalised, which may even increase their emotional impact on the child. Such integrated, interactive, emotions-evoking and potentially personalised marketing techniques challenge the traditional boundaries set in the context of conventional advertising and will therefore be assessed in the context of the current regulatory framework to determine their legality, as well as in light of children’s fundamental rights.

1.1 Integration, interaction, emotional appeal and personalisation may all be part of the game

1.1.1 Persuasive tactics and children’s rights implications

PERSUASIVE TACTICS. Advergames are first of all characterised by a strong interplay between commercial and non-commercial or editorial content. As mentioned, such a mixture can prove to be confusing and children are often unable to distinguish between the

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78 Nairn and Hang (n 36).
79 For instance, Game Pill, a marketing-design company phrases it as follows: “Games offer individual users a personalised experience. It is this experience that gives users a high level of engagement and powerful recall that many brands desire.” Available at http://gamepill.com/gamification-advergaming-transmedia-our-guide-to-game-marketing-terms/.
80 See also Verdoodt, Clifford and Lievens (n 6).
81 See for instance the Kellogs games (https://www.clubkelloggs.ca/games/tonys-grand-slam/).
commercial message (reference to the product or service, or even the brand) and the non-commercial content, in casu the gaming elements (e.g. 'story', moving from one level to another). In this regard, Raney et al. found that if game players are not aware of the advertisements that are embedded within the games they play, their defences would be lower and they process commercial communication in a different manner. In addition, research on advergames promoting food brands showed that the immersive and interactive nature of the games had the potential to influence children’s preferences for the specific brands, even when they understood the persuasive intent of the game. More recently, De Jans et al. found that children especially requested the advertised product more after exposure to an advergame compared to other new formats such as sponsored content and they had less understanding of the persuasive intent of advergames compared to traditional advertising (i.e. television commercial or online banner).

Advergames as a technique may capitalise on the emotion of the games (i.e. that they are fun to play) by creating positive brand awareness and attitude towards the product or service. Games can improve moods and those in positive moods (i.e. happy) are less likely to process information in a systematic and critical way in comparison to those in negative moods, thus leaving them more open to persuasion. Indeed, it appears well established that mood or emotional state determines how individuals process information and influences whether they do so superficially or in detail, thereby having consequences on the effect of advertising campaigns. This effect is important considering that advergames have a positive effect on resulting intended and actual behaviour. Finally, as the advancements in technology allow for the personalisation of content (i.e. the targeting of certain games towards identified children), this may be particularly worrying given the positive effect of advergames on moods, the corresponding increasing effectiveness of advertising campaigns and the consequences for children’s commercial decision-making.

A CHILDREN’S RIGHTS PERSPECTIVE. On one side of the see-saw is the child’s right to development (article 6 UNCRC) which needs to be adequately protected, linked with inter

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82 Rozendaal and others (n 2).
85 Van Wezenbeeck and others (n 29).
87 Cauberghe and De Pelsmacker (n 34).
88 Rozendaal and others (n 2).
89 Hullett (n 67).
90 Mallinckrodt and Mizerski (n 84).
alia the protection against economic exploitation (article 32 UNCRC) right to play (article 31 UNCRC), freedom of thought (article 14 UNCRC) and privacy (article 16 UNCRC). The fact that children do not recognise advergames as having a commercial persuasive intent undermines their ability to process the message critically. Accordingly, children face the risk of being manipulated, which could arguably fall within the notion of economic exploitation.92 Gaming and play can play an important role in the development process of children. In this regard, new media technologies like mobile apps and online games can facilitate access to a variety of playful and social activities. However, the embedding of commercial messages straight into children’s gaming experience, could lead children to normalise the commercialisation of play. In turn, this may have a significant impact on how they think, feel and act in the marketplace.93 Finally, the collection of personal data presents a risk to children’s fundamental rights of privacy and data protection. In the context of children, personalisation techniques used in advergames may also affect the child’s right to self-development. Moreover, the best interest principle of the child demands an adequate protection of children’s privacy and personal data, by giving effect as far as possible to these fundamental rights.94 These rights should be balanced with the interests of businesses and their right to freedom of commercial speech. Nevertheless, the child’s best interest principle requires advertisers to take into account a child’s immaturity and vulnerability, which demands adequate protection and care.95

1.1.2 Blurred lines, mixed emotions and the existing regulatory framework

Conceptual distinction. The analysis of the protections of the regulatory framework in the context of advergames can be subdivided according to the conceptual differences between on the one hand the use of emotions in advertising techniques, and on the other hand the actual influence of such emotions on decision making.96 In relation to the latter, “a decision” (or contract) must be made in order to invoke the application of the legal protections (such as those found in the Unfair Commercial Practices Directive protecting consumers from being misled in transactional decisions). In contrast, the former focuses

92 Valerie Verdoott, 'The Role of Children’s Rights in Regulating Digital Advertising'.
94 And in which personal data has a broad scope, i.e. any information allowing an individual to be identified, directly or indirectly, ranging from a name over a birth date, e-mail address, IP address or photo. According to article 2 (a) of the European Data Protection Directive, personal data shall mean ‘any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity’; Article 29 Data Protection Working Party, ‘Opinion 4/2007 on the Concept of Personal Data. WP 136.’ (2007) 29 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> accessed 21 November 2017.
95 ECtHR 5 May 1979, X and Church of Scientology v. Sweden, Appn. 7805/77.
96 Verdoott, Clifford and Lievens (n 6).
more on the emotional appeal of the advergame in itself and the potentially deceptive mixing of commercial and non-commercial content therein.

A. The mixing of commercial and non-commercial content and advergames’ emotional appeal

Advergames and their emotional appeal. The use of emotions in advertising campaigns has long been recognised as significant. Marketers aim to evoke emotional responses in order to create awareness and positive brand association, and an emotional desire for a product or service. In this regard, article 18 of the ICC Consolidated Code notes that specifically in relation to children

“Marketing communications should not suggest that possession or use of the promoted product will give a child or young person physical, psychological or social advantages over other children or young people, or that not possessing the product will have the opposite effect.”

This appears to restrict advergames’ use of emotion to create a desire for a product or service in order to advance in the game (e.g. requiring the purchase of a particular product in order to get to the next level in the game). However, it is also important to note that advergames as a technique may capitalise on the emotion of the games (i.e. that they are fun to play) by creating positive brand awareness. Accordingly, the identification of such content needs to be made clear in order to allow the consumer to make informed choices in decision making without being unwittingly influenced.

Identification is the key requirement for advertisers. Although the importance of emotions and moods has long been empirically established by marketers and investigated by communication science researchers, the legal approach to advertising and emotion manipulation has been somewhat muted. According to Reed and Coalson, traditional protections in the context of advertising have focused on deceptive practices and misrepresentations by marketers. Such protections can be found in both legislative and alternative regulatory instruments (i.e. self- and co- regulation). In each of these instruments, the identification principle (i.e. commercial communication needs to be recognisable as such) returns in some form as the main protection against misleading advertising. However, the question is whether these instruments apply to advergames.

97 Reed and Coalson (n 58).
99 E.g. the ICC Consolidated Code.
INFORMATION SOCIETY SERVICES. At the EU level, the e-Commerce Directive\(^{100}\) contains certain provisions relating to commercial communications\(^{101}\), which are applicable to advergames. More specifically, the Directive stipulates that commercial communications “which are part of, or constitute, an information society service” must clearly identify promotional competitions or games and present the conditions for participation in a clear and unambiguous way and make them easily accessible.\(^{102}\) Information society services are defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”\(^{103}\) The Directive clarifies that services financed by advertising are included under the scope of the Directive (for instance this could include access to website content).\(^{104}\) The Court of Justice of the European Union (“CJEU”) has supported this by finding that services, as defined by Article 57 of the Treaty on the Functioning of the European Union (“TFEU”), do not necessarily require payment by the users themselves.\(^{105}\) The European Data Protection Supervisor (“EDPS”) has stated in its analysis of the overlap between data protection, consumer protection and competition law that it works from the assumption that all three of these areas are applicable to “free” services.

AUDIOVISUAL MEDIA SERVICES. In addition to the e-Commerce Directive, the Audiovisual Media Services Directive (“AVMSD”) contains certain principles and substantive requirements that are applicable to ‘audiovisual commercial communication’. However, the application of this legal instrument to advergames is unlikely. Although advergames in theory could be interpreted as falling within the definition of an audiovisual commercial communication as defined by Article 1(h) AVMSD\(^{106}\), recital 22 stipulates that the definition of an audiovisual media service

\(^{100}\) The main objective of this legal instrument is to establish an internal market for information society services. One of the topics that required regulation and is necessary to achieve this objective is commercial communications in online services. European Parliament and Council, 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 (Directive on Electronic Commerce) (2000).

\(^{101}\) Under Article 2(f) of the e-Commerce Directive, commercial communication is defined as “any form of communication designed to promote”. This definition should be interpreted broadly and entails both direct and indirect promotion, as a way to prevent circumvention of the ban on commercial communications for certain products (e.g., tobacco, alcohol).


\(^{103}\) Recital 17 e-Commerce Directive.

\(^{104}\) Recital 18 e-Commerce Directive.


\(^{106}\) “Images with or without sound that are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or self-promotional purposes. Forms of
should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.

The recital goes on to note that

“games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as online games and search engines (...) should also be excluded from the scope of this Directive.”

As such, the precise scope of application of the Directive is somewhat unclear as although advergames are games *per se*, one could argue that the game itself is merely the means for the delivery of the audiovisual commercial communication.  

In this regard, certain authors have argued in favour of the applicability of the AVMS Directive to advergames, but their arguments are hardly concrete and convincing. Of particular significance for advergames would be Article 9(1)(a) which bans surreptitious advertising and thus promotes the principle of transparency. The future of the AVMS Directive is currently being debated but there are no indications that the scope will broaden to include advergames.

**Self-regulation.** Similar to the ICC Consolidated Code in article 9 emphasises the fact that marketing communications “should be clearly distinguishable as such, whatever their form and whatever the medium used”. This article goes on to state that “when an advertisement appears in a medium containing news or editorial matter, it should be so presented that it is readily recognisable as an advertisement and the identity of the advertiser should be apparent”. In addition, the Code specifically provides in article 18 which relates to ‘Children and young people’ that marketers should not make it difficult to distinguish between reality and fantasy and the marketing communications aimed at children should be easily distinguishable to them as such.

**Advertising cues and ad literacy.** Thus, it can be concluded that marketers are legally required to identify advergames as commercial content, so that consumers are able to make informed decisions without being unwittingly influenced. In practice, the principle of identification has led certain advertisers to use a type of labelling or ‘cues’ to make

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107 Verdoodt, Clifford and Lievens (n 6).


109 For instance, Facebook uses the term ‘sponsored’ for advertising messages that appear in the newsfeed of Facebook users. A ‘Sponsored Story’ is a mix between user-generated content and pro-motional content. A user’s action related to a promotional message is shown with a promotional message in ‘News Feed’, see AdLit IWT/SBO report 2018
commercial content recognisable. According to van Reijmersdal et al., disclosing the commercial nature of advergames allows those in a positive mood to become more critical of the advertising message following disclosure of the commercial intent. More specifically,

"the disclosure made them more aware of the persuasive nature of the advergame as indicated by higher persuasion knowledge, which in turn led to more brand recall and more negative game and brand attitudes than without a disclosure. These results seem to indicate that, with a disclosure, people in a positive mood process the advergame on a more elaborate and critical level than without a disclosure. In this situation, disclosures activate people’s persuasion knowledge; that is, their knowledge about the commercial source and persuasive intent of the advergame.”

The authors found that as those in negative moods were already critical of the advergame they were more aware and, as a result, the disclosure of the advergame’s commercial nature failed to have a discernible impact in contrast to those in positive moods. The link between emotions and decision making is therefore significant and it seems apparent that disclosing the commercial intent of advergames and adequately identifying the commercial content, can allow the consumer to become more aware and critical of the marketing message. In line with these findings, De Pauw et al. found that children can be empowered by explaining them where to look for advertising tactics as well as how these tactics operate (e.g. by displaying an advertising cue). The authors argued that an increased tactic awareness and comprehension of new forms of commercial communication would allow children to make a conscious decision about commercial products or services. According to Hudders et al., identification of the commercial message is a necessary precondition for advertising literacy to have an effect.

**Limits to the identification principle.** From a substantive perspective, the integration of the commercial and non-commercial content presents a clear challenge in relation to the identification principle. Although the industry has created several labels and tools to signpost commercial content and enhance transparency, these tools will only be effective if all factors are considered. This includes elements such as cross-media use (where

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111 ibid.
112 Verdoost, Clifford and Lievens (n 6).
113 More specifically, children were able to take into account the perspective of other children, which is essential to form a well-balanced moral judgement about advertising. De Pauw and others (n 30).
uniform labels are used across different media and different advertising formats), adoption processes by users or viewers, specific cognitive characteristics and levels of advertising literacy of specific user groups (such as minors) and regular monitoring of efficiency.\textsuperscript{114} Recent studies on the effectiveness of the current standard of implementation of this requirement showed that disclosure characteristics may have an important impact on visual attention of individuals and in turn visual attention on advertising recognition. ROOZENDAAL and VAN REIJMERSDAL stressed that disclosures can only contribute to increased transparency if viewers see the disclosure, understand it and are given the opportunity to process it (i.e. store it in their memory). In order for this process to be successful, the disclosure needs to be formulated in clear and understandable language and designed and placed in such a manner that viewers easily spot it. In addition, WOJDYNISKI and EVANS discovered that the often used words ‘sponsored’ or ‘advertising’ led in fact to greater advertising recognition, compared to vague disclosure language. However, in a second study, the authors analysed the actual placement of the advertising cue and found that the technique often used by industry (i.e. the top-placed disclosure) was seen as relatively ineffective in attracting the visual attention of the consumer.\textsuperscript{115} Conversely, a middle-positioned disclosure or a disclosure within the content could be more effective in garnering attention and increasing consumer awareness.\textsuperscript{116} These studies highlight the need for a more structured, standardised and evidence-based approach to the implementation of the identification requirement.

B. Deception, personalisation and influenced decision making

UNFAIR COMMERCIAL PRACTICES DIRECTIVE. In addition, it is important to assess the consumer protection mechanisms as found in the Unfair Commercial Practices Directive (UCP Directive). In general, the UCP Directive protects consumers (such as children) from unfair business-to-consumer commercial practices.\textsuperscript{117} Such commercial practices include commercial communication such as advertising and marketing by a trader, if it causes the consumer to take a decision that he or she would not otherwise have taken.\textsuperscript{118} The

\begin{footnotesize}
\textsuperscript{116} ibid.
\textsuperscript{118} Art. 2(d) in conjunction with Art. 5 UCPD.
\end{footnotesize}
Directive stipulates that commercial communication needs to be “directly connected with the promotion, sale or supply of a product to consumers”.\textsuperscript{119} In this regard, it could be questioned whether branding (e.g. promoting a brand’s image rather than a specific product) would also fall under the definition, as it does not directly promote a product. According to Trzaskowski, this exclusion does not seem to be intended by the EU legislators, yet it does complicate marketing regulation unnecessarily.\textsuperscript{120} Although the idea of the Directive is to protect all consumers from unfair commercial practices, it takes as a benchmark the average consumer, who is “reasonably well-informed and reasonably observant and circumspect”,\textsuperscript{121} taking into account social, cultural and linguistic factors. Especially in relation to vulnerable consumers\textsuperscript{122} such as children, who are particularly susceptible to advertising, the assessment would be carried out from the perspective of the average member of that particular group.\textsuperscript{123} Furthermore, there is a two-step criterion for determining the unfairness of a particular advertising technique: first, the lack of professional diligence of the trader and second, the influence on the economic behaviour of the consumer.\textsuperscript{124} The actual assessment of determining what a typical reaction of a child would be in relation to a specific advergame is left up to the national courts and authorities, while taking into account the case law of the CJEU.

**Misleading commercial practice.** Deception is one of the examples the Directive mentions, where unfairness should be assumed in particular.\textsuperscript{125} There are two types of deception, (1) misleading commercial practices and (2) misleading omissions. A commercial practice will be misleading if an average consumer takes a transactional decision that he would normally not have taken, because he is deceived.\textsuperscript{126} The assessment should take into account the facts and circumstances of the specific case. Moreover, particular points of reference include the nature of the product, its main characteristics, the price, etc.\textsuperscript{127} A misleading omission on the other hand concerns material information needed by the average consumer, to make an informed transactional decision, thereby causing him or

\textsuperscript{119} Article 2 (e) Unfair Commercial Practices Directive.


\textsuperscript{123} Recital 19 Unfair Commercial Practices Directive.


\textsuperscript{125} ibid.

\textsuperscript{126} Article 6 Unfair Commercial Practices Directive.

\textsuperscript{127} See Article 6 (1) subparagraphs a–g Unfair Commercial Practices Directive.
her to take a decision which he or she would not have taken otherwise.\textsuperscript{128} Finally, one misleading practice is under all circumstances unfair and prohibited (blacklist), i.e. advertisements which use editorial content to promote a product where a trader paid for the promotion but did not make this clear in the content or by accompanying images or sounds that would be clearly identifiable for the user.\textsuperscript{129} Thus, it seems that providing an advergame without some sort of labelling of its commercial intent could fall within the black-listed misleading practice.

**Children and Traditional Contractual Protections.** Aside from general consumer protection mechanisms protecting informed commercial decision making, it should be noted that traditionally there are additional legal protections for children, which safeguard their innocence. More specifically, protections for children have focused on their capacity to contract. For instance, in common law only certain contracts with minors are entirely valid, namely contracts for necessaries and beneficial contracts of service. All other contracts are voidable at the option of the minor reflecting their vulnerable status and restricted capacity to contract. Similar protections have evolved in civil law jurisdictions, the extent of which is dependent on whether or not the minor has reached the necessary level of discernment.\textsuperscript{130} However, it should be noted that such protections fail to adequately deal with the emotional conditioning nature of advergames as they focus on the actual purchasing rather than the establishing of the particular desire for a product or service. As a result they may have restricted application as the mere provision of advertising does not in itself create a contractual relationship as it would constitute an offer.

**Personalisation.** Advergames can also be used as mechanisms for gathering personal data with access to the game potentially conditional upon the provision of this information thus forming an agreement. As such, it can be argued that the contractual protections mentioned supra could be applicable in such a context. Advergames could present a means of gathering children’s valuable personal data in exchange for the accessing of content services. Such data gathering and its application present additional risks to children given the increase in computing capacity. With the proliferation of digital technologies, children are increasingly gaining access to the internet where they act as consumers thereby engaging in contractual agreements on a much more frequent basis.

\textsuperscript{128} Article 7 Unfair Commercial Practices Directive.
\textsuperscript{129} Annex I, point 28 and 11 of the Unfair Commercial Practices Directive.
\textsuperscript{130} For instance, according to the Belgian Civil Code, if a minor has not reached the necessary level of discernment (i.e. 12 years old), any legal actions would be invalid. This means that the court is obliged to declare the agreement invalid on request of the parents or the concerned minor, whereas the contracting party cannot request invalidation (Article 1125 Belgian Civil Code). If the minor has reached the necessary level of discernment, it will depend on the impact of the legal action, as well as on whether or not the action prejudiced the minor (Article 410 Belgian Civil Code).
Although online contracts involving monetary consideration should practically necessitate adult participation (i.e. as children generally do not have access to online payment methods), contracts involving non-monetary consideration (e.g. access to social media in exchange for personal data as consideration) often slip under the radar. This reflects the general public's lack of awareness of the underlying legal significance associated with online browsing.\textsuperscript{131} Such data gathering invokes the application of the data protection and privacy framework and allows for the personalised targeting of marketing campaigns. Targeting children with personalised advertising forms a second use case, which will be discussed infra.

1.2 Conclusion

**Legally compliant, but not child-friendly?** From the analysis provided above, it can be concluded that a myriad of provisions apply in the context of advergames, presenting certain legal issues. This jigsaw reflects the complex nature of the area and the various competing interests involved. Having traced the framework, it appears difficult to conclude that advergames in their current form as a mechanism for advertising are de facto compliant. Given their reliance on the merging and blurring of commercial and non-commercial content, there is a misalignment between modern advertising practices and traditional consumer protection standards. By directly connecting positive achievements within the advergame to brand identifiers, children’s emotions may be capitalised upon without their knowledge. Specific mechanics within the advergames could further push children to engage with the brand in order to progress in-game. These topics go to show the paramount importance of correct identification of commercial content in advergames.

**Legality versus enforceability.** However, it remains unclear why such practices have escaped scrutiny. Scalability vis-à-vis investigations on the enforcement of legal requirements in an online environment remains an issue in this regard. This may provide some explanation, nevertheless it does not provide a justification to truly assess the legality of this practice and to legislate for the social implications associated with such invasive means of advertising. Moreover, given the importance of data-driven business models and the emergence of increased personalisation, the gathering of children’s personal data and the potential for the personalisation of advergames raises concerns in the context of children’s rights which need to be addressed. This is not to conclude, however, that advergames are invariably in violation of the legal requirements. Indeed it may be possible to satisfy the requirements from a purely legal perspective, but regard must be had for best practice recommendations given the potential negative impact on children’s development.

\textsuperscript{131} Verdooldt, Clifford and Lievens (n 6).
NEED FOR STANDARD DISCLOSURES AND QUALITATIVE REQUIREMENTS. Advergames present clear challenges as they involve the mixing of commercial and non-commercial content, rendering it difficult for consumers in general, and children in particular, to adequately recognise the marketing purpose. The legislative response to these practices requires the adequate signposting of commercial content. However, a consistent interpretation of how to implement this identification is currently missing. The creation of labels or cues indicating the commercial nature of an advergame and enhancing transparency about commercial motives could be a possible solution. However, the development of such techniques would need to take into account all the different elements (supra). Moreover, such qualitative advertising standards should be adopted in a collaborative manner, by various responsible regulatory authorities and the advertising industry.

ADVERTISING LITERACY. In order to adequately deal with these issues a comprehensive and collaborative solution is required. It is crucial to ensure that the next generation of internet users is better educated and prepared for coping with new advertising techniques. In this regard, it should be noted that advertising literacy does not end with identification. Users must also be aided in order to help them understand the persuasive intent of commercial communications. Such advertising-literacy development would allow users to critically evaluate commercial communications and understand their persuasive intent. In other words: advertising-literacy does not merely seek to address singular advertising formats, such as advergames, but instead aims to develop how users interact with commercial communications.

PRECAUTION IS BETTER THAN CURE. From an ethical point of view, it has been questioned whether it is acceptable or responsible to target young consumers with commercial messages, if they do not recognise them as such. Even though there is currently little evidence for a causal link between the emergence of new means of advertising and targeting (such as advergames) and negative sociological developments (e.g., the obesity epidemic amongst children), it is perhaps necessary to consider a precautionary approach in the context of children. The precautionary principle is certainly not a new concept and despite certain criticisms its application in the context of the protection of children should be more acceptable even for harsh critics. Hence, the importance of this matter extends beyond a purely legal analysis and requires a balancing of socio-economic

132 Clifford and Verdoott (n 114).
interests, which a legislative framework should reflect, in order to align itself with children’s rights and the best interest principle.
2. Targeting children with personalised advertising

The concept. Increased computing capabilities allow commercial entities to track children’s online behaviour and preferences, on the basis of which they are then profiled and targeted with tailored marketing campaigns. While the advertising industry argues that personalised advertising (e.g. online behavioural advertising or location-based advertising) is more relevant and efficient, the tracking, profiling and targeting of children may raise significant questions from a children’s rights perspective.

2.1 Personalisation: Tracking, profiling and targeting, three different steps

Before personalised advertisements are targeted at children, a chain of events takes place.

Tracking. First, children’s personal data are collected, on the basis of which the commercial message may be tailored. For instance, for online behavioural advertising – a specific form of personalised advertising – this would be the tracking or monitoring of children’s online behaviour. It may consist inter alia of tracking their search history, media consumption (e.g. videos, songs, news articles) and communication data. The majority of existing online tracking technologies is based on cookies, or use cookies as the backbone. KOSTA clarifies that cookies are files that contain certain information on specific users and their interests and preferences. The information is transmitted via

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135 Pew Internet and American Life Project, ‘Teens, privacy and online social networks – How teens manage their online identities and personal information in the age of MySpace’ (2007).
137 BOERMAN et al. define online behavioural advertising as: “the practice of monitoring people’s online behaviour and using the collected information to show people individually targeted advertisements”. Boerman, Kruikemeier and Zuiderveen Borgesius (n 137). According to the IAB Europe Framework, OBA is “the collection of data from a particular computer or device regarding web viewing behaviours over time and across multiple web domains not under common control for the purpose of using such data to predict web user preferences or interests to deliver online advertising to that particular computer or device based on the preferences or interests inferred from such web viewing behaviours.” See also: Article 29 Working Party, ‘Opinion 2/2010 on online behavioural advertising’ (2010) WP171.
138 Other forms include location-based advertising or for instance social ads including friends’ names, or advertising based on other elements such as a person’s age, sex, etc.
141 Kosta (n 11).
the cookie from a server to the web browser of the user and back each time the user accesses a server’s page using the same browser. As a result, KOSTA explains, the website ‘knows’ what language or the type of advertising specified users prefer.142 Other popular technologies include plugins and device fingerprinting.143 In 2015, an international network of data protection authorities conducted a privacy sweep of 1494 children’s websites and apps, which showed that 67% of the websites and apps were in fact collecting children’s personal data and 50% shared this personal data with third parties.144

PROFILING. A second step that forms part of the serving of personalised advertising consists of profiling. Profiling can be understood as a data mining method, which involves data harvesting and conversion of data into profiles. More specifically, BOSCO et al. describe profiling as an (semi-)automated process to examine large data sets in order to create classes or categories of characteristics.145 The categories can be used to generate profiles (i.e. sets of correlated data) of inter alia individuals, groups or places. Subsequently, statistical methods can be used to generate analytical information regarding future trends or to predict future behaviours or developments. In other words, profiling transforms data into a new form of knowledge, by identifying patterns that are invisible to the human eye.146 A similar definition was adopted in the Recommendation of the Committee of Ministers of the Council of Europe on the protection of individuals with regard to automatic processing of personal data in the context of profiling.147 According to that Recommendation, profiling is an automatic data processing technique that consists of applying a ‘profile’ to an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.148 This Recommendation specifies that profiling entails that data on individual behaviour or characteristics is collected, which is analysed to correlate certain

142 Ibid.
148 Ibid.
behaviour(al characteristics), and then the correlation is applied to an identified or identifiable person in order to deduct previous, current or future characteristics.

TARGETING. Third, on the basis of a specific consumer profile, advertisers tailor their commercial messages to have a more persuasive effect. Messages are targeted at persons, including children, who have been profiled as potentially interested in or receptive to the products or services that are promoted.

### 2.1.1 Persuasive tactics and children’s rights implications

**Persuasive tactics.** The persuasive tactics of personalised advertising formats such as online behavioural targeting or location-based targeting have been described supra (Chapter 1, section 2.2).

**A children’s rights perspective.** In the context of personalised advertising, several children’s rights are at stake. The largely opaque practices and techniques employed, paired with children’s low level of advertising literacy vis-à-vis personalised advertising most importantly affects children’s right to development (article 6 UNCRC), right to privacy (article 16 UNCRC) and right to protection against economic exploitation (article 32 UNCRC). In addition, article 3 UNCRC states that in all actions concerning children their best interests should be the primary consideration (article 3 UNCRC).¹⁴⁹ In other words, this principle requires governments, public and private bodies to conduct child impact assessments and evaluate the impact of any proposed law, policy or decision on children’s rights.¹⁵⁰ The first paragraph of article 3 UNCRC seems to indicate that the best interests of a child must be assessed individually. However, in many decisions related to the digital environment this is not what happens in practice.¹⁵¹ For instance, when setting an age threshold from which a child can consent with the processing of his or her personal data in the context of information society services, rather than an individual assessment, the best interests of children as a group or in general are at the centre of the consideration. The principle also requires that States must ensure that the best interests of the child are taken as a primary consideration in decisions and actions undertaken by the private sector. In the context of personalised advertising, this could be interpreted as requiring that the parties involved in the advertising chain must consider the best interests of children when profiling children, and tailoring and targeting their advertisements to this particular group of consumers.

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¹⁵⁰ Ibid.

From the perspective of the rights to development, privacy and protection from economic exploitation, it is important to acknowledge that children often do not grasp the scope of underlying data processing activities and business models of online actors. Moreover, research has shown that children generally consider themselves as having a right to privacy online from their parents or peers (i.e. social privacy), but do not understand that their privacy may also be infringed upon by (State or) commercial actors. The right to privacy also has an important participatory dimension for children, as it is essential for their individual autonomy and self-determination, and a precondition of participation. It is important to realise that personalised advertising has the capacity not only to compartmentalise children, but also to shape their preferences and interests accordingly, ultimately affecting their autonomy and development. In this regard, Savirimuthu warns that the increased role of algorithms in defining children’s consumer experience should not disregard the value of a child’s emotional space, which should not be subject to the inside the box-thinking that underpins profiling-based decisions.

Advertisers’ interests. These considerations should be offset against the fact that advertising revenue allows for the development of children’s media content and digital platforms. At the moment, the dominant business model for online services remains advertising-based. Users often do not have to pay for the services, but in exchange personal information is collected and advertisements are part of the environment. As such, the creation of content and online spaces enables the exercise of other children’s rights, including inter alia their right to information, to access and to participation in digital media. Moreover, for children to grow up to be critical, informed consumers, within these spaces they should have the opportunity to develop and practice advertising literacy skills which are needed to make balanced commercial decisions. The regulatory framework in place, encompassing both self-regulation and legislation, should enable the reconciliation of the interests of children and advertisers in relation to personalised advertising.

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2.1.2 Personalised advertising in the current regulatory framework

A. Collecting and processing of children’s personal data under the GDPR and the proposed ePrivacy Regulation

Two EU instruments. At the EU level, the collection and processing of children’s data is covered by the General Data Protection Regulation (“GDPR”) and the ePrivacy Directive (infra). The GDPR, which was adopted by the European Union Parliament and Council on 27 April 2016, and will be applicable as of 25 May 2018, applies to (most often fully or partially automated) processing of personal data (Article 2 GDPR). This revised regulatory framework is underpinned by the idea that individuals should have control of their own personal data. The GDPR pays particular attention to children and acknowledges that they merit ‘specific protection’ regarding their personal data. This is because children are less aware of the risks and the consequences of the processing of their personal data on their rights. Moreover, the GDPR recognises that the processing of children’s personal data may result in risks to their rights and freedoms. Specific protection should be awarded to children especially when their personal data is processed in the context of marketing and profiling, or in relation to services offered directly to a child. Advertisers that want to process children’s personal data for the delivery of personalised advertising will have to comply with the principles and

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156 Until then the Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281) remains applicable.
157 As well as to “processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system” (Article 2 GDPR).
158 Processing is “any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction” (Article 4(2) GDPR).
159 Personal data is “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person” (Article 4 (1) GDPR).
160 Recital 7 GDPR.
161 Recital 38 GDPR.
162 Recital 75 GDPR.
163 Recital 38 GDPR.
164 It has been argued by behavioural targeting companies that, as long as they do not tie names to data they hold about individuals, they do not process any personal data, and that, therefore, the data protection framework does not apply to them. ZUIDERVEEN BORGESIUS, however, argues that when data is used to single out an individual to target him or her with tailored advertising, the data protection legislation should apply: ZUIDERVEEN BORGESIUS (n 10).
requirements\textsuperscript{165} for data controllers\textsuperscript{166} and the specific protection for children in the GDPR. One of these requirements entails that personal data may only be processed to the extent that there is a ‘legitimate ground’ justifying the processing.\textsuperscript{167} In the context of personalised advertising, the consent of the data subject\textsuperscript{168} or the legitimate interest of the controller are possible legitimization grounds. If the former is relied upon as a legitimate ground for processing children’s personal data, article 8 of the GDPR requires verifiable parental consent for the processing of personal data of children under 16 (or lower\textsuperscript{169}) in the context of ‘information society services’\textsuperscript{170} directly offered to a child.\textsuperscript{171} Regarding the latter ground, recital 47 GDPR specifies that ‘direct marketing’ may constitute a legitimate interest for the controller and hence offer a legitimation ground other than the consent of the data subject.\textsuperscript{172} This, however, must entail a careful balancing of the legitimate interest of the controller against the interests, fundamental rights and freedoms of children.\textsuperscript{173} If children are involved, the GDPR clarifies that their interests may override those of the controller more easily, implying a heavier responsibility for controllers using this ground for processing (Article 6, 1) (f) GDPR). Yet, in relation to direct marketing it has been argued by the Belgian Privacy Commission that obtaining consent remains a best practice.\textsuperscript{174} Also in relation to online behavioural advertising (e.g. social media, search engines, apps) often rely on personalised advertising as an essential element of their business model.\textsuperscript{171} For more information see Eva Lievens and Valerie Verdoot, ‘Looking for Needles in a Haystack: Key Children’s Rights Issues in the General Data Protection Regulation’ [2017] Computer Law & Security Review.

\textsuperscript{165} This includes inter alia the principles of fairness, transparency, data minimisation, accuracy, purpose limitation, storage limitation, but also obligations with regard to data subjects’ rights. For a comprehensive overview see Brendan Van Alsenoy, ‘Regulating Data Protection: The Allocation of Responsibility and Risk among Actors Involved in Personal Data Processing’ (2016) <https://lirias.kuleuven.be/handle/123456789/545027> accessed 31 August 2017.

\textsuperscript{166} A data controller is the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; Article 4 (8) GDPR.

\textsuperscript{167} Article 6 GDPR.

\textsuperscript{168} The consent has to be freely given, specific, informed and unambiguous. The definition of consent can be found in recital 32 GDPR and article 4 (11) GDPR.

\textsuperscript{169} Member States may lower this threshold to a minimum of 13 years. For a mapping of the recent national guidance and proposals in this context, see E. LIEVEN and I. MILKAITE (2017). Age of consent in the GDPR: mapping recent national guidance and proposals, https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=1965202 accessed on 24 October 2017.

\textsuperscript{170} Information society services (e.g. social media, search engines, apps) often rely on personalised advertising as an essential element of their business model.


\textsuperscript{172} Recital 47 GDPR.

\textsuperscript{173} In this regard, MACENAITE and KOSTA argue that this processing ground potentially protects children more than relying on consent, should data controllers fully consider all factors of data processing and ensure children’s interests and fundamental rights are duly taken into account. Milda Macenaite and Eleni Kosta, ‘Consent for Processing Children’s Personal Data in the EU: Following in US Footsteps?’ (2017) 26 Information & Communications Technology Law 146.

\textsuperscript{174} BELGIAN PRIVACY COMMISSION (2013). Recommendation no. 02/2013 of 30 January 2013 regarding direct marketing and the protection of personal data, 12.
advertising it has been argued by scholars that consent is the only appropriate legitimization ground.\textsuperscript{175}

**Proposal for an ePrivacy Regulation.** The ePrivacy Directive\textsuperscript{176} contains rules for the processing of personal data in the electronic communication sector and the free movement of such data and of electronic communication equipment and services.\textsuperscript{177} As such, it forms an additional layer of protection, complementing\textsuperscript{178} the GDPR. At the moment, the current ePrivacy Directive, which already covers popular tracking technologies such as cookies\textsuperscript{179}, is under review. In January 2017, the European Commission launched its proposal for an ePrivacy Regulation,\textsuperscript{180} which is set to replace the ePrivacy Directive and align the rules for electronic communications with the new standards of the GDPR.\textsuperscript{181} The proposed Regulation significantly expands its scope of application, *inter alia* by explicitly including Over-the-Top communications services or ‘OTTs’ (i.e. online services that could to a certain extent substitute traditional media and telecom services, such as Skype, WhatsApp, Facebook Messenger).\textsuperscript{182} It also brings about important changes for the players involved in targeted advertising, by requiring the same type of consent as in the GDPR for the placement and accessing of cookies or the use of other tracking technologies (e.g. device finger printing).\textsuperscript{183} According to the most recent

\textsuperscript{175} Zuiderveen Borgesius (n 44).


\textsuperscript{177} Recital 24 ePrivacy Directive: ‘any information’ that is stored on the terminal equipment of a user, rather than personal data.

\textsuperscript{178} It is a lex specialis to the GDPR and as such complements it.

\textsuperscript{179} Article 5(3) of the Directive provides that the installation of and access to cookies on users terminal equipment (e.g. smartphones, laptops) is only allowed with their consent, except for ‘functional cookies’ or ‘similar technologies’.


\textsuperscript{181} The European Commission hopes to finalise the Regulation by the 25th of May 2018, when the GDPR becomes applicable. The draft proposal was discussed and voted by the LIBE committee of the European Parliament (EP) in October 2017.

\textsuperscript{182} Regarding territorial scope, it does not only envisage entities in the EU, but any electronic communication service provided to end-users within the EU and devices located in the EU, regardless of the service provider’s location.

\textsuperscript{183} Art. 7(4) of the GDPR requires consent to be ‘freely given, specific, informed and unambiguous’ and must be expressed by way of a ‘statement or by a clear affirmative action.’ Recital 20 of the Parliament’s draft legislative resolution requires in relation to tracking that “users should receive all information about the intended processing in clear and easily understandable language.” EUROPEAN PARLIAMENT, Draft legislative
draft legislative resolution of the European Parliament, users need to be provided with granular settings for consent, distinguishing between different categories: (1) tracking for commercial purposes or for direct marketing for non-commercial purposes (e.g. behavioural advertising); (2) tracking for personalised content; (3) tracking for analytical purposes; (4) tracking of location data; (5) providing personal data to third parties (including providing unique identifiers to match with personal data held by third parties). Furthermore, one of the amendments explicitly states that the regulation should prevent the use of tracking or cookie walls (i.e. a barrier that users can only pass if they consent to tracking by third parties). According to the EP, “tracking walls do not help users to maintain control over their personal information and privacy or become informed about their rights”.186

NO SPECIFIC PROTECTION FOR CHILDREN. Yet, whereas the GDPR explicitly recognises children as a vulnerable group of individuals that deserve specific protection when it comes to the processing of their personal data (supra), especially in the context of profiling and marketing, the original proposal for an ePrivacy Regulation contained no references to children. However, as children are increasingly targeted directly by services tailored to a young audience it would make sense to align the proposed Regulation with the GDPR, by recognising that children need specific protection when it comes to the processing of their communications data. As mentioned above, research has shown that children have little or no understanding of and knowledge about the tracking technologies used and the extent and sensitivity of the data collected for personalised advertising. These findings resonate in the viewpoint of the Article 29 Working Party, who argued in 2013 that in the best interest of the child companies “should not process children’s personal data for behavioural advertising purposes, neither directly nor indirectly, as this will be outside the scope of a child’s understanding and therefore exceed the boundaries of lawful processing”. Moreover, it has been argued in this context, for instance by BEUC, that specific limitations on the collection and use of children’s communication data are


184 Recital 23 EP Draft Legislative Resolution.
186 Recital 22 EP Draft Legislative Resolution.
187 Most notably, article 8 GDPR is not reflected in the proposal.
188 This includes a reference to the specific standard of consent as introduced by Article 8 GDPR.

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needed.\textsuperscript{190} In the Opinion of the Committee on the Internal Market and Consumer Protection,\textsuperscript{191} these ideas were integrated in a proposal for a new recital 16a:

“Regulation (EU) 2016/679 of the European Parliament and of the Council explicitly recognises the need to provide additional protection to children, given that they may be less aware of the risks and consequences associated with the processing of their personal data. This Regulation should also grant special attention to the protection of children’s privacy. They are among the most active internet users and their exposure to profiling and behaviourally targeted advertising techniques should be prohibited.”

Parallel to the consideration included in recital 38 of the GDPR, a new recital 23a was proposed confirming the need for specific protection with regard to children’s online privacy, as they are less aware of the risks and consequences associated to their online activities, as well as less aware of their rights. For that reason, the IMCO Opinion stresses that specific safeguards are necessary in relation to the use of children’s data, notably for the purposes of marketing and the creation of personality or user profiles. As a result of these considerations, the Opinion proposed a new paragraph 1 to be added to article 6 asserting that

“Electronic communications data that is generated in the context of an electronic communications service designed particularly for children or directly targeted at children shall not be used for profiling or behaviourally targeted advertising purposes”.

In addition, a new paragraph 4a to article 8 was proposed stating that “\textit{terminal equipment that is intended particularly for children’s use shall implement specific measures to prevent access to the equipment’s storage and processing capabilities for the purpose of profiling of its users or tracking their behaviour with commercial intent.” However, in the end, these amendments, which would have had a significant impact on current advertising practices that target and personalise commercial messages to and for children, were not included in the EP’s Draft Legislative Resolution.

**Profiling of Children.** In relation to the profiling of children, recital 75 GDPR states that processing personal data “\textit{in order to create or use personal profiles}” may give rise to risks


to the rights and freedoms of natural persons. As profiling is a complex and ‘invisible’ process, which is very difficult to understand for adults, let alone children, the GDPR did aim to introduce specific protection for children in relation to profiling. First, it is recognised in recital 38 that circumstances in which personal data of children are processed in order to create personal or user profiles require extra protection. There is no further guidance, though, as to how this protection should be put into practice. In any case, data subjects must be informed about the fact that profiling is being deployed and the potential consequences thereof. Especially when this occurs vis-à-vis children, the information provided will need to be clear and understandable for them. In relation to profiling for direct marketing purposes, data subjects, including children, also have the right to object at any time to profiling to the extent that it is related to direct marketing. The data controller needs to clearly and explicitly inform the data subject of this right. Second, according to recital 71, a decision which may include a measure evaluating personal aspects relating to a data subject, which is based solely on automated processing and produces legal effect for or similarly significantly affects the data subject, should not concern children. In its recent guidelines on automated individual decision-making and profiling, the Article 29 Working Party ("Working Party") confirms that there is no absolute prohibition on the profiling of children in the GDPR. Indeed, the Working Party recognises that under certain circumstances it may be necessary for controllers to carry out such decision-making, for instance to protect children’s welfare. Nevertheless, the Working Party stresses that targeted advertising may, depending on the particular characteristics of the case, have a ‘similarly significant’ effect on individuals. Especially in relation to children, the Working Party recognises that they “can be particularly susceptible in the online environment and more easily influenced by behavioural advertising” and, therefore, “organisations should, in general, refrain from profiling them

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192 Recital 75 GDPR underlines that the processing of personal data may result in a risk to the rights and freedoms of natural persons, in particular “[...] where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles” (emphasis added by the authors).


194 LIEVENS and VERDOO DT (n 52).

195 Recital 60 GDPR.

196 Article 12 GDPR. LIEVENS and VERDOO DT (n 52).

197 Recital 70 and Article 21, (2) GDPR.

198 Recital 70 GDPR.

199 Recital 71, first paragraph, final sentence GDPR.

200 However, the Working Party recommends data controllers not to rely upon the exceptions in Article 22 (2) GDPR to justify such profiling (i.e. necessary for the performance of a contract, authorised by law, consent of the data subject). ARTICLE 29 DATA PROTECTION WORKING PARTY (2017). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679.
Interestingly, it should be noted that a ‘child’ is not defined in the GDPR. The question thus arises whether this statement by the Working Party refers to all under 18-year olds. The same observation can be made in relation to the EP draft legislative resolution on the e-Privacy Regulation.

**CHILDREN’S RIGHTS IMPLICATIONS.** From a children’s rights perspective, a number of crucial concerns arise with regard to the rules on the profiling of children. It has been argued that profiling children may restrict their right to privacy, as well as their right to development.\(^{202}\) According to Ariely and Berns, the creation of profiles may negatively impact children’s development, as the collection and use of personal data for the purpose of profiling may undermine children’s rights to experiment with and critically reflect upon their interactions.\(^{203}\) In that regard, the lack of control by children over their personal data may harm their capacities to develop, get to know and experiment with their own identity.\(^{204}\)

**B. Personalised advertising in the Unfair Commercial Practices Directive?**

**CONSUMER PROTECTION.** Another layer of protection for children in the context of personalised advertising may be found in EU legislation on unfair commercial practices (i.e. the Unfair Commercial Practices Directive, “UCP Directive”).\(^{205}\) Aside from protections against misleading advertising\(^ {206}\), the UCP Directive protects consumers against so-called ‘aggressive’ commercial practices. Marketing techniques are deemed aggressive if they “by harassment, coercion or undue influence significantly impair the freedom of choice or conduct of the average consumer”.\(^ {207}\) While actual harassment or coercion (e.g. the use of physical force) can hardly be argued to occur in the context of personalised advertising, undue influence could perhaps arise. Article 2 (j) of the UCP Directive specifies that undue influence means “exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision”. In this regard, the European Consumer Organisation (BEUC) has argued that advertisers hold a position of power as they collect a lot of personal information of

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\(^{201}\) Ibid, 26.
\(^{202}\) Lievens and Verdoodt (n 52).
\(^{204}\) Ibid.
\(^{205}\) Verdoodt, Clifford and Lievens (n 6).
\(^{206}\) For a clear overview see ibid.
\(^{207}\) Article 8 UCPD.
consumers (including children) without them being aware of what is happening.\textsuperscript{208} Moreover, the repetitive aspect of behavioural advertising (e.g. through retargeting on social media) may put pressure on children, while the selection of advertising based on the presumed consumer choice may prevent the display of other advertisements thereby restricting the comparison with other advertisements and, hence, making an informed commercial decision.\textsuperscript{209} The qualification of ‘undue influence’ will depend on the specificities of the particular case, and when children are involved, their vulnerability should be taken into account.\textsuperscript{210}

C. Self-regulation and targeting children with personalised advertising

\textbf{Advertising self-regulation.} In addition to existing legislation that is relevant to certain forms of advertising, there is a strong tradition of self-regulation\textsuperscript{211} in the advertising sector. At international, European and national level, advertisers have committed to observing certain standards that are often laid down in codes of conduct, which are enforced by self-regulatory bodies.\textsuperscript{212} Such codes of conduct also contain provisions in relation to advertising aimed at children, direct marketing and behavioural advertising.

\textbf{Online behavioural advertising.} Section D7.4 of the ICC Consolidated Code,\textsuperscript{213} for instance, states that children of 12 years and younger should not be targeted by a behavioural advertising campaign. Along the same lines, in the Framework for OBA,\textsuperscript{214} created by the Interactive Advertising Bureau Europe (IAB Europe), companies agree not to create segments for OBA purposes that are specifically designed to target children, meaning

\textsuperscript{208} BEUC (n 191).
\textsuperscript{209} Ibid.
\textsuperscript{211} Self-regulation entails the creation, implementation and enforcement of rules by a group of actors, industry in particular, with minimal or no intervention by the state; E. Lievens (2010). Protecting children in the digital era: the use of alternative regulatory instruments. Leiden / Boston: Martinus Nijhoff Publishers.
\textsuperscript{212} It has been argued before that drawbacks of self-regulation are a lack of effective enforcement and often mild sanctions; however, the advertising sector is one of the sectors where – depending on the self-regulatory body in question – decisions on violations of the codes of conduct are often complied with. E. Lievens (2016). "Is self-regulation failing children and young people? Assessing the use of alternative regulatory instruments in the area of social networks", in: S. Simpson, H. Van den Bulck and M. Puppis (eds.), European Media Policy for the Twenty-First Century: Assessing the Past, Setting Agendas for the Future, Routledge, 77-94.
\textsuperscript{214} The IAB Europe is a European business organisation that develops industry standards, offers legal advice, education and training and conducts research for the European digital advertising industry. The Framework is self-regulatory and creates obligations for any of the members that self-certify their compliance with the principles: https://www.iabeurope.eu/policy/iab-europe-eu-framework-for-online-behavioural-advertising/.
people age 12 and under. This Framework is also guiding the activities of the European Interactive Digital Advertising Alliance, which has been set up by a coalition of the European advertising industry, including advertisers, the advertising agency sector, the direct marketing sector, the advertising network sector and the media sector. Its main objective is to licence the “Online Behavioural Advertising Icon” to companies that are involved in the OBA business across Europe. This icon notifies consumers of data collection for OBA purposes and the delivery of OBA advertising to them, and refers consumers to an online portal: ‘www.youronlinechoices.eu’, which intends to offer information on the practice of OBA and where consumers can turn off OBA by some or all companies. Research into the effectiveness of the OBA icon, however, has found that only one-quarter of the respondents remembered OBA disclosure icons, and only 12% remembered seeing a tagline (e.g., “Why did I get this ad?” or “AdChoices”) and correctly selected the tagline they had seen from a list. Also, none of the taglines were understood to be links to pages where you can make choices about OBA, nor did they increase knowledge about OBA. However, it has been argued that the standard icon could effectively increase OBA awareness and understanding when accompanied by an explanatory label stating, “This ad is based on your surfing behavior”. It remains to be seen whether this finding is also valid vis-à-vis children.

DIRECT MARKETING. With regard to direct marketing, the Federation of European Direct Marketing (FEDMA), an organisation representing the Direct and Interactive Marketing

215 The framework also contains obligation related to notice and choice, including the principles that internet users must be given notice of the OBA data collection and use practices by the relevant third parties as well as the website operator (i.e. of its OBA arrangements with third parties), and that third parties have to provide internet users with a mechanism to exercise their choice regarding the use of their data for OBA purposes. It has been argued, for instance, by KING and JENSEN that in general the IAB principles do not offer consumers sufficient transparency nor do they ensure meaningful access to the information contained in the consumer profiles that are used for behavioral advertising purposes; N. J. KING and P. W. JENSEN (2010). Profiling the Mobile Customer – Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioural Advertisers Target Mobile Phones? - Part II.

216 When accessing the portal, the user will be asked to select his or her location. The user must then navigate to “Your Ad Choices”, at which point the site collects the users’ “status” from the participating companies. Once complete, the individuals can either “turn off” individual companies one by one or scroll down to the setting “turn off all companies”. B. VAN ALSENOY et al. (2015). From social media service to advertising network - A critical analysis of Facebook’s Revised Policies and Terms, 39, https://www.law.kuleuven.be/citip/en/news/item/facebooks-revised-policies-and-terms-v1-3.pdf, accessed on 17 October 2016. However, according to the Article 29 Data Protection Working Party, such an opt-out approach “is not an adequate mechanism to obtain average users informed consent” for purposes of online behavioural advertising. ARTICLE 29 WORKING PARTY (2010). Opinion 2/2010 on online behavioural advertising, WP171, 22 June 2010, p. 15.

217 BOERMAN, KRUIJMEIER and ZUIDERVEEN BORGESUS (n 7).

sector at the European Level, has adopted a Code of Practice for the Use of Personal Data in Direct Marketing.\textsuperscript{219} According to the FEDMA Code, direct marketing is to be understood as: “the communication by whatever means (including but not limited to mail, fax, telephone, on-line services etc...) of any advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals”.\textsuperscript{220} The Code contains, general principles on data protection applied to direct marketing, but also specific provisions that apply to the processing of children’s personal data. The Code defines children as “any individual aged under 14 years old unless otherwise defined in national legislation/self-regulation”. Direct marketers that collect children’s personal data are required to make ‘every reasonable effort’ to ensure that the concerned child and/or the parent are properly informed about the purpose(s) for processing the data. Such a notice should be prominent, readily accessible and understandable by children. Direct marketers also have to obtain parental consent prior to the processing of the data, in accordance with applicable laws and self-regulation. Furthermore, they do not only have to obtain parental consent, but they also have to use every reasonable endeavour to verify whether the consent was actually given by the parent of the concerned child (and for instance not by the child himself). According to the Code, parents should be able to exercise their children’s rights as data subjects. More specifically these rights are (in line with EU data protection legislation) the right to object to the processing of their child’s data or to the disclosure of that data to a third party, the right to access and rectification or deletion of the data in case the processing does not comply with applicable data protection legislation. Finally, in relation to games, direct marketers should not demand more personal data than is strictly necessary when children want to participate in a game, when they may receive a prize or in relation to any other activity involving a promotional benefit.

\textbf{ONLINE DIRECT MARKETING.} Complementary to the provisions of the Code of Practice, FEDMA also adopted an Electronic Communications Annex that contains provisions specifically applicable to online direct marketing (or electronic mail marketing).\textsuperscript{221} According to this annex, direct marketers who want to process children’s data will have to inform them about the processing. This information has to be expressed in easily understandable language. Moreover, direct marketers will have to obtain prior parental consent for the

\begin{footnotesize}

\textsuperscript{220}Please note that this not necessarily means that the commercial message is also personalised.

\end{footnotesize}
processing of personal data of children who have not yet reached the age required by law to give their consent. Important to note is that parents may withdraw their consent at any point in time. Direct marketers are also required to have an age verification mechanism in place. The mechanism should be able to guarantee that the age of the child as well as the authenticity of the parental consent has been effectively checked. The Annex does not provide any further guidance regarding the type of mechanism, but merely requires that direct marketers use ‘reasonable efforts’. Furthermore, the Annex contains certain limitations direct marketers need to keep in mind:

- Data of family members: These data cannot be collected from the child, without the permission of the person to whom the data refer.\(^{222}\)
- Sensitive data\(^ {223}\): Direct marketers may not invite children to share this type of data without the prior consent of their legal representative.
- Incentivise children to share more data: Direct marketers may not incentivise children to provide their own personal data or personal data of a third party for marketing purposes, in exchange for a material or virtual reward.\(^ {224}\)

### 2.2 Conclusion

While the current data protection and privacy laws and policies cover existing tracking, profiling and targeted advertising practices, certain improvements may be proposed.

The GDPR. First, the GDPR foresees in specific protection for children, which is laudable, but it remains problematic that the text does not contain a definition of a ‘child’. This leads to uncertainty regarding the age group(s) to which certain protection measures should apply. This could be clarified by data protection authorities and the Article 29 Working Party or the European Data Protection Board. Second, when consent is relied upon as the legitimate ground for the processing of children’s personal data in the context of an information society service offered directly to children, the GDPR requires parental


\(^{223}\) Sensitive data are data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or the processing of data concerning health or sex life of the child, as well as the financial situation of the child or any third party such as their friends or family. FEDMA (2010). European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-line Annex), http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp174_annex_en.pdf, accessed on 17 October 2017.

\(^{224}\) This includes invitations to provide personal data in order to be able to participate in a game of chance, tombola or lottery. Ibid.
consent for children under a certain age threshold (cfr. discussion on article 8 GDPR). However, considering the complexity of targeted advertising practices, parents themselves might not be adequately prepared to make fully-informed decisions concerning their children's privacy. Therefore, default limitations on the collection of personal data of children for both the development and application of user profiles could be considered. In this regard, the advertising industry should take up their responsibility, and carry out an in-depth data protection impact assessment, with attention for the best interests and rights of children, when setting up digital marketing campaigns. The age and level of maturity of the child will also play an important role in such an assessment. In addition, information society service providers (such as social networking sites) could make a distinction between users based on the age information given upon registration, thereby offering an alternative child-friendly service incorporating the same features minus the tracking for personalised commercialisation.

The proposed ePrivacy Regulation. Second, the ePrivacy Regulation should be aligned with the GDPR, as was proposed in the IMCO Opinion of October 2017, by recognising that children require specific protection when it comes to the processing of their communications data. Adding specific limitations on the collection and use of children's communications data and special protection for terminal equipment or software that is developed for children would be a step forward. Finally, a prohibition for services specifically targeted towards children to use profiling and behavioural marketing techniques would be beneficial for the protection of children's rights (e.g. the right to privacy and to protection against economic exploitation). However, the same concern regarding the fact of whether this applies or should apply to all under 18-year olds arises.

The UCP Directive. Third, the UCP Directive may provide additional protection for children against personalised advertising, as this advertising practice may qualify as a form of undue influence. It could even be considered to add behaviourally advertising practices aimed towards children to the blacklist of practices, which are under all circumstances deemed unfair.

Self- and co-regulation. Fourth, the industry has been very active in self-regulating personalised advertising practices (i.e. direct marketing and online behavioural advertising). While it could be argued that the commitment not to create segments targeting children for 12-year olds and under is laudable, it does not provide any

226 Article 35 and recital 91 GDPR.
227 This is a highly debated issue and one should refer to Van Alsenoy and others (n 109).
protection for children above the age of 12, even though these targeted advertising practices may also have significant privacy implications for 12 to 18-year-olds.\textsuperscript{228} Moreover, different ages can be found in different self-regulatory instruments (e.g. 12 and under, under 14s), which could lead to confusion. Existing self-regulatory initiatives focus mostly on information provision and transparency (e.g. notice requirements, labelling), as well as on the requirement of (verifiable) parental consent for personalised advertising, rather than on actual limitations on the processing of children’s personal data for marketing and advertising practices. Whereas such limitations might go against commercial interests of advertisers, the best interests of children might require this, also taking into account the fact that for advertising to be innovative and fun for children, collecting and using children’s personal data is not a precondition.

3. Digital influencers and vlogging advertising

THE CONCEPT. Nowadays, people can participate online, create and share their own content in all kinds of applications such as blogs, social media and video-sharing platforms. Children and adolescents are increasingly consuming media content online, where their favourite digital influencers upload videos on a regular basis (e.g. on YouTube). Content creators like vloggers (i.e. video bloggers) have over time become extremely popular amongst the younger audiences and even in some instances gained celebrity status among their thousands of followers.\textsuperscript{229} The influence these people may exert over their loyal followers is significant and brings with it certain responsibilities, especially when commercial interests become involved. The popularity of these digital influencers is already shaping advertising and marketing techniques and vlogging advertising may take many forms: (1) online marketing by a brand with vlogger collaboration, (2) advertorial, (3) a commercial break within a vlog, (4) product placement, (5) promotion of the vlogger’s own merchandise, (6) sponsorship and (7) free items.\textsuperscript{230} These integrated advertising techniques form an important source of revenue for vloggers. Vloggers may be rewarded \textit{inter alia} on the basis of ‘pay per acquisition or download’ (i.e. earn rewards whenever a viewer purchases a product or service via the link within the vlog); product

\textsuperscript{228} N. J. \textsc{King} and P. W. \textsc{Jensen} (2010). Profiling the Mobile Customer – Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioural Advertisers Target Mobile Phones? – Part II.
\textsuperscript{229} For instance, Industry research has shown that 59% of 13 year-olds follows YouTubers on social media versus only 32% following television and movie stars. ‘Acumen Report: Youth Video Diet’ (Defy Media) \texttt{<http://defymedia.com/wp-content/uploads/2017/11/Acumen_DL_booklet_16_12_04.pdf>} accessed 29 November 2017.
\textsuperscript{230} This list is not exhaustive and stems from the CAP Guidelines, a UK self-regulatory initiative, see infra. Julian Ward, 'CAP Guidance on Vlogging Advertising' [2016] Entertainment Law 49. However, it does not include video pre-rolls that are placed around uploaded content by the video-sharing platform itself. For more information on such video pre-rolls, see infra.
Professional internet creator has become just another job and vloggers may be tied to agents and production companies, just like movie actors. However, it should be noted that not all vlogs contain commercial messages. Indeed, lots of vloggers merely present their honest opinions about a certain product or service, without receiving any financial benefits (i.e. without being sponsored by the brand or without receiving the product or service for free). Conversely, if a brand has a certain amount of control over the content of the post and rewards the influencer in any way, the post should be considered a form of commercial communication.

### 3.1 Integration: product placement, sponsorships, editorials and other forms of vlogging advertising

#### 3.1.1 Persuasive tactics and children’s rights implications

**Persuasive Tactics.** Viewers or followers seek guidance from media personalities or influencers, see them as friends or imagine that they are part of a programme’s social world. According to Perse and Rubin, viewers “feel that they know and understand the influencer in the same intimate way they know and understand flesh and blood friends”. Followers will turn to influencers for advise and regard them as a trusted source of information. As a result, digital influencers have become an important intermediary between advertisers and consumer-followers. The two-way communication between the media personality (i.e. the vlogger) and the fans (i.e. the followers) is facilitated by social media. Lee and Watkins argue that social media allows consumers to quickly and easily access user-generated content (i.e. video blogs or vlogs), which often

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231 Influencers often use their vlogs as springboards to launch other projects that bring income, such as ebooks, books, speaking assignments, clothing lines, other products, etc. FJ Cavaliere, 'People Can Make More Money on YouTube than Most Lawyers Earn - Is That Even Legal' (2016) <www.webwiselawyer.com>.

232 In the US, YouTubers even have united in the Internet Creators Guild, which will provide YouTubers with support to help them develop a rigorous business sense and avoid exploitation. Chris Stokel-Walker, ‘Vloggers Unite: YouTubers Are Getting Organized after a Decade of Exploitation’ Newsweek (8 October 2016) <http://www.newsweek.com/vloggers-youtube-organized-decade-exploitation-507592> accessed 11 December 2017.

233 Consumers that merely share or produce content containing *inter alia* brand references or the advertised product without receiving rewards in any way (no discounts, no free products, no financial rewards) fall outside the scope of this framework. It should be noted that a formal classification of influencer advertising as commercial communication has not yet been implemented across all Member States. This has led to divergent interpretations of the scope of existing regulation as well as of “best practices” at the national level.


contains product reviews and information.\textsuperscript{236} Research has shown that user-generated content generally has a significant influence on consumers’ brand perspective, brand choices\textsuperscript{237} and new consumer acquisition\textsuperscript{238}. Children in particular perceive digital influencers as more relatable than traditional celebrities and they can identify themselves more with the former.\textsuperscript{239} This strong identification factor is also why influencers can significantly impact not only brand-related aspects, but also a child’s self-esteem and self-image\textsuperscript{240}. Similarly, Lim et al. found that user-generated content is considered trustworthy.\textsuperscript{241} Vlogging advertising allows targeted exposure to the right consumers and repeated exposure to a vlogger can elicit enhanced feelings of connectedness with the advertised brands. As humans are social creatures, they tend to copy behaviours and beliefs of people they like.\textsuperscript{242} In this regard, Lee and Watkins refer to social comparison theory\textsuperscript{243}, which entails that as consumer-followers view themselves as sharing similar opinions and preferences as digital influencers, a positive review of a brand from their preferred vlogger may lead to a positive review from the consumer.\textsuperscript{244}

A CHILDREN’S RIGHTS PERSPECTIVE. Considering the often hidden nature of vlogging advertising and the highly entertaining videos, digital influencers can have a direct impact on children’s consumption behaviour without them being aware of the commercial nature of the communications.\textsuperscript{245} Such mechanisms potentially have an impact on children’s rights such as the right to development, the right to freedom of thought, the right to protection from economic exploitation (similar to the previously discussed advertising formats). This of course may need to be offset with the freedom of expression.

\textsuperscript{236} Lee and Watkins (n 235).
\textsuperscript{239} ‘Acumen Report: Youth Video Diet’ (n 230).
\textsuperscript{243} This theory was developed in the 1950s by personality theorists, including NE Miller and J Dollard, Social Learning and Imitation (Yale University Press 1941); Albert Bandura and Richard H Walters, Social Learning and Personality Development (Holt, Rinehart and Winston 1963).
\textsuperscript{244} Lee and Watkins (n 235).
\textsuperscript{245} For instance, the AdLit risk assessment showed that the advertising literacy level for brand integration, advertiser funded programs, social media advertising and advergaming is rather low, posing a greater risk for children and teenagers. See Vanwesenbeeck et al. ‘Minors advertising literacy in relation to new advertising formats – Identification and assessment of the risks’ (2016) retrieved from www.adlit.be.
of the digital influencers themselves. Furthermore, as vlogging forms an important part of popular youth culture, it also enables children to participate online and exercise their rights to freedom of expression and culture.

3.1.2 Digital influencers and the current regulatory framework

Identification is the key requirement. The current framework regulating commercial communications contains important requirements that are also applicable in the online environment (supra), the key requirement being the identification principle (i.e. identifying the commercial nature of messages). In the context of vlogging advertising, it is again important to clarify the scope of the frameworks that have already been discussed supra (the AVMS Directive, the eCommerce Directive and the UCP Directive). The responsibilities of the different parties involved for the implementation of these requirements in practice also need to be clarified. Finally, certain specific guidelines and best practices have emerged from the industry that should be kept in mind.

A. Vlogging advertising: audiovisual or commercial communication?

A.1 Scoping the applicable legal framework and untangling the vlogging advertising chain

Scoping and untangling The EU framework on commercial communications contains, first of all, sector legislation that might be applicable to vlogging advertising. It is the actual delivery and form of the commercial message that determines the application of the relevant Directives and resulting substantive requirements. More specifically, the question arises whether vlogging as a service would fall under the definition of an audiovisual media service (AVMS Directive) or an information society service (e-Commerce Directive) and subsequently whether vlogging advertising could fall under the notion 'audiovisual commercial communication' (AVMS Directive) or rather under the more general e-Commerce notion of 'commercial communication' (e-Commerce Directive). The distinction is significant considering the more stringent requirements for audiovisual commercial communication. As the vlogging advertising chain may consist of several parties, it needs to be clarified who is responsible for the implementation of the requirements in practice.

Commercial communication under the e-Commerce Directive. First of all, it is argued that vlogging may qualify as an information society service under the e-Commerce Directive. As mentioned, these services can be “any service normally provided for remuneration, at a

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246 For examples of such balancing see CJEU 13 May 2014, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12. (Google Spain) and EctHR 16 June 2015, DELFI AS v. ESTONIA, Application no. 64569/09).
247 Clifford and Verdooit (n 114).
248 This is a similar evaluation like the one in the context of advergames, supra.
distance, by electronic means and at the individual request of a recipient of services." The service provided here entails the provision of videos and making them available to the public on video-sharing platforms like YouTube. In return, the influencer receives a reward, be it in the form of a financial remuneration, free products or services, promotion for their own products, etc. As the videos are uploaded on digital platforms, the requirement of 'by electronic means' is also fulfilled. Lastly, the video is shown at the individual request of the viewer, therefore fulfilling all requirements. Accordingly, the e-Commerce Directive requires digital influencers engaging in vlogging advertising to comply with several information requirements as well as with the identification principle (i.e. “the commercial communication shall be clearly identifiable as such”).

AUDIOVISUAL MEDIA SERVICE AND AUDIOVISUAL COMMERCIAL COMMUNICATION. The more difficult question, however, is whether vlogging and vlogging advertising could fall within the scope of the AVMS Directive. The central definition determining the scope of the AVMS Directive is the notion of audiovisual media service. The Directive will not apply to any service other than audiovisual media services and the definition provides that this includes audiovisual commercial communication as defined in Article 1(1)(h):

images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.

From this definition, certain elements can be extracted that need to be present for vlogging advertising to fall within the scope of the Directive.

Pursuing an economic activity and images designed to promote. First, the Directive comprises economic activities, an element that can only be found with the more professional digital influencers, as the rewards they receive for vlogging advertising may be regarded as remuneration. For instance, if digital influencers promote products or services in the style of a review for their followers, a clear indicator of a commercial intent

249 Recital 17 e-Commerce Directive.
250 See also supra Chapter 2, section 1.1.2, A of this report.
251 According to Article 6 of the e-Commerce Directive, the digital influencer will have to disclose his or her identity and in case he or she launches any promotional competition or game the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
can be found if the video is made in return for financial compensation or if there are other financial ties between the vlogger and the advertiser (product owner). As mentioned, vloggers may also be tied to agents who receive a part of the advertising revenue generated by the vlogger. Conversely, the Directive does not apply to activities that are primarily non-economic, including *inter alia* the provision of user-generated content for the sole purpose of sharing and exchanging within communities of interest or to private websites or blogs. Thus, this first element will depend on the intent of the digital influencer and/or the platform provider and the commercial influence on or interference with the content of the vlogs.

**Accompany or be included in a programme.** As a second requirement, the commercial communication needs to accompany or be included in a programme (i.e. a television broadcast or an on-demand service), established by a media service provider. Valcke and Lievens clarify that the notion of a programme needs to be interpreted in a dynamic way, taking into account the developments in television broadcasting. Translated to the context of digital influencers and vlogging advertising, it means that the form and content of the vlogs needs to be sufficiently comparable to the form and content of television broadcasting. Furthermore, the nature and means of accessing the vlogs (e.g. via the influencer's YouTube channel) would lead the user to reasonably expect a regulatory protection within the scope of the AVMS Directive. In this regard, one should take into account that the viewing habits of children and adolescents have changed significantly over time, as they increasingly consume audiovisual content via tablets and smartphones. Children and adolescents arguably may find certain vlogs or series of vlogs similar to traditional television broadcasting, depending on the format and

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253 Verdoodt, Lievens and Hellemans (n 13).
255 Article 1 (b) AVMS Directive.
256 Excluded are those services which are audio-only and not sufficiently television-like services such as radio, electronic versions of newspapers and magazines, blogs.
258 For instance, research by Ofcom, the UK media regulator, showed that children are watching less broadcast television as they turn to online activities and services such as YouTube. Jasper Jackson, ‘Children Spending Less Time in Front of the TV as They Turn to Online Media’ *The Guardian* (6 August 2015) <http://www.theguardian.com/media/2015/aug/06/children-spending-less-time-in-front-of-tv-ofcom> accessed 7 December 2017.
259 In this regard, the Belgian media regulator of the French-speaking community underlines that more and more high quality short forms of content are appearing on audiovisual platforms which can have a high impact on the public opinion and they are competing with the same audience as TV broadcasts. Jerome Dheur, ‘Belgian CSA Conference - The Platform Is the Message’ (2016) <http://www.csa.be/system/documents_files/2591/original/CI_20160310_The%20Platform%20Is%20the%20Message_report.pdf?1458160565> accessed 11 December 2017.
content of the videos (e.g. episodes in the life of a digital influencer). The professionalism of some of these digital influencers and their ‘channels’, the regular upload of edited vlogs (e.g. daily, weekly) and the fact that the channels are accessible on the same screen as traditional broadcasts may contribute to such a finding. The Directive also requires that the programme should be aimed to inform, entertain or educate the general public and the service should be provided by electronic communications networks. With regard to vlogging, these three elements may be present, as the videos of digital influencers may have an entertaining, informative or educative purpose and viewers or followers can access the content online via the video-sharing platform.

EDITORIAL RESPONSIBILITY IN A VLOGGING CONTEXT. The requirement of ‘accompanying or being included in a programme’ also links to another element, namely editorial responsibility, which requires the exercise of effective control over both the selection and the organisation of the programmes. This entails that a professional media service provider is responsible for the editorial design and final compilation of a programme for broadcasting in accordance with a fixed programme schedule or for viewing on-demand for a catalogue. In other words, the AVMS Directive provides regulatory standards for professionally created mass media content. Applying this criterion in a vlogging context is not straightforward considering many new players have entered the value chain. First, Schoefs underlines that video-sharing platforms like YouTube play a crucial role in providing access to users to both user-generated content and edited professional content. YouTube hosts a massive amount of content, which it organises into different categories depending on the topic of the uploaded video. While it seems well established that the AVMS Directive does not apply to amateur user-generated content, the same cannot be said for professional content which has been provided and/or edited by the platform provider or a professional third party provider before the upload. Indeed, several Member States accept that such professional content and channels do fall within the scope of the AVMS Directive and, as such, assign the responsibility wherever the editorial power rests. Second, the segregation of content produced by professional and amateur

260 Article 1 (1) (c) AVMS Directive.
261 Verdoost, Lievens and Hellemans (n 13).
262 Wolfgang Closs, Susanne Nikoltchev and European Audiovisual Observatory (eds), The Regulation of On-Demand Audiovisual Services: Chaos or Coherence? (European Audiovisual Observatory : Council of Europe 2011).
264 Chavannes and Castendyk (n 255).
265 Schoefs (n 264); Clifford and Verdoost (n 114).
266 Schoefs (n 264). Austria, Belgium, Finland, Italy, The Netherlands and Slovenia. For example, the author mentions BBC’s Top Gear YouTube channel. However, it is important to note the platform provider will only editorially responsible for its own content. This means that the provider of the third party content on that platform should comply with the AVMS Directive if he in his turn can be held editorially responsible for his content.
vloggers forms a major borderline case. On the one hand, the content that some of these professional vloggers create could arguably be considered ‘television-like’ (e.g. reality shows with episodes airing every week), especially for children and adolescents who watch less traditional broadcasts. Furthermore, vlogger’s capacity to influence social trends, the ubiquity of integrated commercial messages and the significant financial rewards they gain in return call for more stringent requirements or even restrictions. On the other hand, making such a distinction is extremely complicated and would require a case-by-case analysis taking into account all relevant characteristics and evidence.

UNTangling the vlogger-platform relationship. Attributing responsibility to platform providers in the context of digital influencers would alter the generally accepted interpretation of ‘selection’ as a way to exercise control. Several European media regulators found that in the case of user-generated platforms like YouTube or DailyMotion, there is neither any selection of videos as everyone can upload them, nor any organisation of the videos in function of their content by the platform provider. This is supported by the fact that these providers often remain outside the specific vlogging advertising revenue chain as they merely facilitate the delivery of the videos to the influencer’s audience and usually generate an income through other forms of digital advertising (e.g. banners, personalised pre-rolls) accompanying the influencer’s videos. However, if the platform provider is the one who engages the services of such professional influencers, the interpretation of editorial responsibility, selection and effective control becomes even more complex. Furthermore, the increased use of automated means of selection and organisation (e.g. algorithmic recommender systems) potentially decreases the role of the digital influencers uploading videos and strengthens that of the platform provider, thereby having a de facto influence on viewers’

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267 For instance research by OFCOM showed that children aged 11 to 15 watch about 1 hour and 32 minutes of live TV per day, compared with the average adult’s 2 hour 58 minutes of viewing. In this regard, the study showed that older children are supplementing their TV viewing by turning to sites such as YouTube, Vimeo and Vine, as well as watching clips posted on Facebook or Twitter and news websites.

268 Criteria to take into account could include inter alia the type of vlogs provided, the amount of videos uploaded and the consistency of uploads, the editorial work performed, the financial rewards gained by the influencer. According to ATVOD, other indicators of television likeness are the presence of: (i) an opening sequence; (ii) a music soundtrack; (iii) narratives or plots; (iv) closing shots and end credits.

269 Clifford and Verdoodt (n 114).

270 Schoefs (n 264).

271 Hellemans, Lievens and Valcke (n 25).

272 Clifford and Verdoodt (n 114); Schoefs (n 264).

273 YouTube recently launched a premium subscription-only version.

274 YouTube’s recommendations system helps users discover personalised content from an ever-growing corpus of videos. It takes as input inter alia user’s watch history, implicit feedback of video watches by users and explicit feedback such as a thumbs up or a thumbs down and through filtering selects videos in the range of hundreds. Paul Covington, Jay Adams and Emre Sargin, ‘Deep Neural Networks for YouTube Recommendations’ (ACM Press 2016) <http://dl.acm.org/citation.cfm?doid=2959100.2959190> accessed 7 December 2017.
choice. For these reasons, the Belgian276 and German media regulators have called for a special category under EU law for large audiovisual platforms that is subject to the (or some of the core) provisions of the AVMS Directive. In this regard, it is important to point out that the AVMS Directive is currently undergoing reforms and the scope of the Directive will be broadened to include video-sharing platforms.

A.2 Broadening the audiovisual playground

Video-sharing platforms officially enter the audiovisual playground. In its 2016 REFIT evaluation of the AVMS Directive, the European Commission recognised the lack of a level-playing field for traditional and new audiovisual media providers, and the lack of consumer protection in relation to the latter. Furthermore, considering that these new digital providers increasingly offer audiovisual content online and research has shown that video viewing is one of the earliest internet activities preferred by young children, it was argued to include them in the scope of the AVMS Directive, especially concerning the protection of minors. The proposal for a new AVMS Directive, therefore, explicitly refers to a new category of ‘video-sharing platform services’ (“VSPs”), which will be subject to specific rules. To fall within the scope of the definition, several cumulative conditions need to be fulfilled:

- First, it needs to be a service normally provided for remuneration, which entails an economic activity, and its principal purpose needs to be of interest to the general public. As mentioned, this may also include services financed by advertising like a vlogger’s YouTube channel.

- Second, the platform service must consist of the storage of a large amount of programmes or user-generated videos, for which the service provider does not

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275 Schoefs (n 264); Clifford and Verdoot (n 114).
276 More specifically, the media regulator of the French-speaking Community, Conseil Superieur de l'Audiovisuel (http://www.csa.be/).
277 Schoefs for instance refers to the obligations in relation to commercial communication and the protection of minors under the AVMS Directive. Schoefs (n 264).
278 Dheur (n 260).
281 Conversely, more private websites where video-sharing takes place within certain communities or groups (e.g. a website of the dancing school for children where videos are uploaded exclusively for parents).
have editorial responsibility. However, it is up to the national legislator to determine the exact meaning of the concept of editorial responsibility.283

- Third, the service provider must determine the organisation of the stored content. This includes the organisation by automatic means, such as displaying, tagging and sequencing.284 Video-sharing platforms like YouTube and Dailymotion (or at the very least specific parts or sections of these platforms) will most likely fulfil the conditions.

- Fourth, the principal purpose of the service or a dissociable section thereof must be devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate.285

- Finally, the service needs to be made available through electronic communications networks.286

As is clear for these cumulative criteria, the proposed AVMS Directive aims to overcome the difficulties described supra associated with the interpretation of 'editorial responsibility".287 However, the actual impact of the proposed inclusion of VSPs in the context of digital influencers and vlogging advertising will depend on whether or not the provisions on commercial communication will apply to such platforms. Under the Council’s General Approach of May 2017, VSPs are required to protect minors against hate speech and harmful content, including harmful audiovisual commercial communications.288 In this regard, a distinction is made between audiovisual commercial communications that are marketed, sold or arranged by the VSP and those that are not (for instance vlogging advertising arranged by a digital influencer). Regarding the former, the VSP would need to comply with Article 9 (1) of the proposed Directive, including inter alia that such audiovisual commercial communications should be recognisable as such (i.e. the identification principle) and should not directly exhort minors to buy or hire a product or service by exploiting their inexperience. Regarding the commercials provided by other parties, the Council takes into account the limited control exercised by VSPs over such commercials and requires that VSPs take appropriate measures such as flagging

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283 The same margin of appreciation has led in the past to different interpretations. For instance, HERMANNS and MATZNELLER are of the opinion that the extensive cataloguing and composing of programmes would fall under editorial responsibility and the media regulator of the French-speaking Community of Belgium ruled that the sole possibility of exercising control over the content of programmes would be sufficient. Olivier Hermanns, Peter Matzneller and Susanne Nikoltchev, ‘The Regulation of On-Demand Audiovisual Services : Chaos or Coherence?’ [2011] IRIS Special : The regulation of on-demand audiovisual services : chaos or coherence ?


287 The second and third requirement aim to specifically cater for these problems and the increased usage of automated means of selection and organisation by platforms. Clifford and Verdoordt (n 114).

288 Article 28a Council’s General Approach.
mechanisms, age verification mechanisms, parental control systems and media literacy measures.

**Social Media Platforms.** An interesting question that arises relates to the potential inclusion of social media platforms such as Facebook in the VSP definition. The Council’s general approach strongly emphasises the role of social media services in young people’s lives, recognising that they are an “important medium to share information, entertain and educate”. Therefore, it needs to be assessed to what extent social media services revolve around providing user-generated audiovisual content. This assessment will need to be decided on a case-by-case basis, and may change over time when these services evolve. The Council’s general approach clarifies that a social media service included when their audio-visual content constitutes an essential functionality of that service, meaning ‘not merely ancillary or a minor part of its activities’.

The proposal for a New AVMS Directive has entered the trilogue stage (i.e. negotiations between the European Commission, the European Parliament and the Council have commenced), meaning that these provisions and requirements are not final.

**B. Vlogging advertising in the Unfair Commercial Practices Directive**

**Scope.** As mentioned supra, the UCP Directive is a horizontal Directive containing rules for commercial communication regardless of the form or delivery used. It applies to unfair business-to-consumer practices, including commercial communications directly connected with the promotion, sale or supply of a product to consumers. Because of its general scope, it will be applicable to many commercial practices that are also regulated by other general or sector-specific EU legislation. In this regard, the more specific...
requirements laid down under other EU legislation usually add to the general requirements of the UCP Directive, thus offering complementary protection (unless the aspect is specifically regulated by the sector-specific rules).295

A.1 Unfair commercial practices by digital influencers and third-party traders

Responsibilities of digital influencers and third-party traders. Video-sharing platforms like YouTube have become platforms for commercial communication, in the form of advertising, product placement reviews, etc. In this regard, digital influencers promoting brands, products or services of a company (or their own) will qualify as traders under the UCP Directive. Article 2(b) defines a trader as: “anyone (including legal persons) who is acting for the purposes relating to his trade, business, craft or profession, and anyone acting on behalf of another trader”. This means that both the brand or company that wants to promote their goods or services and the digital influencer that is hired to engage in the promotion are traders under the UCP Directive.

Hidden traders and advertising. In the context of social media and VSPs, the European Commission has warned for increased risks to hidden and misleading advertising, as commercial elements are often mixed with social and cultural user-generated content.296 Moreover, consumers experience these platforms just as services for exchanging information or communicating with other consumers. As such, they are often unaware of traders employing these platforms for advertising and marketing purposes. Regulatory authorities of several Members found the practice of companies paying bloggers to promote and advertise their products on a blog aimed at teenagers without disclosing the commercial nature of the blogs to be a hidden commercial practice.297 Other examples of commercial practices by third party traders (e.g. brands) and/or digital influencers include:

✓ A third party trader encourages users to share marketing material with other users by offering price reductions on its marketed products as a reward.333
✓ A blogger is given a free vacation by a tour operator in exchange for posting positive reviews on the vacation and the tour operator.334

295 In this regard, Article 3 (4) of the UCP Directive clarifies that “in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.”
296 European Commission (n 122).
A celebrity (music, sports) is given an endorsement deal in exchange for posting pictures of bought products such as sneakers.\textsuperscript{298} \textsuperscript{A13}  

The UCP Directive has specifically tackled the problem of hidden traders, by explicitly forbidding in all circumstances the practices of “falsely 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”.  

For example, traders are not allowed to post fake reviews in the name of consumers or by using e-reputation agencies. Furthermore, digital influencers and traders should refrain from “using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)”. Thus, the UCP Directive clearly requires that digital influencers disclose the commercial nature of their vlogs to their consumer-followers. Important to note is that the Directive does not provide further details on what such a disclosure should look like. With regard to advertorials, this could be either ‘by images or sounds’, and it has to be ‘clearly identifiable’.

**Fake likes could qualify as misleading commercial practices.** Also relevant for digital influencers is Article 6 of the UCP Directive which protects consumers against misleading commercial practices involving the use of systems such as ‘likes’. The EC clarifies that by presenting fake ‘likes’ to consumers, a digital influencer or third party trader may mislead consumers about its own reputation or the reputation of its products or services. In turn, this could potentially influence consumers’ purchasing behaviour, causing them to take transactional decisions they would not have taken otherwise.\textsuperscript{299}  

Significant to note in this regard is the practice of so-called ‘pods’, which entail (mostly hidden) collaborations on social media between a group of digital influencers. Members of a pod agree to like and comment on each other’s videos in a specific manner (e.g. using a minimum amount of words, using enough hashtags), with the aim of being prioritised by the algorithm of the platform and appear more often in consumers’ search results or newsfeeds.\textsuperscript{300} Considering that these collaborations are largely unknown to the public, it may constitute

\begin{itemize}
\item \textsuperscript{298} European Commission (n 122).
\item \textsuperscript{299} ibid.
\item \textsuperscript{300} For instance, regarding pictures or vlogs on Instagram, the more likes and comments a post receives shortly after posting, the better it will perform in the algorithm. High initial engagement signals to Instagram that quality, engaging content is posted and as a result, the post can move higher up in people’s feeds (and potentially go viral through the Instagram Explore page). Gabriela Barkho, ‘Inside Instagram Pods: The Secret Trick to Increase Your Engagement’ (Later Blog, 23 February 2017) <https://later.com/blog/instagram-pods/> accessed 18 January 2018.
\end{itemize}
a misleading commercial practice. Therefore, it could be argued that digital influencers participating in pods should disclose this to their consumer-followers.

Additional protections for children. Finally, as mentioned, digital influencers are particularly popular amongst children and adolescents. Accordingly, Article 5(3) of the UCP Directive could provide a legal basis of protecting “a clearly identifiable group of consumers who are particularly vulnerable”. The EC explains that this legal basis reinforces the general identification requirements (i.e. clearly indicating the marketing purpose). Furthermore, digital influencers need to keep in mind that their vlogs cannot contain a direct exhortation to children to buy a certain product or persuade their parents or other adults to buy such a product for them. For instance, statements of vloggers such as “Go buy the book now” or “Tell your mom to get it from the local store” would be prohibited under the UCP Directive. This does not imply an outright ban on advertising, but merely aims at providing protection to children against direct exhortations to purchase.

A.2 Unfair commercial practices by the video-sharing platform

Platforms as traders. The VSP provider can also qualify as a trader under the UCP Directive in certain instances. In its 2016 guidance document on the application of the UCP Directive, the European Commission explains that it must be assessed on a case-by-case basis whether a platform service provider is acting as a trader, whether it is engaging in a commercial practice and whether this practice is aimed towards consumers. In particular, the Commission stresses that platform service providers may be acting as traders when they draw revenues from targeted advertising. In addition, the VSP provider may put in place commercial practices such as facilitating and selling paid ‘likes’ and sponsored reviews, blogs and accounts to third-party traders. Conversely, for third-party advertising, the VSP provider will not have direct obligations under the UCP Directive. The VSP provider also needs to inform users about any processing of their personal data for commercial purposes, otherwise this could be considered an omission of material information necessary for informed commercial decision-making. Article 7 of

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301 European Commission (n 122).
303 European Commission (n 122).
305 For instance with regard to advertorials, the CJEU held that the prohibition was applicable to the trader whose products or services were advertised, rather than for instance the provider of a newspaper via which the advertisement is published. In other words, the Court found that there was no direct obligation on the newspaper in EU law. CJEU RLvS Verlagsgesellschaft v Stuttgarter Wochesblatt. Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, Rethinking EU Consumer Law (Routledge 2017).
the UCP Directive prohibits such an omission if it is shown that it is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.306

C. Further guidance for vloggers in self- and co-regulation – National best practices

LACK OF QUALITATIVE DISCLOSURE REQUIREMENTS IN LEGISLATION. Although the general identification requirement is applicable to digital influencers, the implementation thereof in practice is not specified in the current legislative framework. The same requirement can also be found in self-regulation, for instance in the International Chambers of Commerce Code of Advertising and Marketing Communication Practice.307 Recently, however, several national self-regulatory authorities, as well as groups of digital influencers themselves, have issued or pledged to follow guidelines on how to disclose commercial relationships.

UNITED KINGDOM: ASA “OREO RULING”. A first example can be found in the United Kingdom, where the self-regulatory body for the advertising industry – the Advertising Standards Authority (“ASA”) - had received a complaint in 2014 from a BBC journalist regarding vlogging advertising of Mondelez’ Oreo cookie. The journalist claimed that the Oreo advertisements were not obviously identifiable as marketing communications. The case involved so-called “Lick Race videos” on different YouTube Channels, owned by popular vloggers, which portrayed the vloggers eating an Oreo in a particular way.308 The videos were part of a marketing project by Mondelez UK Ltd, in cooperation with the vloggers concerned. The ASA ruled that the references used by the vloggers at the end of the videos - “Thanks to Oreo for making this video possible” – did not sufficiently make clear to the audience that the vloggers were collaborating with Mondelez. More specifically, the ASA highlights that the identification requirement is applicable to the general audience of the advertisement. Since the video ads were uploaded on a video-sharing platform that is usually editorial based, viewers might perceive the video ads as a form of sponsorship, where the vlogger retains the editorial responsibility over its content despite receiving financial support.309 The video advertisements were very similar to the editorial content on the respective channels, and as such, the ASA ruled that the commercial intent would

306 Again, Article 5 (3) could present a legal basis for the protection of children in this regard, and as such, reinforces the information requirement and lowers the threshold when it comes to defining whether or not the omission has influences the consumer's transactional decision-making (i.e. the average consumer will be a child).
309 ibid.
not have been immediately clear from the style alone. In addition, the references in some of the videos were only made at the end of the video, or merely in the video description. According to the ASA, this entails that viewers have already interacted with the video, undermining the protective aim of the identification requirement.

CAP GUIDELINES FOR VLOGGERS. Following the ruling, the ASA’s sister body - Committees of Advertising Practice ("CAP") - launched guidelines for vlogging advertising, which clarify the responsibilities for the different parties involved. The principle remains the same: advertising by vloggers needs to be recognisable as such to the audience. If influencers receive any benefits from brands, they will have to disclose this commercial relationship. According to the CAP Guidelines, there are two ways in which a vlogger may clarify the commercial intent of a vlog: (1) by making it clear within the overall context of the communication or (2) by labelling a vlog as an advertisement. The ASA provides specific guidelines for several forms of vlogging advertising and clarifies for each of these who is responsible for complying with the identification requirement. For instance, advertorials (i.e. the video is in the usual style of the vlogger but the content is controlled by the brand and the vlogger has been reimbursed in some way) need to be labelled upfront so that viewers are aware of the nature of the video before engaging with it. In this context, both the vlogger (i.e. publisher) and the brand (i.e. marketer) are considered responsible for this labelling requirement. For each type of vlogging advertising, the ASA provides guidance on how to fulfil the identification requirement. These guidelines are meant to provide "a non-exhaustive of vlogging scenarios with practical advice on how and when the rules kick in". Although the scenarios and means of labelling are non-exhaustive, digital influencers that do not follow the CAP guidelines are at risk of being subject of a ruling by the ASA.

<table>
<thead>
<tr>
<th>TYPE OF VLOGGING ADVERTISING</th>
<th>LABEL</th>
<th>WHO IS RESPONSIBLE FOR THE LABELLING?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Online marketing by a brand</td>
<td>No label needed: commercial intent is likely to be clear from the context</td>
<td>/</td>
</tr>
</tbody>
</table>


311 Rule 2.4 CAP Guidance.

| **Advertorial vlogs** *(the whole vlog is paid for and controlled by a brand)* | Use: “advertisement feature”, “ad”, “ad feature”, “advertorial” or similar  
Where: in the title or thumbnail  
Do not use: “sponsored”, “Supported by”, “ Funded by” and “Thanks to X for making this possible” | The vlogger as ‘publisher’ and the brand as ‘marketer’ |
| --- | --- | --- |
| **Commercial breaks within vlogs** *(a dedicated section of the editorial content is paid for and controlled by a brand)* | Make clear when the ad starts: Onscreen text stating “ad”, “ad feature”, holding up a sign, incorporating the brand’s logo, or by the vlogger simply explaining that they’ve been paid to talk about the product.  
In addition (so not necessary) vloggers may add in the description box: “this video includes advertising for specific products which is indicated by [...]” | Vlogger |
| **Product placement** | No label needed for the entire vlog: onscreen text stating “ad”, “product placement”, holding up a sign, or the vlogger explaining that they’ve been paid to talk about the product | Vlogger |
| **A vlogger's video about their own product** | The video title should make clear that the video is promoting the vlogger’s products: “I’m excited about my promotional/book/album tour”, “new product news” or “Let me show you how to use my new make-up line” would be sufficient. | Vlogger |
| **Editorial video referring to a vlogger's own products** | No label needed if the marketing communication is clear within the context: e.g. a gaming vlogger may say “I’m currently using the new headphones I’ve just released; you can purchase them through the link below”.  
In addition (so not necessary) vloggers may add in the description box: “this video includes advertising for my new [...]”, especially where they haven’t advertised to their followers before. | Vlogger |
Table 1: Vlogging scenarios and how to deal with them. (Source: https://www.asa.org.uk/advice-online/video-blogs-scenarios.html#.Vq9PWGdF2Uk).

**Sponsorships**
* (A brand sponsors a vlogger to create a video but has no control of the content)

<table>
<thead>
<tr>
<th>No label needed under the CAP Guidance</th>
<th>Vlogger</th>
</tr>
</thead>
<tbody>
<tr>
<td>However: a nod to the sponsorship is required under consumer protection law.</td>
<td></td>
</tr>
</tbody>
</table>

**Free items**
* (A brand sends a vlogger items for free without any control of the content (or any conditions attached))

<table>
<thead>
<tr>
<th>No label needed under the CAP Guidance</th>
<th>Vlogger</th>
</tr>
</thead>
<tbody>
<tr>
<td>However: vloggers are required under consumer protection law to tell consumers if an item was given on the condition that it is talked about</td>
<td></td>
</tr>
</tbody>
</table>

**Norway.** Similarly, the Norwegian Media Authority (“NMA”) has issued a very specific guide for Video Bloggers and YouTubers in 2017, on the labelling of advertisements. Interestingly, the Norwegian Broadcasting Act contains rules for hidden advertising, product placement and sponsorships, which also apply to digital influencers posting videos on video-sharing platforms. Influencers that do not follow these rules risk financial penalties, coercive fines or time-limited prohibitions of sending advertisements in their videos. The NMA’s guide aims at helping digital influencers to comply with these rules. Similar to the CAP Guidelines, the NMA Guide contains certain scenarios or forms of vlogging advertising and provides for each of these different qualitative requirements for the labelling.

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| **Advertisement**  
\(\text{(you are paid to present a product in a video, the product is the main focus of the video)}\) | Labeled in writing on-screen, either before you present the product or at the beginning of the video.  
In addition (so not necessary): mention the collaboration verbally  
\[\textbf{Do's:}\]  
\checkmark Use the term “reklame” or “annonse” ("advertisement")  
\checkmark The label must be clear enough, large enough and must appear long enough on-screen for the viewers to acknowledge it  
\checkmark The label must be clearly visible against the background  
\checkmark The title of the video or the video’s information field should also state that the video contains advertising  
\[\textbf{Don't's:}\]  
\xmark It is not enough to merely refer to the fact that the video was produced in “cooperation with...”  
\xmark You cannot use the expression “sponsored by...”.  
Read more about sponsorships below | Vlogger |
| **Product placement**  
\(\text{(you are paid to present a product in a video, the product is not the main focus of the video)}\) | Label the video in writing "P- Inneholder produktplassering" ("P - Contains product placement") both at the start and end of the video  
\checkmark The label must be visible for at least four continuous seconds  
\checkmark The label must be sufficiently large and entirely clear against the background so that it can be easily read | Vlogger |
| **Including links to sales outlets = advertising** | Use the term “reklame” or “annonse” ("advertisement") in connection with the links  
If you receive a share of the profits every time anyone buys the product via the relevant link, you could also make this clear to your viewers | Vlogger |
Sponsorship
(the sponsor does not have any influence on the content of the video, and you do not discuss or demonstrate the sponsor’s products or services)

- The sponsor must be identified in a clear manner at the start and/or end of the programme.
  - E.g.: “Sponsored by X”, or “Takk til X for bidraget” (“Thanks to X for the contribution”).
  - Verbally or in writing.


THE NETHERLANDS. A third interesting example of self-regulation was set up by several Dutch YouTubers in 2017 called ‘Social Code: Guidelines for advertising in online video’ (“Social Code: YouTube”). The Code was developed in collaboration with inter alia the Dutch Media Authority and the self-regulatory body for advertising – Stichting Reclame Code (“SRC”). The latter enforces the Dutch self-regulatory code for advertising, which also contains rules for social media advertising (including identification of commercial messages). The new Social Code: YouTube contains labelling requirements specifically for vlogging advertising on YouTube. Compliance with the Code will also entail compliance with the rules for social media advertising of the self-regulatory code of the SCR. Digital influencers pledging compliance to the Code can only collaborate with advertisers that accept the Code’s labelling requirements.

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316 ibid.
### Table 3

<table>
<thead>
<tr>
<th>Advertising paid by a brand</th>
<th>The label can either be:</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>✓ An image before the video starts, screen-filling, minimum of 3 seconds</td>
</tr>
<tr>
<td></td>
<td>✓ The vlogger mentions that the video includes an advertisement</td>
</tr>
<tr>
<td></td>
<td>Add in the description box: “This video includes a paid collaboration with ... ”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Advertising paid by charity</th>
<th>Idem</th>
<th>Vlogger</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Free goods or services or discounts</th>
<th>Statement at the bottom of the description box.</th>
<th>Vlogger</th>
</tr>
</thead>
</table>

| Products paid by the vlogger (so no advertising) | Add in the description box: This video does not contain any paid collaborations or free products... | |


## 3.2 Conclusion

**Towards a Coordinated, Evidence-Based Approach for Labelling.** It is clear from the analysis that digital influencers need to identify commercial communications that are integrated in their videos. Although the regulatory framework currently requires that certain information needs to be made visible to the consumer, it leaves a wide berth for interpretation and implementation. At the national level, this has led to a variety of self-regulatory initiatives, providing guidelines for the labelling of vlogging advertising. These self-regulatory instruments contain very clear and specific instructions for the implementation of the legal identification requirement in the context of vlogging, making it easy for digital influencers to comply. However, the lack of a coordinated approach at the EU level and the resulting distributed nature of labelling requirements could raise practical questions regarding enforcement. Furthermore, as digital influencers are highly popular amongst children, it could be questioned whether the labelling guidelines and current industry practices were developed with a children’s audience in mind. For instance, research by ZaroUALI et al. indicates that adolescents do not comprehend that the word ‘sponsored’ refers to the persuasive intent of a message. In other words, the current practice of several social media platforms – i.e. the signposting of commercial communication with the word “sponsored” or “sponsored posts” – is not effective when it
comes to adolescents and, as such, fails to fulfil the aim of the identification principle. Accordingly, it is argued that a coordinated, evidence-based approach to labelling, also taking into account the specific needs of children, could be useful for the proper implementation of the identification principle. The European Advertising Standards Alliance could take up a coordinating role in this regard.

**Video-sharing platform need to take up their share of responsibility.** The shift towards the inclusion of more qualitative advertising standards in self-regulation forms a good example of the evolving regulatory context in the digital environment. Whereas traditionally the state was the only regulatory actor issuing command-and-control legislation, other actors now participate in the regulatory process (such as industry players)\(^{317}\), which has led to the emergence of new regulation\(^ {318}\) concentrated on accountability, risk assessment and responsiveness. This shift is also reflected in the ongoing discussions on increased responsibilities for platform providers in the review of the AVMS Directive. While it is still recognised that intermediaries have limited control over content and commercial communications uploaded by third parties, they will need to foresee appropriate measures such as flagging mechanisms, age verification mechanisms, parental control systems, mechanisms to increase media literacy. In this regard, it has been argued that increased responsibilities are inevitable and the only practical means of ensuring more effective compliance.\(^ {319}\)

**Additional layer of protection by consumer protection law.** Finally, the analysis showed that certain provisions of the UCP Directive could form an additional layer of protection for consumer-followers against certain types of ‘unfair’ vlogging advertising. Due to its broad scope of application, the Directive can cover new commercial practices such as fake likes, hidden traders, Instagram pods or any other future persuasive tactic.


\(^ {318}\) Clifford and Verdoost (n 28).

\(^ {319}\) Clifford and Verdoost (n 114).
CONCLUSION

The digital advertising industry undoubtedly plays an important part in the creation and maintenance of content, services and digital spaces for children. The emerging trends in the area of commercial communication create difficulties for children to make carefully considered and critical commercial decisions or decisions concerning their privacy and personal data. In turn, this raises issues related to children’s rights to development, privacy, protection against economic exploitation and freedom of thought. The current regulatory framework provides for certain specific protections for children related to their autonomy and commercial decision-making in this context. These protections include *inter alia* the principles of identification and separation of the commercial message from the non-commercial content, information requirements and the reliance on consent as one of the main grounds legitimising the processing of personal data. However, the effectiveness of these new forms of commercial communication targeted to children calls the existing protections into question.

As advertising literacy studies have shown that recognition of the commercial nature of a message is a preliminary step for activating children’s defences against advertising, the identification and transparency principles remain relevant. However, it is argued that a more structured and coherent approach is needed in order to protect children’s consumer interests. This could include harmonised, evidence-based, qualitative requirements for disclosure cues, for instance through alternative regulatory mechanisms (self- or co-regulation). In addition, for children to grow up to be ad-literate adults, they should be able to practice their commercial decision-making skills throughout their childhood. As a part of their rights to development and education, they should be taught from an early age about how to cope with advertising, also in the digital environment, at school and by their parents.

Furthermore, the development of self-regulatory instruments containing more specific qualitative standards for advertising, could present a more flexible answer to new advertising formats that form a significant obstacle for children’s advertising literacy. In this regard, a more coordinated and collaborative approach is needed to tackle current and future complex commercial practices. This entails bringing together and coordinating the efforts of the various regulatory authorities (i.e. self-regulatory organisations, media regulators and data protection authorities) as well as the advertising industry. In addition, for an effective monitoring and enforcement of the rules, regulatory authorities need to have access to sufficient resources, especially if their tasks were to expand (e.g. new tasks for media regulators regarding video-sharing platforms).
Finally, given the sophistication and persuasiveness of certain trends, a balance should be made between on the one hand empowering children as young consumers and protecting them against harmful commercial practices. It is up to the State to ensure that effective regulation and monitoring of businesses’ advertising and marketing practices aimed at children are in place. Children's advertising literacy and needs should be taken into account in the on-going reforms and the implementation of the legal frameworks discussed. From the analysis it can be concluded that new advertising formats often combine several persuasive tactics and the protections for children against such tactics are spread across different regulatory instruments. Therefore, rather than looking at instruments in isolation, a holistic interpretation of the existing regulatory framework on commercial communication is needed. The potential role of consumer protection law as an additional layer of protection for children should be emphasised in this regard.
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