



## **SUBGROUP 1**

**2022**

### **CONSISTENT IMPLEMENTATION AND ENFORCEMENT OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE FRAMEWORK**

## **DELIVERABLE 4**

### **ERGA VLOGGERS REPORT 2**

#### **HOW TO IDENTIFY AND LOCALISE VLOGGERS AND REGULATE THEIR COMMERCIAL COMMUNICATION?**

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# 1 Introduction

In 2021, ERGA published its first Vloggers Report<sup>1</sup> with the intention to find common ground in the assessment of video services identified as on-demand audiovisual media services and offered on video-sharing platforms according to national case-law (called “vloggers”). Much common ground was identified ensuingly, based on the following assumptions: these types of offers had become very professional, constituting audiovisual offers in their own right, directly competing with traditional media services in regards of audience shares and advertising revenue. Further, the number of subscriptions and views of some offers led to the conclusion that they had a mass media impact and that regulation in regards of the core media values such as the protection of minors and human dignity as well as the identification of commercial communications was required and justified. ERGA reached the conclusion that increasingly, National Regulatory Authorities (NRAs) had begun to identify vloggers as potential audiovisual live streaming or on-demand services independently from each other.

The Report consequently identified common interpretation problems, such as the lack of (numerical) thresholds in regards of the service criterion or the significant proportion of the public. Basic interpretation issues also arose in relation to the definition element “mass media which inform, entertain or educate the general public.”, both with regard to the notion of mass media as well as of offers which inform, entertain or educate the general public. This analysis appeared to be crucial as many on-demand services on video-sharing-platforms may have a big reach but produce content which does not constitute a mass media offer informing, entertaining or educating the general public. This delineation poses many problems in the daily practice of NRAs.

Although material obligations of vloggers were briefly touched on in this first Report, ERGA’s Work Programme for 2022 foresaw a continuation of this activity, namely to focus on regulatory requirements pertaining to such on-demand audiovisual media services. In this context and specified by the Terms of Reference for this activity, consensus was reached to focus mainly on the challenging requirements as regards advertising and to touch on some practical aspects of enforcement.

It should be noted that the issue of advertising (more commonly referred to as “influencer marketing”) poses a challenge in many ways. On the one hand, such audiovisual offers frequently constitute – in common terms – advertising in its own right. The advertising message is staged in an editorial context, in other words, the advertising message constitutes the story. This typical appearance of content on video-sharing platforms was relatively new, if one disregards excessive cases of product placement prior to Directive 2010/13/EU. The phenomenon led to new challenges, as the labelling of advertising, a core value of media regulation, only makes sense if editorial content and commercial communications are clearly contrasted. Therefore, the present Report will also present the different business models of vloggers, including commercial content outside of a video (affiliate links).

Another challenge in this context is that normally, other rules will apply on a national level. Beside the Directive, this may be media law or voluntary industry standards. In other words, compliance is rendered difficult for vloggers in view of the various rules applying to them. The present Report will address this issue and make some recommendations in this regard, both in regards of concrete

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<sup>1</sup> Report – Analysis and recommendations concerning the regulation of vloggers, <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Vloggers.pdf>.

examples on how to label commercial communications and best practices of NRAs how to inform the stakeholders subject to the relevant rules. Equally, media literacy, especially of vulnerable groups (children) must be addressed. Many studies have shown the lack of awareness of users in this regard, namely if and when they are subject to a commercial message. Strategies to counter this must therefore be twofold: on the one hand, compliance of service providers in regards of advertising rules must be enhanced, on the other, media literacy initiatives specifically aiming at the issue of commercial communications must be launched. This Report will also address the issue of how relevant rules can be circulated in the vlogger communities and take stock of self-regulation initiatives of vloggers. Already the first ERGA Vloggers' Report had pointed at the benefits of self-regulation, which may be either complementary to statutory regulation or dominant in jurisdictions where vloggers are not considered as audiovisual media services.

Other aspects to be examined in the present Report are issues such as the identification of service providers and online enforcement of relevant rules. These aspects are very relevant to regulation insofar as the best legislative measures will fail if the originator of the service cannot be identified. Audiovisual offers where video-sharing-platforms host a vlogger do not require specific identification other than an e-mail-address, which makes, for instance relocation and thus circumvention or forum shopping to other jurisdictions much easier compared to a traditional media company. This Report analyses the various methods to get hold of the originator, bearing in mind that technical must be proportional to the severity/intensity of the infringement. Furthermore, effective means of enforcement must be identified. Currently, the Directive foresees detailed rules on the information (name, address, contact address, competent authority) which must be provided easily accessible on an audiovisual media service, this provision is futile if – as mentioned – the provider of the service cannot be identified.

Another element which must be taken into account in the context of vloggers and their legal obligations are the complementary duties of video-sharing-platforms as introduced by Directive (EU) 2018/1808. Following a legal analysis of the relevant rules, recommendations on how to effectively safeguard statutory obligations on commercial communications with regard to the service as such will be made.

As regards to the rules potentially addressed, a reference to the new rules of the Digital Services Act must be made. Therefore a chapter will tackle the rules on advertising and their possible interplay with the provisions of the Directive.

## **2 ERGA's engagement so far**

This Report has been prepared under the responsibility of ERGA's Subgroup 1 Consistent implementation and enforcement of the AVMSD framework and a follow-up of the activities of the subgroup in 2021, and more specifically the second workflow of this subgroup.

The work of subgroup 1 in 2021 had to provide insight into how countries have implemented and apply the new AVMS Directive provisions for VSPs (Video Sharing Platforms) and media service providers in practice. Building on practical examples in certain countries, the subgroup aimed to provide guidance in the application and interpretation of the most complex provisions. The subgroup's activities were divided into two workflows. In the first workflow, the focus was on exchange best practices and an inventory was made of how countries apply some of the new AVMS Directive provisions. It looked at Article 28b of the Directive and how regulators can determine that video sharing platforms take

appropriate measures to protect users against harmful or even illegal content. In that context, ERGA also organized a workshop with stakeholders in September 2021. Research has also been conducted into the implementation of Article 7a of the Directive. Finally, it has also been mapped out how Article 7b of the Directive has been implemented, which prescribes that signal integrity must be guaranteed and that unwanted overlays must be prevented.

In the second workflow of subgroup 1 in 2021, the emphasis was more on providing technical expertise and guidance. The reports generated by this workflow not only provide an overview of how countries have implemented certain articles, but also provide suggestions for the application and interpretation of complex AVMD Guidance provisions. In doing so, ERGA zoomed in on Article 7 of the Directive: how can accessibility of media services in general be promoted? It has also been mapped out how Member States apply Article 13, paragraph 1 of the Directive, which prescribes that on-demand services must contain at least 30% European works and that these European productions must receive appropriate attention.

Finally, research has also been conducted into the application of (definition) criteria of the AVMS Directive to vloggers and comparable providers on online platforms. The current Report is a follow-up to the Analysis and recommendations concerning the regulation of vloggers, which was adopted in December 2021. The 2021 report contained a detailed overview of the relevant provisions of the AVMS Directive, drafting history, considerations (including from previous Directive versions), relevant case law, and national approaches. Based on best practices from some regulators, the Report suggested several practical criteria that can be used in determining which vloggers and other parties who upload videos on video platforms can be considered media service providers. The previous Report acknowledged that Member States have a discretionary power in the implementation of the AVMS Directive and therefore have the freedom to interpret it themselves. But this mainly applies to substantive provisions of the regulations. When it comes to determining the scope of the regulations, as much uniformity as possible is desirable, especially to ensure a level playing field in Europe.

The mapping exercise showed that at the time the first Report was drawn up, various countries had already started regulating vloggers such as Austria, Germany, Belgium (French-speaking community) and Norway. It should be noted, however, that supervision was not always (fully) based on formal regulations implementing the AVMS Directive, but (partly) on general consumer law such as in Germany or self-regulation such as in Norway. The Report also pointed out that threshold criteria (so called *de minimis* rules) can help to determine the scope of regulation. For instance a turnover threshold or a minimum number of followers/subscribers of a service can be used to define key criteria such as economic service and mass media. Furthermore, the Report also concluded that with regard to the application of material rules on commercial communication and protection of minors among vloggers, there was a need for a follow-up workflow under subgroup 1.

So, the present Report is the materialization of this follow-up exercise. Its purpose is to explore the main issues around the identification and localisation of vloggers as well as commercial communication in and around their content. Furthermore, the Report aims to provide guidance to NRAs to deal with legal and practical challenges. A special focus of the Report is on how to achieve optimal transparency about commercial communication in and around vloggers material and protection of audiences. As this was the case in the first Vloggers Report, the recommendations made will be of practical nature, as the Report is meant to be a practical handout for regulators and stakeholders.

### 3. Legal assumptions

A major cause for the prominent treatment of vloggers by ERGA lies in the fact that a given offer – the vloggers’ offer – can combine an on-demand audiovisual media service, mainly regulated by the Directive, and – basically – an information society service corresponding to the definition of a hosting provider in accordance with Art. 14 of the E-Commerce Directive. At the same time, this provider, on condition of the fulfilment of certain criteria defined in Art. 1 paragraph 1 (da) of the AVMS Directive constitutes a video-sharing platform. This point is crucial insofar, as in the future and by way of Recital 16, the E-Commerce-Directive will be integrated into the Digital Services Act, which will therefore equally govern these types of platforms, which constitute, in accordance with Art. 2 (h), an online platform, potentially a very large online platform (VLOP) in accordance with Art. 25 paragraph 1 of the DSA. This means that in addition to the rules of the E-Commerce-Directive (according to Article 1a Point 3 of the DSA, the latter shall not affect the application of Directive 2000/31/EC), the obligations of online platforms as enshrined in the DSA (Art. 14 to 24e) come on top of the rules applying to intermediary services which apply in any event.

If the number of average monthly active recipients of the service in the Union however are equal to or exceed the number of 45 million active users, an additional set of obligations, as enshrined in Art. 25 to 37 of the DSA, apply. With a view to the fact that, by its very nature, a video-sharing platform serves as a catalyst (in economic terms and such of relevance) for the performance of the latter, it may be assumed that they will constitute VLOPs. This means that another layer of obligations, namely the noteworthy for VLOPs, will apply.

The picture is thus as follows:

Vlogger service --      Provisions applying to on demand audiovisual media services (AVMS Directive)

- (+ Provisions applying to on-demand audiovisual media services DSA?)
- + Provisions applying to video-sharing platforms (AVMS Directive)
- + Provisions of the E-Commerce Directive (incorporated into the DSA)
- + Provisions on intermediary services (DSA)
- + Provisions on online platforms (DSA)
- + Provisions on VLOPs (DSA)

Whereas it is assumed that the DSA in itself offers a consistent framework for activities by platforms, the relationship between the Directive and the DSA with regard to video-sharing platforms is not, in theory at least, that straightforward. It was noted by ERGA in its Position Paper in the course of the legislative process on the DSA that further clarification of the relationship between the Directive and DSA was required. Added to this it should be noted that the Directive to date has not yet been implemented in all Member States and is per se open to stricter measures by Member States (since the rules on video-sharing platforms were ultimately not harmonised in the course of the negotiations on the Directive), whereas the DSA, as a regulation, is not open to national discretion.

In principle, the DSA *expressis verbis* stipulates in Art. 1a Point 4 (a), that it is without prejudice to Directive 2010/13/EU. What this means is seemingly specified in Recital 10: “This Regulation should be without prejudice to other acts of Union law regulating the provision of information society services in general, other aspects of the provision of intermediary services in the internal market or specifying

and complementing the harmonised rules set out in this Regulation, such as Directive 2010/13/EU of the European Parliament and of the Council, including the specific provisions set out in that Directive as regards video-sharing platforms. [...] However, to the extent that these rules pursue the same objectives as those laid down in this Regulation, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.” For the practical, day-to-day work of NRAs and also in regards of the need of legal certainty for providers, the last sentence, especially the relativization made (“not fully addressed by those acts” and the reference to the possibility for Member States to adopt stricter measures) are very much open to interpretation. A preliminary version of the DSA had foreseen the obligation of the European Commission to issue guidelines on the relationship between the DSA and the other neighbouring acts. This was deleted in the course of the legislative process, and would besides have been prejudicial in consideration of the independence of NRAs. Furthermore, the legislative process, for very good reasons of safeguards for vulnerable groups and consumers in general, brought by additional measures especially as regards protection of minors and advertising.

As this Report mainly addresses the issue on advertising by vloggers, provisions of the DSA devoted to political advertising, but especially the relevant proposal for a Regulation on Political Advertising by the Commission are not tackled in this Report but dealt with in the context of ERGA’s work in the field of disinformation. In that regard see for instance the ERGA Position Paper on the Regulation on the transparency and targeting of political advertising<sup>2</sup>.

## **3.1 Relevant provisions of the Directive for audiovisual on-demand media services (hence vloggers) and video-sharing platforms**

### **3.1.1. Audiovisual on-demand media services**

Whereas Directive 2010/13/EU, regulating audiovisual on-demand media services for the first time, introduced a graduated approach to regulation, including for commercial communications, by differentiating between the regulation of linear and non-linear services (basic requirements only), Directive (EU) 2018/1808 mainly converged the relevant obligations, differentiating only in regards of the specificities of on-demand services.

The picture is thus as follows:

Art. 9 of the AVMS Directive stipulates core principles applying to commercial communications:

- They must be readily recognisable as such (surreptitious commercial communications are prohibited and not subliminal techniques shall be used)
- They must respect human dignity
- They must not include or promote any discrimination based on sex, racial/ethnic origin, nationality, religion or belief, disability, age or sexual orientation

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<sup>2</sup> ERGA position paper on the Regulation on the transparency and targeting of political advertising, <https://erga-online.eu/wp-content/uploads/2022/09/2022-08-31-ERGA-Position-Paper-on-the-proposed-Regulation-on-political-advertising-2022-as-adopted.pdf>.



- They must not encourage behaviour prejudicial to health or safety
- They must not encourage behaviour grossly prejudicial to the protection of the environment
- Any commercial communications for cigarettes and other tobacco products, as well as electronic cigarettes and refill containers are prohibited
- They shall not be aimed specifically at minors and not encourage immoderate consumption of such beverages
- Any commercial communications for medicinal products and medical treatment available only on prescription (in the Member State of origin) shall be prohibited
- They shall not cause physical, mental or moral detriment to minors by exhorting to buy or hire products or services by exploiting their inexperience or credulity, directly encourage them to persuade their parents/others to purchase goods/services advertised, exploit the special trust minors place in parents/teachers/other persons or unreasonably show minors in dangerous situations
- Regarding alcoholic beverages, with the exception of sponsoring and product placement, they shall comply with the following criteria: they shall not be aimed specifically at minors, not link the consumption to enhanced physical performance or to driving, not create the impression of social or sexual success, not claim therapeutic qualities or being a stimulant, a sedative or a means of resolving personal conflicts, not encourage immoderate consumption or present abstinence of moderation in a negative light and not place emphasis on high alcoholic content as being a positive quality of the beverage

To this end, Member States shall encourage the use of co-regulation and foster self-regulation through codes of conduct especially in regard of inappropriate commercial communications for alcoholic beverages aiming at effectively reducing the exposure of minors to this type of commercial communications as well as inappropriate commercial communications, accompanying or included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended.

In this context, ERGA refers to its recommendation in Chapter 6.5 of the first Vloggers Report<sup>3</sup>, according to which tools such as self-regulation can play an important part as regards of vloggers' regulatory compliance. As will be demonstrated in the following chapters, this instrument can also be very useful as regards the labelling of product placement and/or sponsoring.

The rules on sponsoring (Art. 10 of the AVMS Directive) are guided by the following principles:

- its content and their scheduling shall not be influenced in a way as to affect the responsibility and the editorial independence of the provider
- it shall not directly encourage the purchase or rental of goods or services (in particular by special promotional references)
- viewers shall be informed of the existence of the sponsorship agreement (clear identification as such by the name, the logo and/or any other symbol of the sponsor such as a reference to its

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<sup>3</sup> Report – Analysis and recommendations concerning the regulation of vloggers, <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Vloggers.pdf>.

products or services or a distinctive appropriate sign thereof at the beginning, during at/or at the end of the programmes

- there shall not be any sponsoring by undertakings with the principal activity manufacture or sale of cigarettes/tobacco products/electronic cigarettes/refill containers
- sponsoring by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment by promoting the name or the image of the undertaking is admissible, but shall not promote specific medicinal products or medical treatments (available on prescription in the Member State of origin)
- news and current affairs programmes shall not be sponsored, Member States may prohibit the sponsoring of children's programmes or the depiction of a sponsorship logo in children's and religious programmes and documentaries

Product placement is permitted under the following conditions (Art. 11 of the AVMS Directive):

- it is admissible in news, current affairs programmes, consumer affairs programmes, religious programmes and children's programmes
- its content and organisation within a catalogue shall not be influenced in a way to affect the responsibility and editorial independence of the provider
- it shall not directly encourage the purchase or rental of goods/services, in particular by promotional references
- it shall not give undue prominence to the relevant product
- viewers shall be clearly informed of the existence of product placement by appropriate identification at the start and at the end of the programme, equally after an advertising break
- product placement for cigarettes/other tobacco products/electronic cigarettes/refill containers or from undertakings whose principal activity is the manufacture or sale of those products is prohibited
- product placement for specific medicinal products or medical treatments (available on prescription in the Member State of origin) is prohibited

The rules on product placement only apply to programmes produced after 19 December 2009. Member States may waive the obligations in regards to labelling except for programmes produced or commissioned by a media service provider or by a company affiliated with that media service provider. This exception of course can generally be disregarded, as it is the very nature of vloggers to provide self-produced programmes, in other words, user-generated content.

### **3.1.2. Video-sharing platforms**

As mentioned above, when speaking of vloggers, it is important to emphasize platform responsibilities as Directive (EU) 2018/1808 introduced a couple of obligations for video-sharing platforms affecting a vloggers' offer as such and (at least in theory) complements his responsibility.

In the Commission's proposal for a revised Directive, no obligations pertaining to advertising for video-sharing platforms were included. In the course of the legislative process, it was the Council demanding the introduction of such obligations, with a view to safeguard maximum protection of users when consuming user-generated content on these platforms and to make the platforms also responsible for the commercial communications they market.

This led to the following requirements, which must be imposed on video-sharing platform providers by Member States in accordance with Art. 28b paragraph 2:

- They must comply with the qualitative requirements set out in Art. 9 paragraph 1 (see above) in regards of commercial communications marketed, sold or arranged by themselves
- They must take appropriate measures to comply with the requirements of Art. 9 paragraph 1 in regards of commercial communications not marketed, sold or arranged by them, taking into account the limited control exercised by them over the commercial communications
- They must clearly inform users on the presence of commercial communications provided the user has declared them or it has knowledge of the fact

The measures imposed by Member States must be determined in the light of the nature of the content at stake and the harm it may cause, thus be proportionate, also with a view to the size of the video-sharing platform.

Guidance on how video-sharing platforms may fulfil the obligations in relation to commercial communications is given in Art. 28b point 3:

- inclusion (and application) in their terms and conditions of the requirements relating to commercial communications (Art. 9 paragraph 1.), which are not marketed, sold or arranged by the platform
- inclusion of a functionality for users to declare the presence of commercial communications (as far as they know or can be reasonably expected to do so)

In practice, with reference to the above, it is probable that vloggers perform their activities on big platforms (VLOPs), and thus situations will occur as follows: a vlogger is registered or identified in Member State A and his service is provided on a video-sharing platform established in Member State B. In this context, vlogger regulation becomes an issue of cross-border nature.

In this context, the following situation may arise: on the one hand, legal obligations for both the vlogger and the platform regarding the same video may be given (e.g. the prohibition of discriminatory commercial communications), on the other, jurisdiction over the vlogger and the video-sharing platform falls apart. Added to this, the determination of whether or not an offer constitutes an on-demand audiovisual media service depends on national requirements and may incur, amongst other things, an obligation to notify/register the service.

The distribution of competences between two regulators, in regards of the video-sharing platform and the vlogger can become complicated/unclear in regards to advertising. For instance, the provision conferring obligations on the video-sharing platform is made conditional on the degree of influence over the content offer in quite vague terms (“taking into account the limited control”, “provided that... has knowledge of that fact”) or the contractual relationship between the content provider and the platform (“sold, marketed and arranged”). In addition, regulation relating to video-sharing platforms is performed on a macro-level by the responsible NRA, whereas the NRA supervising the audiovisual offer handles individual cases. What may complicate the situation even more is the following: video-sharing platforms offer a variety of forms of monetisation with different contractual arrangements.

In view of this non-straightforward situation ERGA has provided for an own mechanism of cooperation between regulators especially with regard to video-sharing platforms. For the maintenance of a high level of consumer protection within the common market, the risk of forum shopping should be avoided by close cooperation of NRAs.

### **3.2. Relevant provisions of the DSA on (very large) online platforms**

As referred to above, obligations arising from the DSA are (more or less) complementary to those of the vlogger for the commercial communications offered as regards a given offer. They shall be touched on only briefly and reference is made to a report by the European Audiovisual Observatory<sup>4</sup> which deals with the relevant provisions of the DSA and other important aspects in relation to online advertising.

As the Council, to date, has not taken a final decision on the agreement with the European Parliament on the DSA, the following references revert to the provisional agreement between the institutions of June 15<sup>th</sup>, 2022.

Recital 52 acknowledges the importance of online advertising in the online environment, where the provision of the service is sometimes in whole or in part remunerated directly or indirectly, through advertising revenues. At the same time, it stresses the significant risks associated: the potential of illegal content in the advert itself, as well its potential contribution to the publication or amplification on illegal/harmful content and activities, and finally potential discriminatory presentation and consequences on equal treatment of citizens. Therefore, in addition to the requirements resulting from Article 6 of Directive 2000/31/EC (E-Commerce Directive), providers of online platforms shall be required to ensure that the recipients of the service have certain individualised information necessary for them to understand when and on whose behalf the advertisement is presented (clearly visible, unambiguous, adapted to the nature of the service, directly accessible via the interface). In addition, recipients of the service should have information directly accessible from the interface where the advertisement is presented, on the main parameters used for determining that a specific advertisement is presented to them, providing meaningful explanations of the logic used to that end, including when this is based on profiling. Such explanations should include information on the method used for presenting the advertisement, and, where applicable, the main profiling criteria used; it should also inform the recipient about any means available for them to change such criteria. It is also noted expressis verbis that this Regulation complements the application of the Directive 2010/13/EU (AVMS Directive) which imposes measures to enable users to declare audiovisual commercial communications in user-generated videos.

Recital 57d, amplified by Recital 58b, further stipulates that practices in regards of advertising should be considered among potential systemic risks, including collection of data, use practices and recommendations. The discontinuation of advertising in relation to certain information shall be considered as a remedy and authoritative information furthered, especially in times of crisis (Recital 59a).

Recital 63 stipulates that VLOPs should ensure public access to repositories of advertisements presented on their online interfaces to facilitate supervision and research into emerging risks brought about by the distribution of advertising online, for example in relation to illegal advertisements or manipulative techniques and disinformation with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality. Repositories should include the content of advertisements, including the name of the product, service or brand and the object of the advertisement, and related data on the advertiser, and, if different, the natural or legal person who paid for the advertisement, and the delivery of the advertisement, in particular where targeted advertising is concerned. This information should include both information about targeting criteria and

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<sup>4</sup> Unravelling the Digital Services Act package, European Audiovisual Observatory, [https://search.coe.int/observatory/Pages/result\\_details.aspx?ObjectId=0900001680a43e45](https://search.coe.int/observatory/Pages/result_details.aspx?ObjectId=0900001680a43e45).

delivery criteria, in particular when advertisements are delivered to persons in vulnerable situations, such as minors.

Recital 66 encourages self-regulation as a tool to further consistent implementation on the advertising rules, also with a view to best-practices, taking into account the whole value chain of online advertising (Recital 70).

Article 24 details the rules relevant to advertising on online platforms. Providers of online platforms that present advertising on their online interfaces shall unambiguously ensure (in a directly and easily accessible way) that the recipients of the service can identify, for each specific advertisement presented to each individual recipient that the information presented is an advertisement (including the natural or legal person on whose behalf the advertisement is presented, the natural or legal person who paid for the advertisement where this person is different from the natural or legal person referred to from the latter, information about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters).

Article 24b tackles the issue of online protection of minors. Online platforms accessible to minors shall put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service and not present advertising on their interface based on profiling using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor. The Commission, after consulting the Board, may issue guidance to assist providers of online platforms in the application of this rule.

Article 27 details the measures to mitigate risks as regards VLOPs. These measures may include adapting the design, features or functioning of their services, including their online interfaces and/or adapting their terms and conditions and their enforcement. Further, those measures may consist in adapting their advertising system and adopting targeted measures aimed at limiting or adjusting the presentation of advertisements in association with the service they provide.

Article 30 provides for rules on additional online advertising transparency for VLOPs: they shall compile and make publicly available in a specific section of their online interface, through a searchable and reliable tool that allows multi-criteria queries, and through application programming interfaces, a repository until one year after the advertisement was presented for the last time on their online interfaces. They shall ensure that the repository does not contain any personal data of the recipients of the service to whom the advertisement was or could have been presented. The repository shall be constituted as follows: the content of the advertisement (name of the product, service or brand and the subject matter of the advertisement), the natural or legal person on whose behalf the advertisement is presented, the natural or legal person who paid for the advertisement, where that person is different, the period during which the advertisement was presented, whether the advertisement was intended to be presented specifically to one or more particular groups of recipients of the service and if so, the main parameters used for that purpose including where applicable the main parameters used to exclude one or more of such particular groups, the commercial communications published on the VLOPs, the total number of recipients of the service reached and, where applicable, aggregate numbers in each Member State for the group or groups of recipients to whom the advertisement was targeted specifically. Also for this purpose, the Commission may, after consultation of the Board, relevant vetted researchers and the public, issue guidelines on the structure, organisation and functionalities of the repositories.

Article 36 provides for the creation and encouragement of voluntary codes of conduct at Union level between, providers of online platforms and other relevant service providers, such as providers of online advertising intermediary services, other actors involved in the programmatic advertising value

chain, or organisations representing recipients of the service and civil society organisations or relevant authorities to contribute to further transparency for actors in the online advertising value chain beyond the legal requirements. The codes of conduct shall address at least the following issues: the transmission of information held by providers of online advertising intermediaries to recipients of the service and the transmission of information held by providers of online advertising intermediaries to the repositories as well as meaningful information on data monetisation.

## **4 Identification and localisation of the content and the (editorial responsible) service provider (vlogger)**

### **4.1 General supervision and enforcement instruments**

When it comes to supervisory and enforcement instruments, in principle, media regulators have the same instruments at their disposal as with traditional media service providers. This applies in any case if a vlogger can be regarded as an on-demand media service provider. However, what can make supervision and especially enforcement more challenging is that you have to deal with more different parties that play a role in the online distribution of video offerings. Media regulators often do not maintain a formal supervisory relationship with such intermediaries because they fall outside the scope of national media legislation. In such cases it is important that media authorities can rely on general information collection powers and the obligation of market parties to respond to formal requests. In the Netherlands, the Media Authority Commissariaat voor de Media (CvdM) can, for example, make use of the power laid down in the General Administrative Act to request from parties all information it deems reasonably necessary for the exercise of its supervisory powers. If the parties refuse to cooperate, administrative sanctions such as a financial penalty may be imposed on them.

For media supervision the detection and sanctioning of violations on the Internet represents a particular challenge. Since in most countries on-demand audiovisual media services – in contrast to broadcasting – usually do not need a license finding out what services exist is the first difficulty. Even if there is an obligation to register, some providers will evade it intentionally or out of ignorance.

As it is practically impossible to permanently monitor which (new) vloggers are located within the jurisdiction of a public authority, complaints from users can be an important source of effective supervision. In Germany, the Landesmedienanstalten (federal media authorities) operate a joint complaints portal ([www.programmbeschwerde.de](http://www.programmbeschwerde.de)), through which media users can report content that they consider harmful to minors or that constitutes violations of the advertising rules or the transparency requirements. Citizens can also contact one of the 14 Media Authorities directly. Special e-mail addresses or online contact forms for inquiries or complaints are provided on the websites.

Another way to find vloggers is through targeted research. When reviewing the content of a vlogger, attention can be paid to whether he/she is managed by an agency. These agencies, that are specialized in social media marketing and represent persons, that create content for audiovisual media services, often feature their "talents" on their websites. So, the websites of agencies can be a source to find further vloggers. In addition, vloggers often cooperate and appear in each other's videos. In this way, "new" vloggers can also be discovered as part of general reviews.

In addition, vloggers may be monitored through free (or based on a freemium model) specific tools available online (see below 4.2.1). These tools are a way for NRAs to monitor vloggers' accounts without being granted access to their internal statistics. Indeed, some companies provide public global and automatically updated analytics and databases for content creators, live streamers and brands posting audiovisual content on various video-sharing platforms and social networks. These tools are proposed either on websites or through web browser extensions. As an illustration, Social Blade offers user statistics to help vloggers and users understand channels' growth, SEO optimization and social media trends on 12 different services such as YouTube, Twitter, Dailymotion and Odysee. Thanks to advanced automation and artificial intelligence, data compagnies such as Social Blade, TubeBuddy and VidIQ also provide a browser extension whose window appears aside a vlogger's video and delivers data specifically related to the video being played (e.g. tags embedded by the vlogger, average number of daily views, number of subscribers in the last 30 days or total number of comments and likes).

Monitoring is a suitable instrument for detecting violations in audiovisual media services, that are already known. The content of vloggers who have already been contacted because of inadequate advertising labelling etc. can be reviewed consistently. In Germany, the Media Authorities also carry out a joint focus analysis on advertising labelling in audiovisual media once a year. On a set date, each authority checks a certain aspect, such as the advertising marking of discount codes, with the vloggers known to it.

If violations of the advertising regulations are detected in an audiovisual media service, the vlogger is usually the first contact person. According to Art. 1 Para 1 point (d) AVMSD a "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised". Based on this, the vlogger, who provides the media service, is also responsible for correctly labelling advertising within the service.

Vloggers that qualify as audiovisual media service providers will be subject to information requirements. According to Art. 5 AVMSD the following information about the service provider must be available: "a) its name; b) the geographical address at which it is established; c) the details, including its email address or website, which allow it to be contacted rapidly in a direct and effective manner". In Germany, each of the 14 Media Authorities checks compliance with the advertising rules and the provisions on the protection of minors in audiovisual media services based in its own federal state. Decisive for the assignment is the address given in the imprint. So, as long as a channel or account has a proper imprint, it is obvious which state media authority is responsible. The vlogger would be contacted by e-mail or letter about possible advertising violations.

Of course, violations are also found in channels/ accounts that do not have a proper imprint. Often, however, an e-mail address can be found on one of the vlogger's social media accounts. In this case, the vlogger is not only informed about possible advertising violations, but also about the imprint obligation. If no contact details are available, there are various ways to research information about the vlogger. The published content may be used to identify the city or region in which the vlogger lives (possibly using reverse image search or map programs). If the vlogger's real name and city of residence are known, a request at residents' registration offices is possible, to find out the exact address. Another approach is to find out, if the vlogger is managed by an agency through which it is possible to contact him.

## 4.2 Instruments and tools to identify the content and the service provider

Identifying and locating the party that bears editorial responsibility for an audiovisual media service can turn out to be a rather complex and challenging exercise in the online domain in which vloggers operate. Online parties are in general more elusive because they can use all kinds of tools and techniques that can disguise their identity, their activities and their actual location. In addition, it concerns parties who are not used to supervision and who sometimes also have specific reasons for evading supervision. It may therefore be partly due to ignorance or unwillingness. While in the first case clear communication geared to the target group can offer solace, in the case of unwillingness and deliberately calculating behaviour other approaches are needed. As part of an effective supervision and enforcement policy, NRAs (National Regulatory Authorities) must therefore keep themselves permanently informed of the digital techniques and tools in use by market parties in order to be able to respond adequately and, for example, to understand confidentiality structures.

Due to the enormous scale of content generated on social media and other platforms by content creators digital monitoring tools become more and more indispensable. Online monitoring of players and the content they provide on platforms can be done in various ways, depending on the techniques used and the legal mandate of the NRA. A usual way to collect multimedia content (audiovisual) and text (including posts, captions and comments) is to use the platform Application Programming Interface (API). Alternatively, especially in the situation that a platform does not have a data API (such as TikTok), data collection can take place through scraping.

### 4.2.1 Digital services to facilitate identification

Social media analytics platforms are data companies (such as Social Blade) that use social media platform APIs (Application Programming Interfaces) to offer insights into the volatile metrics of social media content creators. These companies are selling data products that help brands and other relevant commercial parties to identify the influencers who are fit for advertising the brand's products or services. A sub-category of social media analytics platforms are influencer marketing platforms. They are not only suggesting metrics (such as engagement scores) for the purpose of ranking the performance of influencers, they also offer other types of services such as influencer management tools<sup>5</sup>.

More and more market parties are developing tools to gain access to vloggers and other parties that are active on social media in general and video (sharing) platforms in particular. Initially, these products and services are developed for advertisers, their agents and related private parties. In this way they can get a good picture of where their target groups and potential customers are located and can thus use their online advertising budgets more strategically. Due to an increasing range of platforms and the accompanying fragmentation and fragmentation of their target groups, the need for such tools is increasing and the market is responding intelligently. As a kind of variation on the adage "If you cannot beat them, join them", regulators could consider using such marketing tools for their (online) supervision and enforcement activities.

In this context, reference can be made to the following products and services:

Heepsy

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<sup>5</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 35.



Heepsy describes itself as an influencer marketing platform for brands and agencies. Heepsy provides access to millions of influencers from all over the world and various tools that help to find the most suitable influencer for a brand. With the help of Heepsy you can search for influencers on the platforms Instagram, YouTube, TikTok and Twitch and by using filters such as location, category, number of followers, engagement rate and more, a very targeted search can be made. Heepsy also provides detailed influencer analytics reports that focus on engagement, follower growth, audience demographics, and authenticity. All search results can be organized by specific characteristics and stored in spreadsheets and other lists<sup>6</sup>. The permanently updated database of contact details can be useful when approaching parties that fall under the scope of regulation but have not yet notified themselves and/or their services to the NRA in charge.

#### Modash Influencer Search

Modash states to have a database of approximately 200 million social media influencers who are active on platforms such as YouTube, TikTok, Instagram and Twitch<sup>7</sup>. Modash claims to have all the tools for advertisers and brands to organize effective marketing campaigns. The platform enables companies to access all kinds of influencer target group data and thereby identify the appropriate influencers for their brand or market. Influencers can be filtered, classified and stored in lists based on characteristics such as audience age, location and other follower data. Manual filtering and searching is also possible. Using a so-called engagement calculator, the engagement percentage of influencers can also be measured. Similar to Heepsy, Modash's database contains extensive contact details. As a result, advertisers, brands, agencies, but also regulators can not only identify relevant influencers, but also reach out to them if necessary.

The Dutch Media Authority CvdM has used both the services of Heepsy and Modash when implementing its registration policy with regard to vloggers – video uploaders in the terminology of the Dutch Media Authority – on the platforms YouTube, Instagram and TikTok. Both tools have helped the CvdM in identifying and tracing online parties that could possibly be regarded as providers of on-demand media services within the meaning of the Dutch Media Act and which – at least potentially – can fall under supervision. In particular, the filtering options based on language and location of the target group has contributed to a better mapping of the market and the relevant vloggers (video-uploaders in the terminology chosen by the CvdM). In addition to Heepsy and Modash, there are many other parties active or in the market that offer similar products and services. Also they can be reconsidered as digital tools to get a better grip on which vloggers are active in certain (national) markets. This includes – in no particular order – services and applications such as Shoutcart, Aspire, YouTube BrandConnect, Ampjar, Influence.co and Influencity<sup>8</sup>. Apart from minor differences, these parties offer comparable search tools, filtering options and databases with contact details. Usually, most companies focus on all well-known and popular social media platforms where today's social influencers and vloggers are active. An exception is YouTube BrandConnect, which – as the name already suggests – only focuses on YouTube influencers.

### 4.2.2 Professional recognition of vloggers through financial support

In addition to potential legal consideration and material assessment, there can be financial indicators of the professional recognition of the vloggers.

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<sup>6</sup> <https://www.trustpilot.com/review/heepsy.com>.

<sup>7</sup> <https://www.eu-startups.com/directory/modash/>.

<sup>8</sup> <https://www.modash.io/blog/shoutcart-alternatives>.

#### 4.2.2.1 Financial support received from European, national or regional funds for the audiovisual creation<sup>9</sup>

The professionalization of the vloggers can result from European, national and regional grants for audiovisual webcreation.

The type of funds described below act also potentially as tools to help vloggers create their own audiovisual production companies by labelling their artistic creation which results from it. The financial aid granted to vloggers enables them to structure their economic activity and prepare their future financing plans. Conversely, the allocation of these grants depends on the level of professionalization of the vlogger who will be forced to adopt a professionalizing attitude in order to be assisted.

➤ **Example: the French National Center for Cinema vloggers' fund**

As a sign of the will to warrant online audiovisual content as a cultural object, the French National Center for Cinema (CNC for Centre national du cinéma et de l'image animée) created in October 2017 the **fund for internet content creators, known as "CNC Talent"**<sup>10</sup>, dedicated to original French-speaking projects aiming at a first free internet broadcasting.

The fund arose from the observation by the CNC of a professionalization of the sector and the lack of a support mechanism, and more particularly following the widening of the tax base on the broadcast in physical and online video of audiovisual content<sup>11</sup> in September 2017.

The fund includes **two selective pre-production grants**, awarded on the advice of a commission made up of 10 members and meeting five times a year. The fund sets audience eligibility criteria depending on the grant:

- A creation grant, up to €30,000; open for vloggers or groups of vloggers with at least 10,000 subscribers or<sup>12</sup> having been awarded or selected at a festival in France over the past five years. It allows vloggers to operate creative leap in the quality of their content and must be used for production expenses and/or the acquisition of broadcasting rights;
- A digital channel editorialization grant<sup>13</sup>, up to €50,000; open for vloggers or groups of vloggers with a minimum of 50,000 subscribers. It is used for production expenses and technical expenses related to the download, editorialization and promotion of works.

These entry criteria are the result of consultations with actors of the sector, and serve to **attest to the economic feasibility and the good management of the vloggers' projects**.

The CNC Talent fund "aims to support those who want to make of content creation their profession and not to support amateur practices". Project holders can be individuals<sup>14</sup>, associations or production companies. To be eligible, the project submitted needs to be an original French-speaking work benefiting from scriptwriting and of cultural interest. Apart from institutional and promotional projects

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<sup>9</sup> The elements included in the present section stem from an interview conducted with the manager of the fund, Cécile Delacoudre, on December 15, 2021.

<sup>10</sup> For more details: [https://www.cnc.fr/professionnels/aides-et-financements/nouveaux-medias-et-creation-numerique/fonds-daide-aux-createurs-video-sur-internet-cnc-talent\\_190814](https://www.cnc.fr/professionnels/aides-et-financements/nouveaux-medias-et-creation-numerique/fonds-daide-aux-createurs-video-sur-internet-cnc-talent_190814).

<sup>11</sup> This may involve broadcast on VSPs and social networks, but also on any other type of service free of charge accessible on the Internet such as France.tv Slash, Arte.tv and Brut.media.

<sup>12</sup> These are non-cumulative criteria. It should be noted that regarding the audience criterion, the cumulative audience on several services is no accepted.

<sup>13</sup> The CNC characterizes a digital channel as a set of works around a theme, a concept or a person, made available to the audience on a digital platform (e.g.: a YouTube or a Dailymotion channel, a Facebook page, an Instagram or Snapchat account, etc.).

<sup>14</sup> Only for the creation grant.

and strictly musical content, all formats (short, medium, feature film, web-series, etc.) and all genres (fiction, documentary, docu-fiction, vlog, tutorial, etc.) are accepted, including product placement.

Under the CNC Talent fund, the CNC provides **two million euros to around a hundred vloggers per year**.

CNC Talent is not only a support fund but also a talent incubator by assisting both the works and the channels of vloggers every step of the way, particularly at the key moment of their professionalization and therefore of their structuring. As such, the fund annually awards around twenty festivals, places for the emergence and identification of talents, with CNC Talent prizes. These prizes are grants for writing residencies or support structures allowing the winners to write their next audiovisual content and to professionalize themselves.

In addition, in partnership with YouTube, the CNC supports vloggers during the Cannes and Series Mania festivals as part of **talent residencies**. These residencies allow vloggers to meet professionals of the sector, to participate in events or workshops, to watch films or series and to produce original content in situ, individually or collectively, followed by releases on digital platforms and social networks.

The CNC also offers other funds for which vloggers as authors or producers are eligible, in particular the Audiovisual Support Fund (FSA) which is intended for French production companies to promote the production of patrimonial audiovisual works broadcast on television services or on on-demand audiovisual media services, the Images of Diversity Fund, the Support Fund for Digital Experiences (XN), the Support Fund for Audiovisual Innovation (FAIA) and the Mechanism for Multimedia and Digital Artistic Creation (DICReAM).

#### ➤ **The regional funds**

Initiatives are multiplying to support the financing of the sector including at a sub-national level. Several regional funds are open for vloggers operating in France:

- **The regional fund for internet video creators “Hauts-de-France Talent”<sup>15</sup>**: created in 2022 by Pictanovo (association promoting and supporting audiovisual and cinematographic production in the Hauts-de-France region) and Hauts-de-France region, this fund was created to support the new sector of native works and channels on the Internet by co-financing French-speaking works in the same conditions as the CNC Talent fund. This aid will be awarded by a committee made up of 6 personalities (creators, producers, web entrepreneurs, etc.). The first commission will meet in September 2022;
- **The Région Sud Provence-Alpes-Côte d’Azur fund for webcreation<sup>16</sup>**, supported by the Provence-Alpes-Côte d’Azur region in partnership with the CNC since 2020. The fund offers two grants: a writers-in-residence grant from €5,000 to €7,000 and a production grant from €10,000 to €30,000. To be eligible, the projects have to be intended for webcreation, to keep a geographical or cultural link with the region and to propose guarantees of its artistic qualities

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<sup>15</sup> Source: <https://www.pictanovo.com/actus/fonds-hauts-de-france-talent/>.

<sup>16</sup> Source: [https://www.maregionsud.fr/fileadmin/user\\_upload/Documents/AAP/Cinema\\_Soutien\\_a\\_la\\_creation\\_et\\_la\\_production\\_cine-matographique\\_et\\_audiovisuelle/Soutien\\_...\\_la\\_web-cr\\_ation\\_MAJ\\_septembre\\_2021.pdf](https://www.maregionsud.fr/fileadmin/user_upload/Documents/AAP/Cinema_Soutien_a_la_creation_et_la_production_cine-matographique_et_audiovisuelle/Soutien_..._la_web-cr_ation_MAJ_septembre_2021.pdf).

(e.g., dramaturgy, characterization of the characters, interactivity, quality of immersion and filmography of the director);

- Broader funds (audiovisual and immersive works aids not aiming specifically webcreation projects) are also open to vloggers, such as: the **Île-de-France audiovisual support fund**<sup>17</sup> delivering a production grant and the **Montpellier Méditerranée Métropole (agglomeration located in the Occitanie region) creation aid fund**<sup>18</sup> supporting actors of the Cultural and Creative Industries sector by financing unique works in the documentary, animation, video games and immersive experiences fields.

Those regional funds act as territorial marketing tools for the promotion of the creative diversity of territories and allow the emergence of regional vloggers, which are usually less visible and supported than nationwide vloggers.

#### 4.2.2.2 Registration within organisations managing IP rights (authors' societies)

Some vloggers are considered authors and as such, benefit from **royalties** for their videos broadcast on advertising video on demand platforms, in addition to their other sources of income. This remuneration depends on the number of views, the agreement negotiated between the authors' society and the platform, and the web economy. The revenue from the exploitation of these rights constitutes a new source of funding for the vloggers.

Authors' societies, having a role of collective management of authors' rights, act as a link between vloggers and the services and platforms who spread their content worldwide. Some vloggers entrust authors' societies to grant licences on their behalf; the revenue generated by the use of their works is paid back proportionally to the rightsholder (i.e. the vlogger). According to the GESAC (the European Association of Authors' and Composers' Societies), '**authors**' is an umbrella term referring to the creators of any type of original work and "many European countries title the copyright protection they provide for literary and artistic works as 'authors' right' (e.g. droit d'auteur, Urheberrecht, diritto d'autore, autersrecht)"<sup>19</sup>. Collective management may be viewed as enabling vloggers to negotiate fair terms and services and platforms to keep legal certainty for the use of broad repertoires of audiovisual works from a single source.

In France for instance, the SACD (society of authors and composers of dramatic works) and the Scam (civil society of authors of multimedia works) collect and manage royalties of hundreds of vloggers, provided that they meet their eligibility conditions. In order to collect and pay those royalties to their members, the authors' societies sign agreements with content operators (i.e., video-sharing platforms, TV networks, media service providers)<sup>20</sup>.

The SACD and the Scam in France for example also carry out important **cultural actions** (grants, prizes, festivals) and provide **legal and logistical support** to their affiliated vloggers: legal and tax advice, free

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<sup>17</sup> Source: <https://www.iledefrance.fr/fonds-de-soutien-audiovisuel-aide-la-production>.

<sup>18</sup> Source: <https://www.montpellier3m.fr/fonds-aide-creation-icc>.

<sup>19</sup> Source: <https://authorsocieties.eu/author-societies-and-%e2%80%a8collective-management/>.

<sup>20</sup> Three authors' societies (SACD, Scam and ADAGP for society of authors of graphic and plastic works) signed an agreement with Dailymotion in September 2008 then a retroactive agreement with YouTube in November 2010 which covers the all set of works posted since the launch of the platform in France in June 2007. Since 2018, the partnership with YouTube is regularly renewed for a period of four years, enabling in the long term the recognition of the rights of the affiliated vloggers, and guarantying them a fair remuneration for the prominence of their works on the platform. In addition, negotiations have been initiated between the SACD and operators (Meta, TikTok) to reach a first agreement on copyright remuneration (source: [https://www.sacd.fr/sites/default/files/2022-06/ag\\_2022\\_rapport\\_annuel\\_2021\\_fr.pdf](https://www.sacd.fr/sites/default/files/2022-06/ag_2022_rapport_annuel_2021_fr.pdf)).

rental of co-working spaces and recording and editing studios. The SADC Digital Series Fund<sup>21</sup>, inaugurated in 2019, offers a 13,000 euros grant intended for vloggers accompanied by a production firm, for the writing and production of an original series pilot aiming a first free internet broadcasting.

### 4.2.3 Professional recognition of vloggers through visibility and networking

The recognition and legitimization of the sector of the web content creation can also materialize through the visibility and support of its actors by the audiovisual industry.

#### 4.2.3.1 Participation/awards in audiovisual media festivals

The selection or awarding of a prize at a festival dedicated to web creation or more generalist can be viewed as another recognition indicator of the vloggers.

In France, the **Frames Web Video Festival** is entirely dedicated to vloggers and is one of its kind. The aim of this festival based in Avignon since 2016 is to build cultural encounters and to promote internet content creation. Since 2017, the festival offers a fair trade, the Frames.Pro, in order to establish a dialogue between various players of the industry and to build the foundations of an expanding business model. Project holders justifying a prize or a selection in a festival, regardless of their audience, are eligible for the creation grant of the CNC Talent fund.

As for **festivals of a general nature**, in partnership with YouTube, the CNC accompanies vloggers during the Cannes and Séries Mania festivals as part of talent residencies. The call for projects “The web in series” of the Séries Mania festival requires that project holders justify 10,000 subscribers and the production of at least two successful works. During the 2022 Cannes Festival, popular vloggers were invited by Cannes’ partners TikTok and Meta in order to promote the festival and the platforms.

Indeed, existing audiovisual markets or festivals make more and more room for vloggers through the organization of round tables, workshops, creation spaces and residencies. During the 2022 edition of the Cannes Film Festival, social platforms, via content creators with millions of subscribers, played an important role in the visibility of the festival by becoming official partners with the latter. The vloggers invited to the event were allowed (and encouraged) to disclose the ‘behind the scenes’ of the event. How and why these collaborations were implemented by social networks and video sharing platforms?<sup>22</sup>:

- YouTube and Brut created the Cannes Creators Connection, a program designed with and for vloggers gathering a dozen of famous vloggers from around the world such as Squeezie or Liza Koshy (respectively 17.3 and 17.4 million subscribers on YouTube; 7.9 and 20.1 million followers on Instagram), and granting them “carte blanche” to cover the festival. The objective was to link the younger generations to the cinema industry allowing vloggers to connect to film professionals. “There are many synergies between the world of cinema and YouTube, and the Cannes Film Festival was the perfect place to highlight them” (Justine Ryst, director of partnerships for YouTube France).

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<sup>21</sup> Source: <https://www.sacd.fr/fr/fonds-sacd-series-numeriques-saison-2-0>.

<sup>22</sup> Source: <https://www.strategies.fr/actualites/culture-tech/LQ597035C/les-plateformes-sociales-envahissent-cannes.html>.



*Brut and Youtube organised cross promotion by highlighting on social media the interview of the director Baz Luhrmann by the French influencer Léna Situations, under the label #BrutCreators [source: Brut FR's Twitter account <<https://twitter.com/brutofficial/status/1532723697454403588>>]*

- Through Instagram, Meta established its presence at the festival on two levels: firstly, the Reels Squad program gathered 80 to 100 French and international vloggers selected according to their creativity and their ability to produce content. Secondly, Instagram took over the Palais Bulles to create the Creator Villa, a place celebrating the young generation of vloggers (around 600). The villa was dedicated to video production and meetings, allowing the young creators to identify the sector(s) in which they want to develop (i.e. an opportunity to get into the cinema sector, like the vlogger Just Riadh – 6.1 million subscribers on TikTok – playing his first role in the movie A la belle étoile).
- Pairing with the festival, TikTok's goal was to bring its community to the heart of the event inviting 6 talents to create on demand content and live broadcast for the official TikTok account of the festival. TikTok may be willing to show filmmakers that its network offers more than teenagers lip-synching to the latest viral music content. The operation also benefits Cannes Festival as a way to diversify its audience (attract young audiences). In addition, the #TikTokShortFilm competition<sup>23</sup> rewarded emerging vloggers who had submitted short original videos of between 30 seconds and three minutes. Winners were awarded a cash prize and a trip to the event.

The objectives of the social networks seem to converge: on the one hand, the presence of these platforms allows the coverage of the event for a wider, young and global audience; on the other hand, the festival is an opportunity to introduce vloggers to a sector they want to discover and to create

<sup>23</sup> Source: <https://newsroom.tiktok.com/en-gb/welcoming-festival-de-cannes>.

bridges between traditional and digital professionals and may also help to rejuvenate the cinema audience.

In Italy, the Venice International Film Festival also invited popular vloggers: the influencer Chiara Ferragni (27.7 million subscribers on Instagram) presented her docufilm during the 76<sup>th</sup> edition and the most-followed TikToker, the Italian Khaby Lame (148 million subscribers and 14 billion views on TikTok), was proposed a movie opportunity in 2021.

#### 4.2.2.3 Syndication/membership in a professional federation of vloggers<sup>24</sup>

Another marker of the vloggers' professionalization would be the structuring of this sector through its professional representation.

In France for instance, about 300 French-speaking vloggers are members of **the Guild of Vloggers** (for "Guilde des Vidéastes"), a federation gathering web content creation professionals created on June 2019 in the form of an association. As an independent professional organization, it aims to support the development of web creation and the professionalization of vloggers through the dissemination of best practices and the defence of their interests. The guild tends to **value the singularity of the profession of vlogger whose skills are vast (writing – production – distribution)**.

The initial project emerged as part of the creation of the CNC Talent fund in October 2017 and professional meetings at the 2017 Frames Festival (see above). These led to an 18-month consultation of vloggers, producers, companies and institutions in the sector in order to collect the needs and issues encountered by them in their process of creating and distribution content on the Internet.

The guild is acting under the presumption that the profession is facing structural difficulties due to the young age of its sector of activity and the lack of representation. The current regulation is not necessarily fully adapted to web creation and may be unknown to vloggers, which would expose them to significant legal risks.

The guild benefits from private funds (e.g., authors' societies, CNC) and from corporate sponsorship, wishing to have a single desk and to dialogue with more legally agile vloggers in the frame of negotiations. Now that the organization is well structured around a socio-economic and legal support for vloggers, it aims to develop a sector observatory in order to budget the creation of specific tools (access to data, database) and define a research program above regulation.

The French Guild of Vloggers may have no equivalent in Europe. In 2016, the YouTuber Hank Green had initiated the first vloggers organizing attempt in the United States, the Internet Creators Guild, which shut down three years after its creation<sup>25</sup>. In 2018, YouTubers unionized within one of Europe's largest trade unions, IG Metall, originally a metalworkers union base in Germany but covering other industries, namely **the YouTubers Union**<sup>26</sup>. In 2019, the internet movement called "FairTube" gathered 18,000 members of the union in order to collectively protest changes to YouTube's advertising rules dating back to the spring of 2017<sup>27</sup>. The union does not seem to have followed through.

When identifying vloggers who are potentially subject to supervision, it is also good to investigate which parties make use of facilities and interest groups that are traditionally open to professional parties. In the introduction of this chapter we referred already to the involvement of agencies in vloggers business activities. Vloggers are now affiliated with local or even internationally operating

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<sup>24</sup> This information stems from several interviews held with the Guild of Vloggers between October 2021 and July 2022.

<sup>25</sup> Source: <https://www.theverge.com/2019/7/11/20688929/internet-creators-guild-shutting-down-hank-green-youtube-copyright-claims-monetization>.

<sup>26</sup> Website: <https://youtubersunion.org/>.

<sup>27</sup> Source: <https://www.vox.com/the-goods/2019/7/30/20747122/youtube-union-fairtube-ig-metall-instagram>.



Multi Channel Networks (MCNs). These organisations are assisting influencers with various aspects of their business including programming, partners and digital rights management, and monetisation, in return for fees, usually based on the advertising revenues of influencers.

Such market parties are interesting contact points for NRAs that want to gain better insight into the local vloggers communities and find out what is going on. MCNs can also provide valuable input in consultations in the context of new regulations or supervisory and enforcement policies because they have often solid knowledge of current developments in the sector. Years ago, when taking its first steps in the field of video uploaders regulation, the Dutch Media Authority CvdM established already contacts with some main MCNs active on the local market.

## **4.3 Instruments and tools to localise the service provider**

When determining which party (natural person or legal entity) is editorially responsible for a vlogger's channel or comparable activity and where this party is located, regulators have various sources of information at their disposal.

The first source that is eligible to check is of course, the provider itself. In the most favourable situation, such contact details will be mentioned in the information tab of the vlogger's channel on the video (sharing) platform or on its own site, if applicable.

Of course also providers of the video (sharing) platforms can be approached if there is a need for additional information. Especially with regard to privacy considerations, platform providers will not automatically be inclined to respond to every request for information regarding individual users. It is therefore important to invest in a good relationship of trust and efficient working arrangements regarding information sharing with such parties.

NRAs can also use information stored with institutions such as the local Chamber of Commerce. Extracts from the trade register of the Chamber of Commerce can, for example, provide insight into the specific constellation of directors and shareholders of a company. This kind of information does not immediately answer the question of who and where the editorial decisions are made, but it can definitely provide helpful clues. Incidentally, it can be assumed that with vloggers, the editorial responsibility often lies with the makers of the videos. In that respect, vloggers cannot always be compared with large media organizations where various responsibilities in the decision-making and production process are assigned to different officials.

If vloggers (also) use their own sites and domain names, you can look up the domain name registrar via so-called whois sites such as the frequently consulted site <https://who.is/>. A domain name registrar is the person or company that takes care of the domain name registration for a website. Where this party is located can also be an important indication of where the editorially responsible party is located. Domain name registrars can not only be an important source of information, but also an important link in the enforcement and effectuation of any sanctions. For example, they are effectively able to unlink or remove a domain name from the DNS, with the result that a website will be unreachable.

Hosting service providers who provide the servers or cloud-based services to host and store sites are another important link in online distribution and can provide useful information about the origin of online offerings and websites. Such parties act as a "transmission hatch" but may be requested to intervene under usual Notice and Take Down (NTD) procedures based on the e-Commerce Directive if sites hosted by them are manifestly against the law and they have been notified about it. They can also be held liable if they could have known that illegal activities are taking place on their server.



In general, tracing the responsible parties and then enforcing them to comply with rules within the online domain can be a difficult exercise. This can certainly occur with parties who are not used to being supervised and/or who offer potentially controversial content. Such parties often have a need or an interest in anonymity and hide behind other intermediary parties. It is important to emphasise that these challenges are not typically for vloggers but are due to the nature of online distribution of audiovisual content and occur also with other (on-demand) media service providers that operate online.

The main rule in NTD procedures is that the person providing the information is primarily liable for its content. In some cases, however, this provider cannot be found or does not respond to information and/or enforcement requests. In such cases you have to go to the next link in the chain and if that doesn't respond to the next, et cetera.

To trace the provider of the site, you should initially rely on the contact details on the website. However, you can get stuck there because the data is missing, incorrect or incomplete. It is also not inconceivable that you will not receive a response when you will approach a party by email, letter or otherwise.

In that case you could find out the domain name registrar via so-called whois sites such as the aforementioned site <https://who.is/>. The information about the domain name registrar does not always help you further. For example, there may be (dummy) person placed in between so that the actually responsible party remains out of the picture. In addition, there is the phenomenon of anonymous domain name registrars. In such situation the site owner pays a small extra amount when registering his domain name in order to keep his identity confidential. If you then enter a domain name on <https://who.is/> you are confronted with the fact that the domain name is linked to a company that provides such anonymous registrations. Such companies do have to publish their contact details, but these are often only general email addresses to report abuse and there is a chance that you will not receive any response to your request.

The low responsiveness is also related to the fact that these companies provide such services for thousands of websites and that an email, even if it is from a (foreign) supervisor, will not immediately be given the highest priority. A final complicating factor is that anonymous domain name registrars are often located outside the EU.

You could trace the hosting service provider via the IP address. But a vlogger or other online media service provider does not have to outsource the hosting to a third party. It may very well be that the website owner manages himself the server(s) on which the websites are located. In the event that the site owner is unwilling to provide information, you could run into obstacles here as well. With external hosting (using conventional servers, virtual servers or cloud hosting solutions) there may be a better chance of success. But even then it can concern constructions with parties established abroad (hosting service) that turn out to be unreachable or unwilling to requests to provide information or cooperate in general. A common tactic used by such parties is, for example, masking the real IP address through the use of VPN programs or Tor browsers, making it virtually impossible to trace from which IP address the activities are taking place.

In short: in the case of online media offer, including vloggers material, it can be challenging to determine who exercises the ultimate editorial responsibility and where that party is located. Hosting service providers, domain name registrars and other online intermediaries can be an important source of information and even play a decisive role in enforcement. However, they are parties with whom media regulators usually have no formal supervisory relationship. However, such parties could fall under the scope of the Digital Services Act (DSA). So new provisions to implement the DSA in national

legislation can create opportunities to strengthen supervision and enhance transparency. It will ultimately differ per country whether the DSA powers are assigned to a specific (media) regulator or a more general consumer or market authority. In any case, it is crucial to strengthen partnerships with other regulators.

## 5 Commercial communication

Commercial communication by vloggers is characterised by many features and is constantly evolving. Influencer marketing has been a buzzword for a while now and has become a mainstream and established form of online marketing. An influencer can be defined as someone who has:

- the power to affect the purchasing decisions of others because of his or her authority, knowledge, position, or relationship with his or her audience
- a following in a distinct niche, with whom he or she actively engages. The size of the following depends on the size of his/her topic of the niche.

Influencer marketing involves a brand collaborating with an online influencer to market one of its products or services. Some influencer marketing collaborations are less tangible than that – brands simply work with influencers to improve brand recognition.

An early and often cited example and often of influencer marketing involved YouTube celebrity PewDiePie. He teamed up with the makers of a horror film set in the French catacombs under Paris, creating a series of videos in which he underwent challenges in the catacombs. It was very appealing content for PewDiePie's 111 million subscribers and received nearly double the views as the movie's trailer and was a win-win-situation for everyone<sup>28</sup>.

The influence of vloggers on their followers and their attitudes and purchase behaviour cannot easily be overestimated. The report *The impact of influencers on advertising and consumer protection in the Single Market* by the Policy Department for Economic, Scientific and Quality of Life Policies of the European Parliament pointed out the huge impact of influencer marketing due to the (assumed) authenticity of influencers and the trust they receive from their audiences<sup>29</sup>. In general, influencer marketing activities do not fundamentally differ from traditional marketing activities. Influencers get sponsored for, endorse, advertise a product, and the brand has various degrees of control over the content. However, trust and authenticity features of the relationship between influencers and their audience play a key role and differentiate influencers from other marketing actors. Trust and authenticity of the relationship also increase the credibility of influencers, who are considered as experts and trustworthy by their audience. These features have the highest impact on consumers' attitudes and behavioural intentions, and through that they can also strengthen brand preferences and purchasing behaviour.

The global influencer marketing platform market size was valued at USD 10.39 billion in 2021. It is expected to expand at a compound annual growth rate (CAGR) of 33.4% from 2022 to 2030. This can be credited to the shifting inclination of brands from traditional celebrities to online influencers to endorse their products<sup>30</sup>.

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<sup>28</sup> <https://influencermarketinghub.com/influencer-marketing/>.

<sup>29</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 24-25.

<sup>30</sup> <https://www.grandviewresearch.com/industry-analysis/influencer-marketing-platform-market/>.

The fashion and lifestyle segment accounted for a revenue share of more than 29% across the influencer marketing platform market in 2021. This can be ascribed to the increasing adoption of influencer marketing to meet the rising need for high-end lifestyle and fashion brands to be more approachable to people. Various fashion companies employ influencers to advertise new clothes and accessories, thereby keeping people abreast with the latest fashion trends<sup>31</sup>.

According to several online publications YouTube has highest potential ad reach compared to Instagram and TikTok. It's predicted that 12 trillion hours are expected to surf the net this year and much of this is being attributed to social media use on platforms like YouTube, TikTok and Instagram.

But while TikTok is being touted as the video platform of choice, the highest number of monthly active users are still over on YouTube according to an infographic from Shortstack.

YouTube has some 2.5 billion monthly active users compared to 1.5 billion on Instagram and 1 billion on TikTok. While YouTube still scores highest for engagement (around 24 hours per month), Instagram ranks at around 11 hours a month. TikTok users spent almost 20 hours scrolling and viewing videos on the platform each month.

When it comes to demographics, TikTok has the largest gap between male and female users with women making up 56% of its active users. The app also has some of the youngest users. Instagram and YouTube are more similar when it comes to gender and age range.

The potential ad reach on YouTube is huge at around 32% of the population. Instagram ranked second at 19% while TikTok scores lowest at 11%<sup>32</sup>.

## **5.1 Different types of commercial communication and business models**

In the eco-system relevant for commercial communication via video vloggers on platforms we can identify three key actors. The increasing popularity of independent video bloggers, the "vloggers" who film their thoughts and observations for thousands of subscribers and become celebrities on their own is setting a new standard for marketing and advertising. Product placement on social media platforms can be more effective than traditional product placement in tv and cinematographic works because of a strong personal bond that connects a vlogger with his/her audience. The relation between a vlogger and their audience sits somewhere between a TV star and a friend. Vloggers claim to understand their demographic better than traditional television producer because there is less distance between them and their audiences. In addition, prominent Youtube vloggers are considered to offer a truly creative approach to engaging with brands. When it comes to sponsoring and product placement, vloggers, marketers and brands acknowledge that these constitute ethically controversial forms of promotion. Especially product placement can be perceived as deceitful. Among some demographic groups it can easily lead to mistrust and negatively affect the reputation of vloggers as well as brands<sup>33</sup>.

The second group of key actors are companies who use vloggers for advertising, and increasingly for social commerce. While different influencer business models exist, commercial relationships with companies are still one of the major sources of income for the majority of influencers. From the point

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<sup>31</sup> <https://www.grandviewresearch.com/industry-analysis/influencer-marketing-platform-market>.

<sup>32</sup> <https://www.businessofapps.com/news/youtube-has-highest-potential-ad-reach-compared-to-instagram-and-tiktok/>.

<sup>33</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 36.

of view of the brands, influencer marketing is a tool to increase their brand exposure, engage with their customers, and ultimately increase the sale of their goods or services<sup>34</sup>.

The third group of key actors are social media platforms, which have created the technical eco-system in which influencers undertake their professional activities. Given the rise of monetisation on social media platforms, some have gone beyond the classical advertising revenue model of sustaining influencers (e.g., YouTube's Partner Program) and developed creator funds. Creator funds entail more direct payments between platforms and creators not solely linked to advertising, but rather to the engagement that creators may be able to generate online. In recent years, social media platforms have embraced content monetisation and social commerce, which raises significant questions about the fitness of current consumer protection rules when discussing the obligations of platforms<sup>35</sup>.

Influencers, companies and social media platforms can thus be considered the three cornerstones forming a triangle that is at the core of the influencer marketing industry. Influencer marketing and commercial communication of vloggers can be categorised along many characteristics. An important business model of influencers is based on revenues from brands. Revenue from brands refers to the type of revenue that is obtained often through contracts concluded outside social media platforms, between influencers and brands (and/or their intermediaries), and generally for advertising purposes. Influencer marketing is the main and most well-known business model that brings revenues from brands. It entails the receiving of direct or indirect revenue for advertising services. Several contractual practices stand out in this category, namely endorsements, affiliate marketing, and barter. Endorsements are transactions whereby an influencer receives money in order to promote a product or service. Affiliate marketing entails a transactional structure whereby the influencer is paid a percentage of referral sales, often identified through discount codes. Barter transactions entail the exchange of goods or services from a brand or its representatives against an advertising service offered by the influencer<sup>36</sup>.

It is important to realise that there are many different business models and that revenues from brands is just one way to earn money as a vlogger. Other than directly from brands, influencers may receive revenue from platforms through ad revenue, subscription/crowdfunding, or tokenisation.

In the situation of ad revenue platforms allow third parties to add their ads to an algorithmically managed ad library. For instance on YouTube, users who want to monetise their content may choose a specific "ad unit" such as display, overlay, video ads (skippable, non-skippable and bumper ads), and sponsored cards. The content of the ad is then selected and shown by the platform based on its algorithms<sup>37</sup>.

In the case of subscription/crowdfunding platforms allow users to subscribe to premium content from creators. Using subscription models, influencers can get income on the basis of subscription models on social media platforms such as YouTube, or from their own video streaming platforms. Through crowdfunding models, influencers can also make money by being supported by their Patron peers, who in turn receive a collection of "perks" against a tiered payment system. Other platforms adopting this model operate in very specific industries, such as OnlyFans (adult content) or Spotify (podcast content). There is a fine line between subscription and crowdfunding from a legal perspective.

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<sup>34</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 36.

<sup>35</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 36.

<sup>36</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 37.

<sup>37</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 39.

Depending on national private laws, crowdfunding may entail donations, while subscriptions entail a paid service<sup>38</sup>.

“Tokenisation” means that users viewing content made by influencers can purchase tokens, or alternative “virtual currencies” which they can spend interacting with their favourite creators. Examples are YouTube’s Super Chat or Super Sticker that allow fan messages to be highlighted when interacting on live streams<sup>39</sup>.

Furthermore, influencers can also choose to create their own products and/or branded products (also known as merchandise), and link to their web shops or feature them on social media platforms that have social commerce affordances. This business model often entails additional supply chains in ecommerce, such as those involved in drop shipping. Interestingly, some mega-influencers even open brick and mortar shops or collaborate with retailers to sell their product lines, thereby leaving the digital sphere<sup>40</sup>.

This report aims to map the different types of advertising and other commercial communication predominantly by features which are relevant for regulation and supervision. A principal distinction can be based on the deliberate choice to offer commercial communication and the effective control levels. With that regard, the first question that needs to be answered is whether it is the vlogger who chooses to offer advertising or that this decision is primarily made by the platform. A question that follows immediately from that one is whether the party who has made the choice to offer commercial communication also can control how the advertising looks like and should target the audiences.

According to the AVMS Directive we can identify the following main categories of commercial communication:

- Advertising
- Sponsoring
- Product placement
- Self-promotion

## **5.2 Commercial communication initiated and/or controlled by the service provider**

When we have a closer look at commercial communication initiated and/or controlled by the service provider we need to realise that a clear distinction between this type and commercial communication placed by and/or controlled by the platform is not always easy to make and can feel even arbitrary. For the interpretation and application of the rules in the AVMS Directive for media service providers on one hand and video sharing platform (VSP) providers on the other hand such a distinction might make sense from a principal point of view. However, in practice this assessment of responsibilities and powers regarding advertising can be a challenging exercise. For instance, the principal choice of offering advertising might be made by a vlogger, but for the way such advertising can be presented and flagged to the audience he can also be depending on the facilities and technical tools provided by the VSP provider. Exactly this interplay between different actors on VSPs was the main reason for the EU legislator to introduce article 28b and certain obligations for VSP providers to ensure optimal transparency about commercial communication.

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<sup>38</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 40.

<sup>39</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 40.

<sup>40</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 40.

At EU level, in addition to the sector-specific of the AVMS Directive a lot of horizontal legislation and even self-regulation on consumer protection applies to commercial communication by vloggers. The recent study *The impact of influencers on advertising and consumer protection in the Single Market*, which was provided on request of the committee on Internal Market and Consumer Protection (IMCO) of the European Parliament, gives a comprehensive overview of the relevant legislative frameworks and self-regulatory schemes in place<sup>41</sup>. Concerning transparency requirements under consumer law applicable to influencers who are active as advertisers, the Unfair Commercial Practices Directive (UCPD) in particular provides the overall framework on practices infringing consumer protection rules. The UCPD can be applied to frame the issue of misleading advertising in influencer practices. The Consumer Rights Directive (CRD) and other legislation on consumer contracts apply to influencers who act as sellers with regard to the obligations of online traders to disclose a wide array of information to consumers before the conclusion of a contract. The Digital Services Act (DSA) also addresses some of the new challenges that emerged with recent market trends and aims to complement the existing set of horizontal EU legislative instruments. Furthermore, in many countries codes of conduct based on self-regulatory schemes constitute important principles for different types of advertising. As a consequence, commercial communication in and around vloggers material on platforms is governed by many different legislative frameworks and self-regulatory regimes on national and European level. It is crucial for all key actors, especially the vloggers, platforms and their users to have a good overview of all relevant regulations. Due to their central and informed position NRAs are very well placed to play a key role in enhancing awareness and understanding of the main rules originating in media law, consumer protection legislation and self-regulation in these areas.

### 5.2.1 Commercial content in the video

The way vloggers deal with commercial communication in their videos is as multifaceted and diverse as the content they produce.

The advertising content is sometimes not labelled at all or is labelled with such creative expressions that it is not even recognizable what form of advertisement it is supposed to be. Missing or incorrect labelling can be due to intent or simply due to a lack of knowledge of the legal situation.

Art. 9 No. 1 lit. a of the AVMS Directive says: “audiovisual commercial communications shall be readily recognisable as such; surreptitious audiovisual commercial communication shall be prohibited”. The AVMSD distinguishes between different forms of commercial communication. These are subject to different transparency obligations so that they can be easily recognised as such. These are classic advertisements/ commercials, sponsoring and product placement.

However, the Directive itself gives only few indications as to how these forms of advertising must be specifically labelled so that they are easily recognisable in accordance with the requirements of Art. 9 of the Directive. If national regulations follow the wording of the Directive in their transposition, they do not provide precise instructions for advertising labelling as well.

Unlike in the area of simple websites, the correct labelling of commercial communication in audiovisual content is therefore not that simple for vloggers. Sometimes, specifications on the labelling of advertisements are already made in the contracts with advertising partners. However, these specifications do not necessarily correspond to the legal requirements and expectations of the national supervisory authorities. For vloggers, this means that they actually have to identify the correct form of advertising already when concluding the contract in order to prevent incorrect labelling requirements.

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<sup>41</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), page 62.

At the same time, they must choose the labelling appropriate to this form of advertising and implement it in their videos in such a way that it is recognisable. Even though more and more video sharing platforms offer their own labelling tools today, these are usually not sufficient to cover the whole range of advertising types and specifications. Furthermore, the general use of language in regard to advertisements may be very different from the legal requirements. In Germany, it became evident in recent years that vloggers - regardless of the legal form of commercial communication - spoke either of "sponsoring/sponsor" or of "product placement". This led to the assessment that, in addition to the usual monitoring of videos that have already been produced, nationwide awareness-raising measures are also necessary. Vloggers need to learn to identify the different forms of advertisement and respond appropriately.

### Sponsoring

Art. 1 No. 1 lit. k) AVMS-Directive states: "sponsorship means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or video-sharing platform services or in producing audiovisual works to the financing of audiovisual media services, video-sharing platform services, user-generated videos or programmes with a view to promoting their name, trade mark, image, activities or products". The definition of sponsorship could initially lead one to believe that it is no different from "normal" advertising. However, the further requirements of Art. 10 must be taken into account. Audiovisual media services that are sponsored shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services.

This indicates that sponsorship as a form of audiovisual commercial communication is less "intense" than classic ads, as the latter usually encourages the purchase of goods. It is a financial contribution to the production of the content, which must be made transparent and thus includes a certain advertising effect. At the same time, however, it must not have the same impact as a (TV) ad. Sponsored programmes shall be clearly identified as such by showing the name/ logo etc. of the sponsor at the beginning, during or at the end of a video. In Germany, it was found that vloggers often interrupt the action in the course of their video and then announce that they now want to introduce the sponsor of the current video. However, this introduction is not limited to the insertion of a logo or the brief mention of the name. Most of the time, the sponsor's products are introduced, benefits are highlighted, a call to purchase is made and a discount code is shown. These are typical components of a classic ad and are likely to go beyond what is allowed under Art. 10. Such commercial content inserted in videos is not uncommon and is obviously based on a wrong understanding of the term "sponsorship" (at least with German-speaking vloggers). If the criteria for genuine sponsorship are met, a video should be labelled at the beginning, during or at the end. If vloggers have correctly identified the form of advertising, they usually use an insert at the beginning of the video to make the sponsorship transparent. In one of the corners of the screen, a text with "sponsored by..." or "presented by..." (corresponding terms in national language) is usually shown for a few seconds. In addition to the name of the company, a product name or brand logo may also be displayed. Sponsorship spots with moving images and a slogan, as they are found on television, have not yet been observed among vloggers.

### Product Placement

According to Art. 1 no. 1 lit. m) "product placement means any form of audiovisual commercial communication consisting of the inclusion of, or reference to, a product, a service or the trade mark thereof so that it is featured within a programme or a user-generated video in return for payment or for similar consideration". It is the integration of a specific product or brand into otherwise editorial

content. The special nature of this form of advertising lies in the fact that the subtle integration blurs the lines between editorial content and advertising content, which is actually necessary. This increases the risk of misleading viewers. This makes it all the more important that product placement is properly labelled and that viewers know they are being confronted with commercial content. The Directive also has special rules for product placements (Art. 11). Similar to sponsorship, product placements are also subject to the requirement that they must not directly encourage purchase and at the same time must not be too prominent. A misconception of this term or form of advertising can also be found among German vloggers when it comes to product placement.

In Germany, the labelling of the videos is mostly done in the same way as on television. At the beginning and end of the video, the words "supported by product placement" are displayed for a few seconds in one of the upper corners, sometimes followed by just the letter "P" in a circle.

This form of labelling is viewed as to be appropriate. Nonetheless, what happens in these videos does often not match the criteria of product placement.

The videos often include a sequence that deals with the "placed product" in great detail, presenting advantages, highlighting it positively and recommending a purchase. Nowadays, discount codes for the product are often included as well. This implementation therefore violates the regulations for product placement in two aspects. On the one hand, there is given undue prominence to the product in question, on the other hand, the purchase is encouraged. In these cases, it would have made more sense to choose the form of a classic ad to be inserted in the video or to design the video as a promotional video altogether.

Discussions with vloggers on this topic have shown that these mistakes are not intentional, but simply due to a lack of knowledge of the regulations. The fact that labelling is used at all shows that there is at least an effort to show transparency in this respect.

Recital 91 of the AVMS Directive (Directive 2010/13/EU), at which occasion product placement was introduced in the Directive, provides guidance for drawing the line between product placement and sponsoring. In this recital it is noted that the decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme. That is also the reason why the definition in Article 1 (m) of the AVMS Directive contains the word 'within'. For product placement, the screening or mentioning of a product or service are embedded into the plot (action) of the programme. As a result, these products or services are brought to the attention, for example by mentioning, discussing, or actively using them during the programme. In contrast, products of a sponsor may be shown during a programme but are not embedded into the action (plot) of a programme. Another important criterion distinguishing sponsorship and product placement is the fact that the (possible) financial contribution by the sponsor is provided for the overall benefit of the programme and not a direct compensation for the reference or presentation of the product or service, as is the case for product placement. To sum up: It is product placement if two cumulative conditions are fulfilled; - a financial contribution in return for a reference or presentation or other use of product, service or trade mark; - which is embedded in the plot of a programme.

For many vloggers and their users alike the distinctions made between advertising, sponsoring and product placement might seem irrelevant. What counts for them mainly is that there is involvement of commercial parties and interests and that the audiences should be aware of this. However, the subtle difference between the different types of commercial communication can have great consequences. For instance, when an arrangement with a commercial party qualifies as product placement, it will not be allowed to aim the videos at minors or include information dealing with



consumers affairs. In the event that the videos contain news or current affairs, both product placement and sponsoring are not allowed.

In the Netherlands, prior to adopting a new policy guideline regarding commercial on-demand media services and designing a decision scheme for the registration of vloggers (video-uploaders in the CvdM's terminology) many stakeholders active in the vloggers industry have been consulted. A lot of feedback indicated that parties not always understand or are even confused about the subtle differences between sponsoring and product placement. Also for users it seems to be rather irrelevant whether a commercial arrangement qualifies as one or the other. For them, the main interest lies in the transparency and awareness of commercial involvement. Some feedback suggesting less detailed rules and maybe even lifting the distinction between some forms of commercial communication. This is something that could be taken into account when designing new rules under national regimes or at the occasion of a future revision of the AVMS Directive. For NRAs it is crucial to have insight in the specific commercial arrangements made between the contracting parties. Only when media regulators will be provided with such info they will be able to make a proper assessment of the situation and can judge whether the arrangement should be qualified as product placement or sponsoring.

#### Promotional videos and classic ads

As already explained, the video content of vloggers often corresponds to classic advertising, despite the various terms used to label it. So, naturally, vloggers produce commercial content that resembles TV commercials. This content can take on two forms.

The first form is most similar to classic television programming.

Videos by vloggers often have entertaining or informative content. The vloggers then insert a sort of commercial spot into this content and promote a product. Unlike typical TV ads, however, this one cannot be distinguished from the rest of the content in sound and image by itself, because the vlogger himself continues to appear in his usual environment in the ad itself.

If the commercial content is limited to such a short section and the content of the video is otherwise an editorial programme, it would be unreasonable to require permanent labelling of the entire video.

On the other hand, a short insertion only at the beginning of a video would not be helpful either, especially in the case of videos lasting several hours, which are then interrupted by this advertisement in the middle. It seems sensible and helpful for viewers to demand that the advertising sequence be labelled as "advertising".

Experience shows that this is now being implemented by vloggers at least in Germany.

Many vloggers even go so far as to announce the advertisement or produce short breakers, as they do on television.

The second form that vloggers use is entirely promotional videos. The sole purpose of these videos is to promote one or more products. Even though they may initially give the impression of being editorial, the commercial purpose is clearly in the foreground. It is not really possible to distinguish between advertising and editorial sequences. Taking this into account, the entire video should be made permanently recognisable as an advertisement, by displaying the note "ad" or "advertisement" ("Werbung" or "Werbesendung" in German) in the video, so that viewers do not mistake it for editorial content.

#### Vlogger's Attitude

The first generation of vloggers started out as a group of creatives producing videos as a hobby. They used the videos to share their interests and experiences with viewers. In the early days, when a vlogger recommended products, it was usually because they actually wanted to share their own experience with them. Vloggers not only shared these interests, but also large parts of their private lives with the public. Through comments, messages, and meetings, they - unlike film stars - entered into direct communication with their fans. This closeness made them an object of identification for young viewers, who put great trust in the opinion of vloggers. This trust was severely shaken when it became known a few years ago that vloggers present products not only because they really like them, but because they were paid by the manufacturers to do so. Video production changed from a mere hobby into a way to make a living out of it. Many viewers began to doubt the statements of the vloggers and felt betrayed because they had not made the payment transparent.

However, the advertising impact of vloggers is largely based on this trust in the online idols. Many vloggers have realised this themselves. Transparency with regard to advertising in videos ensures their credibility and thus the effect of their advertising and thus provides them with further jobs. For this reason, many vloggers are at least trying to comply with the regulation on transparency of advertising.

On YouTube the following main types of product placement can be witnessed:

#### 1) Simple product placement

Brands can insert product placements in YouTube videos in a similar way to how it is done on television. It is often labelled as simple product placement and considered the most subtle type of placement that has an indirect effect. Without being too aggressive or pushy, a vlogger can introduce a specific product or service as if “by the way” of what he or she is really presenting in the film. This type of product placement is particularly popular for cosmetics and lifestyle goods. A Youtuber would normally present a product without really describing it in details, often with a closer zoom on it and crafted storytelling.

#### 2) Active product placement

This type of product placement is often suggested when targeting young audiences, ie under the age of 30. Active product placement is a more advanced form of promotion than a simple product placement. It involves the Youtuber to additionally provide a detailed description of a product’s functionalities. This approach often requires brands to partnering with a vlogger directly and co-creating content around the brand. A vlogger who genuinely believes in a product and brand, can also convince the audience. This type of promotion is often considered by brand that wants to provide informative content and highlight the unique selling points of the product or services. However, there are some cases when active, too excessive product placement can expose brands at risk.

#### 3) Sponsored YouTube film

A sponsored YouTube film is a film fully dedicated to a given brand. In this case, a brand’s name will show up in the film title and/or in a short announcement at the very beginning of a movie. Sponsored films have multiple aims that serve brand’s promotion. First, they are designed to provide an audience with a relatively broad scope of information about a product. Secondly, they are to generate emotions. Usually the information is provided indirectly to make product placement not too obvious or even aggressive. Often, this type of product placement takes a form of a “challenge” that a brand poses for a vlogger and which he or she needs to address using huge dose of creativity and courage. A sponsored

YouTube film sits somewhere between an entertainment and an ad. It is informative but wrapped around engaging content and can benefit from the vlogger's authenticity<sup>42</sup>.

Product placement is meanwhile a wide-spread phenomenon in the beauty and lifestyle industry. But recent research projects show that it is also has become a popular practice among vloggers and influencers to promote unhealthy food to young audiences. Also a recent US based research project<sup>43</sup> showed that the promotion of unhealthy foods to children in YouTube has increased significantly. The researchers aimed to determine the frequency with which kid influencers promote branded and unbranded food and drinks during their YouTube videos and assess the nutritional quality of food and drinks shown. They used Socialbakers data to identify the 5 most-watched kid influencers (ages 3 to 14 years) on YouTube in 2019 and searched for 50 of their most-watched videos and 50 of their videos that featured food and/or drinks on the thumbnail image of the video. The main conclusion was that kid influencers generate millions of impressions for unhealthy food and drink brands through product placement. One of the recommendations was that the Federal Trade Commission should strengthen regulations regarding product placement on YouTube videos featuring young children.

This trend demonstrates that regulatory authorities have an important role to ensure compliance with the protection levels prescribed by the AVMS Directive. NRAs will need to check whether codes of conduct based on self- and or co-regulation address these issues. But also they need to supervise whether the rules regarding product placement are observed, including the requirement that there should be no excessive attention for products and services. But more important: when the videos are targeting young audiences they may not contain any product placement at all. This could lead to calculative behaviour within the vloggers community and create the incentive to disguise product placement as (regular) sponsorship. Regulatory authorities should be attentive to these possible risks. Moreover, it could increase the need for more guidance on the distinctive features between sponsoring and product placement.

### **5.2.2 Promotional references in text elements accompanying the video**

Advertising doesn't just take place within videos. On the common video sharing platforms, it is possible to create accompanying texts to a video. There are colloquially different terms used to describe text information that belongs to a video, such as "video description", "info box", "description box" or "show notes". Of course, these text box can contain all sorts of information. For instance, many vloggers use them to link to their own website or other social media accounts. But often the text fields are also used for advertising purposes, such as publishing advertising links or discount codes<sup>44</sup>. Often, vloggers even refer to this information in their videos. For example: In a video about cooking tips, the vlogger mentions different products. Instead of describing them in detail in the video, there is a short note to the viewers, that all products are linked in the description box. If there is a cooperation with a company that manufactures kitchen utensils and certain products are linked due to this business relationship, this is a form of advertising.

The text box under or next to a video can be filled in as part of the upload process. So the editorial responsibility for this text content lies with the vlogger. According to Art. 9 para 1 point (a) AVMSD the vlogger must ensure that "audiovisual commercial communications shall be readily recognisable as such." A clear identification is crucial for this. The AVMSD does not define any specific forms of advertising in text elements accompanying a video. Accordingly, the Directive does not contain any

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<sup>42</sup> <https://brand24.com/blog/youtube-product-placement/>.

<sup>43</sup> [https://www.researchgate.net/publication/346423676\\_Child\\_Social\\_Media\\_Influencers\\_and\\_Unhealthy\\_Food\\_Product\\_Placement](https://www.researchgate.net/publication/346423676_Child_Social_Media_Influencers_and_Unhealthy_Food_Product_Placement).

<sup>44</sup> Vloggers can also highlight their advertising hyperlinks by pinning their own video comment, either in the live or on demand comments box

indication of how these forms of advertising must be labelled. The popular video sharing platforms also do not offer labelling tools for the text boxes.

When addressing commercial communication, placed outside the videos of vloggers, we are facing a rather principal issue. It poses the question whether advertising and other commercial communication in text elements of the vloggers belong to the audiovisual media service and therefore fall into scope of the regulation?

This question actually falls into two sub-questions:

1) Do we consider only the video part or also other elements such as the text shell as part of the (regulated) media service?

The AVMS Directive refers in provisions to audiovisual commercial communication and does not contain explicit references that support a “broad interpretation”. However, it can be concluded from the description of the main purpose criterion of the AVMS Directive that an audiovisual media service consists of more elements than just videos. And that approach also does justice to practice. Regardless of whether you watch an on-demand media service via a publicly accessible website or in a closed environment such as the app of a subscription service, there is always a text shell and other elements outside the videos.

In the Netherlands the CvdM accepts registrations per individual account of a video uploader and not per individual video catalogue, which suggests a broad interpretation.

2) Can the existing rules on advertising sponsorship and product placement of the AVMS Directive and the national laws stemming from it be applied to commercial communication that is not (exclusively) audiovisual by nature?

A broad interpretation seems to pose specific challenges to supervisory authorities. Not all of the rules are fully applicable to, for example, advertorials in text and advertising banners. Therefore, in the Netherlands, the CvdM has not opted yet for a broad interpretation when amending its policies for advertising by commercial media service providers. In the Netherlands this is only different for public media service providers as a consequence of their special legal status, as a result of which – as a principle – all their activities fall into the scope of the Dutch Media Act. Since advertising in text is fundamentally different by nature some rules originally designed for audiovisual material cannot be fully applied. Nevertheless, in the interest of protecting the public, advertising outside the videos should adhere to some basic principles as well. This may include advertising located in the caption or description of the video and other text elements of the website or the application that is used for the provision of the media service on demand.

The CvdM has elaborated the rules governing advertising and how to make advertising recognizable in a recently adopted policy guideline *Commercial Media Institutions Advertising Policy Rule 2022* (Beleidsregel reclame commerciële media-instellingen 2022)<sup>45</sup>. In this policy guideline on-demand media service providers such as video uploaders are recommended to signal it also in the video description when a video contains advertising, sponsoring or other commercial communication. But this concerns only the recognizability of advertising in videos and does not imply that advertising outside of the videos are automatically subject to material rules for advertising and other commercial communication.

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<sup>45</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2022-12443.html>.

A broad interpretation could be desirable with regard to adequate protection of users. A different reading, namely a “narrow interpretation”, meaning that non-audiovisual advertising would remain out of scope of regulation, could also lead to calculative behaviour. It would entail the risk that video uploaders will intentionally place commercial communication outside the video part of the media service in order to fall outside the scope of regulation and supervision. The Dutch CvdM has opted for a narrow interpretation for the time being and will closely monitor the situation to see whether a broad interpretation would be necessary for adequate protection. When it would lead to the conclusion there is a need for a broad interpretation it might also require a consultation of the industry and maybe even an amendment of the Media Act.

It is important to realise that media regulation is one way to provide for protection of audiences against (unclear) commercial communications. In many situation we can also rely on rules aiming to prevent misleading advertising on the basis of the general consumer protection legislation. In the Netherlands for instance these are the Consumer Protection Enforcement Act (Wet Handhaving Consumentenbescherming: WHC) and the Unfair Commercial Practices Act (Wet Oneerlijke Handelspraktijken: WOH) (WHC) which are maintained by the Authority for Consumers and Markets (Autoriteit Consumenten en Markten: ACM).

Furthermore, it should be noted that article 28b of the AVMs Directive requires VSP providers to provide tools so that users of their platforms, such as video uploaders, can mark commercial communications on their channels. The VSP providers must include also in their general terms and conditions provisions that ensure transparency of commercial communication on their platforms. In the event that VSP providers operate advertising themselves they are required to make it clearly recognizable and comply with the AVMS Directive rules. All this must be laid down in codes of conduct which will be the supervisor of the country where the VSP is located must supervise. Last but not least, we must not lose sight of the fact that there are also safeguards through self-regulation in most countries. In the Netherlands video uploaders and the parties for whom they advertise are in principle also bound by the rules of the codes of the Advertising Code Foundation (Stichting Reclame Code: SRC) and the Advertising Code Committee (Reclame Code Commissie: RCC) monitors compliance with regard to complaints.

Hashtags are an interesting phenomenon and worth incorporating in our supervisory policies. Not only they can be a tool for flagging the commercial nature of the video or other content to the audience. But in most cases they constitute advertising themselves. Although hashtags usually refer to brands and other commercial parties that does not automatically mean the commercial nature of the content is transparent and recognizable to the audience. Instagram is one of the main platforms that offer huge opportunities for companies to market their products and services through influencers using hashtags.

A recent research project in Germany<sup>46</sup> aimed to investigate on Instagram, which and how many products are promoted via influencer marketing and which hashtag, tag and mention categories were used. Throughout six months, product placements of German micro and macro influencers have been evaluated. The research revealed that despite the product placement labelling policy in Germany, a high level of influencer marketing is still executed on Instagram with the heavy use of hashtags, tags and mentions. The results indicated that the fashion (30,51%), accessory (19,07%) and beauty (18,64%) industries were among the sectors most commonly marketed by influencer types. On average, macro influencers use 4 hashtags per product placement and micro influencers use 6 hashtags per product placement. Hashtags of the content categories Slogan, Product, Fitness and Brand are the most commonly used. In addition, hashtags of the categories Lifestyle, Description, Company, Sentiment,

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<sup>46</sup> [https://www.researchgate.net/publication/334371736\\_Product\\_Placements\\_by\\_Micro\\_and\\_Macro\\_Influencers\\_on\\_Instagram](https://www.researchgate.net/publication/334371736_Product_Placements_by_Micro_and_Macro_Influencers_on_Instagram).

Technology and Environment are among the 10 most common hashtag categories for advertising products. In Germany, the following cases are considered to be advertising subject to labelling:

- Links/ tags to a commercial offer, a company profile or a webshop due to a commercial interest or in the context of an advertising cooperation. A corresponding notice “Werbung” or “Anzeige” (“advertisement”, “ad”) must be placed in the immediate vicinity of these advertising links.
- Many vloggers offer discount codes as part of a corporate cooperation. Discount codes are always advertising for a company or products, so the indication “Werbung” or “Anzeige” (“advertisement”, “ad”) must always be placed in the immediate vicinity of the code.
- Another common business model are affiliate links. By clicking on such a link, the user will be directed to a dealer page. If a purchase is made, the vlogger receives a commission. Thus, affiliate links have a commercial character that must be made transparent. This can be done with the note “Werbung” or “Anzeige” (“advertisement”, “ad”) in the immediate vicinity of the link. Alternatively, affiliate links can also be marked in color or by a symbol (e.g. “\*”). Then an explanation of what the label means and what the affiliate model is should be placed near the links.

In Germany, no advertising labelling is required if persons or companies are named or linked for pure information and without a commercial background. For example, links/ tags to friends, sources, location information, if not based on a commercial agreement. It is also possible to link the technical equipment that was used for creating a video. The naming or linking of the vlogger’s own products, services, brand or company is also possible without labelling – if the vlogger's entrepreneurship is clearly and directly recognizable. If it is a cooperation with a company or a product branding (fashion collection of vlogger X at brand Y), an advertising label is required.

### **5.3 Commercial communication initiated and/or controlled by the video platform provider**

As stated before the important role and great impact of video sharing platforms within the online media eco system was the main driver for the EU legislator to introduce in the revised AVMS Directive several requirements to provide for optimal transparency about commercial communication.

Following article 28b, paragraph 2 of the AVMS Directive Member States shall ensure that VSP providers under their jurisdiction comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are marketed, sold or arranged by those VSP providers.

Member States shall also ensure that the video-sharing platform providers under their jurisdiction take appropriate measures to comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers, taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications.

Furthermore. Member States shall ensure that video-sharing platform providers clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, provided that such communications are notified by the responsible party or the VSP provider has knowledge of that fact.

Last but not least, Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) aiming at effectively reducing the exposure of children to audiovisual commercial communications for foods and beverages containing

nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.

As far as the commercial communication initiated and/or controlled by the VSP provider or provider of a similar platform is concerned it is important to make a nuance when exploring the applicable legal regimes and possible supervisory policies. In some situations, especially when the advertisements are directly affecting the video offer, vloggers could be involved to a certain extent and they could indicate which products or services they don't want to be advertised in pre-, mid-, or post-roll advertisements or overlay ads.

### 5.3.1 Pre-, mid- and post-roll ads

Pre-roll advertisements are an established advertising tool on platforms during many years already. More recently, also mid-roll and post-roll ads have become increasingly popular. Normally, these advertisements will be placed by the VSP or other platform provider and will need to be addressed via the regimes designed for VSP platforms. If a certain platform would not qualify as a VSP it still will be governed by the (transparency) rules of the Digital Service Act (DSA).

To see what is happening in the area of pre-, mid- and post-roll advertisements it is worth to have a look at what options YouTube is offering to advertisers. TrueView ads or skippable video ads are known as best brand engagement advertisements on YouTube. Because these ads can be skipped after 5 seconds; these are labelled as skippable ads. According to various online sources businesses who have opted for TrueView ads have witnessed significant increases in the engagement of customers with the brand.

#### 1) TrueView video ads or skippable video ads (YouTube)<sup>47</sup>

These types of YouTube ads are considered safe ads to invest in because advertisers will have to pay when people watch ad for at least 30 seconds. Otherwise, these ads can be paid based on optimization of action or reach to the audience. There are two basic formats, such as in stream and discovery ads, of TrueView ads. The maximum length of in-stream TrueView ads is 6 minutes and minimum length lies between 6 – 30 seconds, while 30 seconds is usually recommended and mostly used.



*Example of a TrueView ad on YouTube [source: <https://www.marketing91.com/7-types-of-youtube-ads/>]*

#### 2) Preroll or non-skippable ads (YouTube)<sup>48</sup>

This is the category of video ads which cannot be skipped and can be played before, in the middle or after the video is finished. Unlike skippable videos, non-skippable videos are small in length. The

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<sup>47</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.

<sup>48</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.

duration of such videos will usually be 15-20 seconds. Video ads which appear in the middle of the videos, which are at least 10 minutes long, are called mid-roll non-skippable ads.

YouTube's Preroll ads can include people, audios, elements related to the brand, which can represent brand effectively within 15-20 seconds. Advertisers can include call-to-action (CTA) in pre-roll ads because these can't be skipped by viewers and the attention of the viewer can be optimized. Preroll ads are a common way for brands and companies to promote on YouTube a newly launched product or big event.

Preroll ads are considered the best method to receive clicks and Google also charges Pay-per-click (PPC) for non-skippable ads. There are longer Preroll ads as well, whose maximum length is 30 seconds. Preroll ads are offered in standard video size and can be viewed on both desktop and mobile.

### 3) Bumper ads (YouTube)<sup>49</sup>

Bumpers ads are at the moment the shortest types of YouTube ads and are only six seconds long. Bumper ads are displayed before a viewer chooses a video to watch. These are non-skippable ad videos like Preroll ads and are paid per view like TrueView ads. Therefore, Bumper ads are often praised as combining best of both advertising tools.

It is difficult to make an impression on the viewer with a just 6 seconds time slot, and such a short time must be used wisely and display attention-grabbing content. A good presentation can grab the attention of viewer and ask them for call-to-action (CTA). A link can be provided in the window of these ads which can either lead viewer to the website of the business or to longer videos. According to Google's own surveys the Bumper ads play an important role to boost the reach of long video promotion campaign. YouTube Bumper ads are also in standard video size so that they can be displayed and accessed on many devices.



*Example of a Bumper ad on YouTube [source: <https://www.marketing91.com/7-types-of-youtube-ads/>]*

### 4) Video Ads (Instagram)<sup>50</sup>

Nowadays, many brands create video ads especially for digital media because the viewer rate is much higher than other mediums. The Video Ads on Instagram differ from the previously described pre-roll and similar ads on YouTube because they constitute stand-alone videos and do not accompany another video. Instagram typically allows 30-60 second videos to be posted, so brands alter their video content accordingly and either post full-fledged ads or teasers to the actual ad (which then takes them to another video platform like YouTube).

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<sup>49</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.

<sup>50</sup> <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>.





*Example of a Video Ad on Instagram [source: <https://digitalagencycynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>]*

Online marketing research suggests that 84% of marketers are increasing their investments in TikTok in 2022. In combination with over a billion monthly active users it will not come as a surprise that business is booming on TikTok. The platform's rapid growth opens a massive window of opportunity for brands to closely cooperate with creators.

TikTok recently released a report revealing the power of creator-based ads, which claims that TikTok ads featuring creators saw an 83% higher engagement rate versus non-creator ads (12%).

TikTok offers brands a lot of video based advertising tools which can be broken down in distinctive categories.

#### 5) In-Feed Ads (TikTok)<sup>51</sup>

These types of TikTok ads appear as people scroll through their For You Page (FYP) on TikTok. In-Feed Ads can be up to 60 seconds long (although videos between 9 to 15 seconds seem to be the preferred option). TikTok users can actually engage with these ads via likes, comments (sometimes) and shares. Brands that create or let create this type of TikTok ads can also include a call-to-action button that links to a landing page. Although the In-Feeds Ads are also skippable they are popular with advertisers who want to drive traffic or sales from TikTok. Marketing experts claim that this type of TikTok advertising is ideal for brands that want their ads to blend naturally in with the native content feed (versus being totally in-your-face). Consumer packaged goods (CPG) companies and Brands selling physical products often use In-Feed Ads because they are supposed to be ideal for showing off products in action.

<sup>51</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.

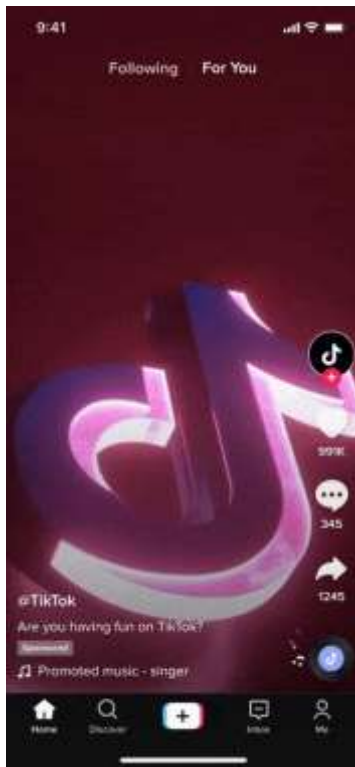


*Example of an In-Feed Ad on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

#### 6) Spark Ads (TikTok)<sup>52</sup>

Spark Ads allow brands to promote their existing TikTok content and user videos rather than create a video from scratch. Similar to In-Feed ads, these ads look and feel like organic content, because they appear in-feed without interrupting the scrolling experience. But unlike In-Feed Ads, Spark Ads can link out to a TikTok account versus just a landing page. Since these ads are attributed to an actual TikTok account, viewers can visit the original poster directly. That said, a Spark Ad on TikTok can include a call-to-action (CTA) button that directs viewers to a landing page instead of an account page. All of the video views, comments, shares, likes and follows gained during a Spark Ad promotion campaign are attributed to the original, organic post, regardless whether it's the brand's or the creator's piece of content. These additional analytics built into Spark Ads make it easy for brands to assess the return on investment (ROI) of a campaign. Spark Ads are considered ideal for brands that already have viral content which has potential as a TikTok ad. Also companies that are more interested in expanding their audience and brand awareness than in direct sales.

<sup>52</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.



*Example of a Spark Ad on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

#### 7) TopView Ads (TikTok) <sup>53</sup>

These “video-first format” ads are 60 seconds long and appear immediately after someone opens the TikTok app. They show up in full-screen and have auto-play with sound. Brands that are looking for seamless ads that feel organic will not use TopView Ads because they can potentially interrupt the user experience. Coupled with their length, TopView Ads are considered the most traditional ads on the TikTok platform because they feel like commercials. Also here, advertisers can also include a call-to-action button within the ad. TopView Ads on TikTok Ads are considered to be a good pick for brands that already have existing ad creatives and commercials they want to recycle and companies with big ad budgets since the explicit nature of these ads increases the price tag. Despite the intrusive nature of TopView Ads, it doesn’t stop them from being effective. According to TikTok’s own research, 71% of the users say TopView ads grab their attention. The platform themselves also states that CPG companies experienced 67% higher sales effectiveness when using these types of TikTok ads.

<sup>53</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.



*Example of a TopView Ad on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

#### 8) Brand Takeover Ads (TikTok)<sup>54</sup>

These full-screen ads appear on the For Your Page immediately after someone opens TikTok. They're created using 3 to 5-second videos (or 3-second images), directing viewers to a Hashtag Challenge or landing page. Brands can choose either depending on their campaign objective. TikTok users will see only one Branded Takeover Ad per day. This means less competition for the ad space but also makes them a rather expensive option. According to online marketing experts especially brands interested to build buzz for events or getting a TikTok hashtag trending should consider Brand Takeover Ads. Also here, given the high price tag the ads are mainly used by brands with big budgets who want to maximize ad exposure (with less competition).

<sup>54</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.



*Example of a Brand Takeover Ad on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

#### 9) Branded Hashtag Challenge Ads (TikTok)<sup>55</sup>

These sponsored hashtag challenges are featured at the top of TikTok's Discover Page. This form of advertising results in greater engagement (on average 8.5%) and encourages user-generated content, too. When TikTok users will click such an ad at the top of the Discover Page they will be taken to a Brand Challenge page containing a description of the challenge, the rules, the brand logo and a link to the brand's website. The TikTok users can create their own content based on the challenge, and using the brand's hashtag to promote their post. These Types of TikTok Ads are advised by marketers to brands that want to encourage more user-generated content and brands focused on building awareness and increasing engagement among the fairly young TikTok users. The #PlayWithPringles challenge is a good example of how successful a Branded Hashtag Challenge As campaign can be. This particular challenge launched in Germany, France and Italy during the pandemic invited participants to showed off their creativity through dance, comedy and TikTok's music library. Nearly 350,000 TikTok users contributed to the challenge which led to one billion views at the time.

<sup>55</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.



*Example of a Branded Hashtag Challenge Ad on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

#### 10) Branded Effects (TikTok)<sup>56</sup>

This advertising type on TikTok is rather comparable to what Snapchat and Instagram offer. Branded Effects allow brands to create sharable stickers, filters and special effects on TikTok for self-promotion. Brands will often combine this format with other TikTok ads. Filters and special effects are often loud and flashy, making them perfect for TikTok's audience. These types of ads are claimed to be ideal for increasing engagement with the platform's user and brands looking to maximize the exposure of an existing TikTok promotion. For example, PUMA created a Branded Effect (along with a hashtag challenge) to promote their new collection under the #FlashOfFuture tag. This campaign garnered 587.5 million views at the time.

<sup>56</sup> <https://brands.joinstatus.com/6-types-of-tiktok-ads>.



*Example of a Branded Effect on TikTok [source: <https://brands.joinstatus.com/6-types-of-tiktok-ads>]*

### 5.3.2 Overlay ads<sup>57</sup>

Where overlay ads are a long-standing phenomenon on YouTube they can also be noticed more on other social media and online platforms. What has been stated before regarding the applicable regime for pre-roll, mid-roll and post-roll advertisements applies here as well.

On YouTube overlay video ads contain image or text of size of 468X60 pixels or 728X90 pixels and can be displayed at the bottom of the video player or on the top right of the video. These advertisements are also known as “In-video advertisements”: semi-transparent banners covering the 20% of video player screen. Overlay ads c. In most cases, overlay video ads can only be displayed on desktop or similar applications. As overlay video ads on YouTube are concerned they can be managed from Adwords of Google.



*Example of an Overlay Ad on YouTube [source: <https://www.marketing91.com/7-types-of-youtube-ads/>]*

<sup>57</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.

### 5.3.3. Banners and other display ads<sup>58</sup>

In a world where everything seems to turn into video, even on platforms originally designed for sharing photos such as Instagram and Flickr, one might think that advertising banners have lost their relevance and become less popular. Nevertheless, they are here to stay and they can pose interpretation issues and challenges for supervision. Normally, at least in the situation where vloggers share their videos via VSPs and other platforms, such banners will be placed by the video platform provider. In such situations the banner advertising can be addressed via the provisions of the AVMS Directive for VSP providers, as is the case for pre-roll ads and overlay ads, described before.

However, when a vlogger or other on-demand media service provider uses an own website or other platform for dissemination of the videos a different situation could occur. Then the decision to insert pre-roll or overlay ads or publish advertising banners could entirely lay with the media service provider. In such cases the rules for audiovisual media service providers apply instead the ones dealing with VSP providers.

On YouTube advertising banners and other display ads usually appear above the video suggestion list. Whenever a user searches for a particular subject he will see in the search bar of YouTube a list of suggested videos displayed along with the display ads. But display ads can also be positioned on the right of the featured video or in between the playlist. These types of YouTube ads are usually made in the form of a screenshot displaying important information clearly and have the size of 300X250 pixels or 300X60 pixels. Display ads can only be seen when videos on YouTube are played on desktop or similar applications and will not show up on most mobile devices.

#### Masthead Ads (YouTube)<sup>59</sup>

Masthead Ads are a specific type of display ads on YouTube, which can cover a large area on the home page of the website and have maximum visibility. They are considered to belong to the most expensive advertising options on the YouTube app or website and are mostly used by businesses and brands with large budget. The size of home page Masthead Ads is typically 970X250 pixels, but these can only be displayed on desktops. In addition to this, Masthead Ads expandable of size 970X500 pixels can be displayed for 24 hours on the top of the home page of the YouTube website.



*Example of a Masthead Ad on YouTube [source: <https://www.marketing91.com/7-types-of-youtube-ads/>]*

<sup>58</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.

<sup>59</sup> <https://www.marketing91.com/7-types-of-youtube-ads/>.



## 5.4 Other types of commercial communication

Influencers are part of the vlogger's community. The concept of influencers can cover various aspects depending on the underlying business models.

More importantly, this concept is not necessarily defined in law and in many cases the rules applicable through the existing regulatory framework are very general.

When it comes to obligations and restrictions regarding commercial communications in the case of influencers those might not always seem straightforward to apply because of the specificities of influencer marketing. This is linked, among others, to the contractual relationship between the vlogger/influencer and the brand (or the agency who acts as an intermediary) and the degree of freedom the influencer has when collaborating with a brand.

Hence, the existence of self-regulatory commitments by the advertising industry. The aim is to make the relationship with influencers more transparent and mindful of ethical standards which should be applied to this particular – and increasingly popular – marketing technique (as it is the case for more traditional commercial communications).

In practice, the influencer ecosystem is characterised by the emergence of new market actors and business models where brands and products have a key role<sup>60</sup>. Influencers have different ways to interact with their audience (or followers) and a large diversity of revenues to drive. Among the most common new business models stand ad revenue, direct payments, crowdfunding, subscription, tokenisation<sup>61</sup> and business ventures. As there were not yet mentioned in the present report, the brand content (4.4.1) and business ventures (4.4.2) processes should be addressed.

### 5.4.1 Brand content

#### ➤ Brand content as part of influencer marketing

As stated before, brands are increasingly reaching out to influencers/vloggers in order to create brand content, going beyond brand sponsorship. It is a marketing technique potentially problematic especially for minors as the commercial nature might be blurred.

This marketing strategy is known as **influencer marketing** and refers to a set of commercial techniques using the power of recommendation, the influence and the notoriety of an opinion leader on the web, especially on social media, to promote a product or a brand.

The **European Advertising Standards Alliance (EASA)**<sup>62</sup> defines influencer marketing based on two criteria to be met: *“(i) editorial content from sponsoring brands having a dominant control with a pre-suggested message script, scenario or speech for the influencer before its publication, and; (ii) a compensation for the marketing communication shared by the influencer, which can take different forms, from formal contractual agreements defining monetary payments to a mere provision of free goods or other reciprocal commitments for the benefit of the influencer”*<sup>63</sup>.

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<sup>60</sup> See also below the French example and the role of multi-channel networks (MCN) in commercial partnerships.

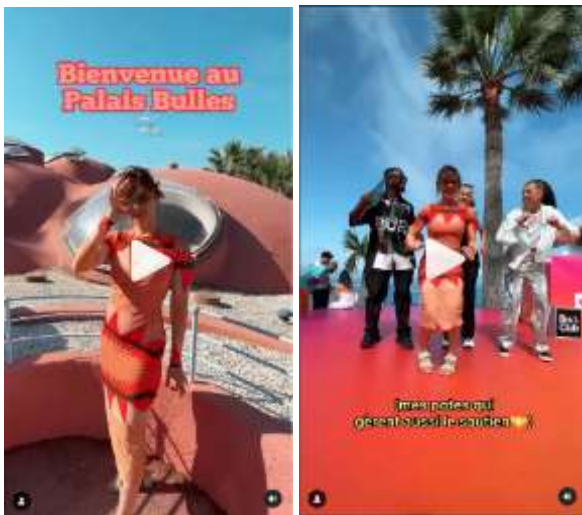
<sup>61</sup> Tokens or virtual currencies allow users to interact with or to be given access to exclusive content in exchange for real money (e.g. YouTube's Super Chat or Super Sticker enables fan messages to be highlighted when appearing on live streams).

<sup>62</sup> Organisation promoting responsible advertising by monitoring advertising self-regulatory rules and setting out operational standards for advertising self-regulatory systems. Its network is constituted of 41 organisations representing 27 self-regulatory organisations from Europe, 13 industry members and one digital pure-play company (Google).

<sup>63</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf).

Influencer marketing focuses on key influencers/vloggers to promote and sell products or services. Brand content is a form of influencer marketing in which a brand partners with an outside party to produce content about their product, service or brand. Before partnering with more and more vloggers, brand content was managed through traditional marketing media such as television, radio, magazines and newspapers. The user experience is now enriched with the use by vloggers of social networks and video sharing platforms' multiple tools to engage the user/customer.

One of the leading trends of social media is **the “Story” format** tool, adopted both by vloggers and brands to create brand content operations. Stories started on Snapchat and branched out to nearly every other social network and video sharing platform (e.g., Instagram, Facebook, YouTube, LinkedIn, Twitter, Pinterest). Stories are quick, snacking content giving users different glimpses into a person a business lifestyle and aiming to disappear within 24 hours. Stories tend to be more spontaneous than content posted on platforms' feeds, and they are shown in the vertical orientation, more engaging for the user<sup>64</sup>. Stories are a way for brands to capture behind-the-scenes footage, company announcements and discrete product or service promotion by influencers shooting their daily life and “natural” use and customisation of the products promoted.



*Example of a brand content on Instagram (Reel format) produced by the influencer Natoo in 2022 promoting the Palais Bulles for the Cannes Film Festival [source: @natoogram's Instagram account]*

Another key format in brand content operations is **the “Haul” video**, on the edge between product placement and brand content<sup>65</sup>. A haul generally consists of a vlogger showcasing a collection of purchases coming from a single retailer, a collection of retailers or a particular category of products. Vlogger explains the reasons of his choices and the specificities of each item then gives his most honest first impression by trying them in a prompt way. Haul videos initially arose in 2006 through the beauty and lifestyle vloggers community on YouTube (makeup and clothing). Haul videos are attractive for advertisers as a way to connect to prospects (potential consumers) via vloggers (very popular or niche vloggers) even if the products come from a small retail business. Haul videos allow vloggers to help

<sup>64</sup> Vertical videos became the standard format on many social networks because it generates more watch time and engagement from the users than square videos for several reasons: the growing popularity of mobile devices, using the default vertical orientation (and allowing full-screen); the higher completion rate compared to square videos, the majority of mobile users holding their phones vertically when watching content or scrolling through social media; the availability for creators to be creative (splitting a vertical screen in half). Many social media have embraced vertical videos: Snapchat was the first popular network that leveraged vertical videos with the Story format; TikTok, the most downloaded social media application today, sets up vertical and full-screen videos at the center of its interface; Instagram uses it in its Stories, Feed, IGTV and Ads formats. Vertical video is a mobile-centric video trend: <https://medium.com/social-media-tips/does-vertical-video-make-a-difference-we-spent-6-000-on-tests-to-find-out-49dc99d3927c>.

<sup>65</sup> A vlogger receiving “free” products from a brand can be considered as paid by the latter, even though he doesn't receive cash payment.

their audience to shape their own purchasing decisions. When a vlogger shares a collection of his so-called favourite products, the views might decide to purchase one as well. Indeed, prospects are more inclined (influenced) to purchase the articles showcased as they trust the vlogger they are following or share similar preferences in products.

In summary, **brand content is the combination of editorial and marketing dimensions**. It lies at the intersection of marketing, editorialization and public relations. Its major advantage from the brands and vloggers points of view is keeping the users/prospects engaged by providing a value brought by their favourite vloggers without interrupting their viewing experience with advertisement. It is viewed as a popular commercial communication for advertisers, allowing them to connect with consumers in modern and “authentic” way.

### ➤ Two case studies

As seen above, many advertisers partner with vloggers (directly or through an agency dedicated to this) to create brand content. This is the case of the French 24-year-old vlogger-influencer **Léna Situations**<sup>66</sup>, who has more than 1.6 million subscribers on her YouTube channel and 3.4 million subscribers on her Instagram account. She represents a very significant potential for attractiveness for the general public and for the brands, many of which offer partnerships in order to use her notoriety to make itself known to young people and the general public, particularly women. The young vlogger managed to run operations of brand content for her own fashion and decoration brand *Hôtel Mahfouf* launched in July 2022.

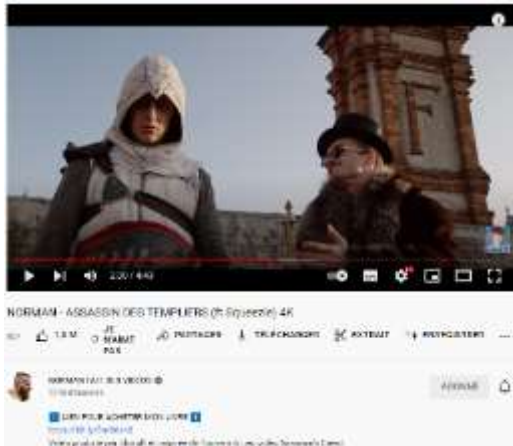


*Left: Léna Situations inaugurating her physical store (Instagram, @hotelmahfouf, @lenamahfouf) / middle: shooting as part of a partnership with Dior (leparisien.fr, Vogue.fr) / right: the first pieces of her brand sold on her e-commerce store (hotelmahfoufparis.com)*

A good illustration of brand content in France could be the marketing strategies commissioned in 2018 by **Les Produits Laitiers** (“Dairy Products”), one of the labels of the union of breeders and dairy companies, the National Interprofessional Center for the Dairy Economy (CNIEL). Responding on Twitter to an absurd humor video capsule of its iconic jingle by the YouTuber Mister V (“*dairy products are our friends for life*”), the organization seized the occasion and broadcasted an advertisement with the vlogger as the muse on the Dairy Products’ YouTube channel (over 6 million views so far). Later,

<sup>66</sup> She is the most popular influencer in France and a lifestyle and fashion vlogger in the strict meaning of the term. She has been posting the videos’ concept “August’s Vlogs” on her YouTube channel each year in August for 6 years.

the union contacted the most-popular French YouTuber, Squeezie, and offered him to sponsor a video, leaving him editorial freedom. Squeezie decided to make music with other popular vloggers, the duo of YouTubeurs McFly and Carlito. The clip “The clash of generations”, hosted on Squeezie’s YouTube channel, stages the three creators competing for the best era, 90’s or 2000s, and in the middle of the song, “dairy products are our friends for life” sounds. The specification that the video is sponsored by the union is visible on a YouTube-designed banner. The sketch has reached 31.6 million views<sup>67</sup>.



*Example of a brand content YouTube video produced by Ubisoft in 2015 and showcasing both most popular French YouTubers promoting the Ubisoft video game Assassin’s Creed [source: YouTube]*

### ➤ Regulatory framework

Apart from the rules for advertising, sponsoring and product placement of the AVMS Directive, touched upon before, it is important to realise that general consumer protection legislation applies to influencer marketing. Unfair commercial practices can be constituted when editorial content promotes a product/service/brand where a brand paid for the promotion without making it clear in the content showed or heard by the consumer (see below). A vlogger or a brand failing to identify a commercial intent behind a social media content (that has been paid and-or submitted to a form of editorial control) by omitting or hiding information may not respect consumer protection law. According to the UK’s authorities CAP (Committee of Advertising Practice) and CMA (Competition and Markets Authority)<sup>68</sup>, the influencers would have to question:

- What counts as an ad;
- Whether the influencer is paid (either in money, gifts or free visits) and what counts as ‘payment’ for advertorial content;
- Whether the content is editorially controlled by the brand and what counts as ‘control’ for advertorial content;
- Whether the promotional content is obviously identifiable as such (as an advertisement) by a label or any other means;
- Whether the content advertises age-restricted products (alcoholic beverages, gambling, tobacco products, etc.) or products subject to specific rules (food) and respects the legislation.

<sup>67</sup> <https://www.youtube.com/watch?v=rjq6FJSAVJ0>.

<sup>68</sup> An Influencer’s Guide to making clear that ads are ads: <https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf>.

Moreover, the International Council for Ad Self-Regulation (ICAS) offers an overview of existing self-regulatory guidelines implemented in ICAS markets worldwide to ensure a transparent disclosure of advertorial content by influencers. These guidelines are consistent with the **International Chamber of Commerce (ICC) Advertising and Marketing Communications Code**<sup>69</sup>, considered as the standard of advertising self-regulation.

From the European side, the **EASA**<sup>70</sup> provided a definition of influencers and identified regulations on their advertising content to complete the legislation.

EASA defines influencers as *“content creators with a commercial intent, who build trust and authenticity-based relationships with their audience (mainly on social media platforms) and engage online with commercial actors through different business models for monetisation purposes”*<sup>71</sup>.

According to the study, the activity of influencers presents four main features which are:

1. **Content creation:** the service provided by influencers;
2. **Commercial intent:** driven by direct revenue from brands (monetary and non-monetary), by revenues from audience-engagement or by platform compensation;
3. **Monetisation:** the generation of revenue through different business models;
4. **Trust and authenticity:** the source of influence, related to the parasocial relationship of trust established with the audience and the perceived authenticity and relatability of the content.

EASA monitors advertisements targeting young children and non-disclosed commercial partnerships.

### 5.4.2 Self-promotion / business ventures

As indicated above, vloggers have the possibility to manage websites organising product sales related to their image/brand, either directly on the VSP or through third marketplaces. The proceeds constitute an additional revenue for them.

Many vloggers manage a company, a brand and the sale of products and services related to their social media account(s). When creating their own company, vloggers may hire several employees, and offer sales of products derived from their “brand image” either directly from their platform account (e.g., Instagram) or a third-party website. This is for example the case of the sports vlogger *Tibo InShape* who owns a brand of clothing and bodybuilding accessories, and a brand of food supplements, and of the child influencers *Swan & Néo* with their e-shop “Sweoshop” (*books, board games, stationery, mugs and so on*).

### 5.4.3 Other forms of commercial communication (of hybrid nature)

In this section we will address types of commercial communication which do not really fit in the categories described before. Especially on Instagram we can find marketing tools available for both influencers and brands that are of a hybrid character by combining typical features of display advertising with other characteristics.

#### 1) Photo Ads (Instagram)<sup>72</sup>

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<sup>69</sup> <https://iccwbo.org/publication/icc-advertising-and-marketing-communications-code/>.

<sup>70</sup> Lead self-regulatory authority for advertising in Europe promoting self-regulation composed of national bodies from EU member states.

<sup>71</sup> Study requested by the IMCO committee (the European Parliament’s Committee on Internal Market and Consumer Protection) “The impact of influencers on advertising and consumer protection in the Single Market”, EASA, February 2022.

<sup>72</sup> <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>.

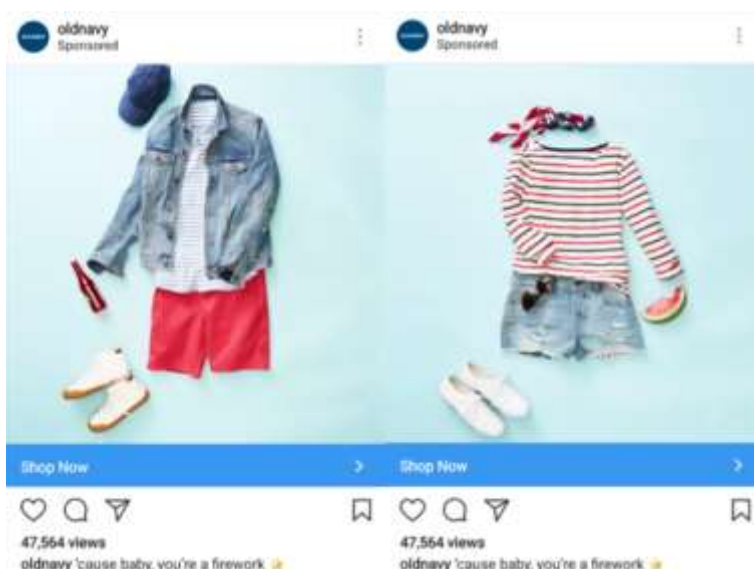
On a platform that was launched originally for photo sharing it will not come as a surprise that Photo Ads are a very common type of advertising. Once the photo sharing option was only a tool for Instagram account holders to share pictures with friends, family and other followers. Nowadays, the scenario has changed, and people are using photos to promote products, services, brands, events, and much more.



*Example of a Photo Ad on Instagram [source: <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>]*

## 2) Sponsored Ads (Instagram)<sup>73</sup>

Unlike the name suggests this is more a display type of advertising than sponsoring as we know it and is defined in the AVMS Directive. Sponsored Ads are an option available to business accounts on Instagram, and allow the brand to promote their posts through paid ads. These ads appear on the target audience's home feed, with a direct link to either a website, e-store or back to the profile of the brand. This allows the brand to directly sell their product/service and consequently increase reach and following. Sponsored Ads are also considered good tools to promote contests and giveaways and increase the engagement of the audience with the brand.



*Example of a Sponsored Ad on Instagram [source: <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>]*

<sup>73</sup> <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>.



### 3) Story Ads (Instagram)<sup>74</sup>

Instagram stories are an extremely popular feature on Instagram and research claims that nearly 80% of the active users on Instagram posts stories at least 2-3 times a week. According to marketing specialists story ads are all about clever targeting and placement. Story Ads appear typically while a user is switching between the stories of different accounts. These ads are backlinked with a “swipe up” option, which leads back either to the brand’s profile or to their website. Story Ads appear only for a few seconds before the next story appears, and once gone they cannot be revisited. While this seems a drawback, many brands nevertheless consider Story Ads as a great tool to redirect users to a brand’s page and content.



*Example of a Story Ad on Instagram [source: <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>]*

### 4) Carousel Ads (Instagram)<sup>75</sup>

If posting just one photo or video isn’t effective enough, the Carousel Ads are a pretty effective alternative. These types of Instagram ads allow a user to swipe through up to 5 images promoting the same ad but keeping them engaged on the same post for a longer time. Rather recently Instagram expanded the Carousel Ads to support video. Advertisers can now add up to 5 videos to a single ad that users can scroll through and view one by one. They can also feature a call-to-action and have room for 2,200 characters of text. Also here, backlinking is possible and it’s considered a good tool for brands that are trying to sell a new product or service. Instead of cluttering all the information on a single photo/video, brands can split up content and disseminate more information so that viewers can have a better idea.

<sup>74</sup> <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>.

<sup>75</sup> <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>.



Example of a Carousel Ad on Instagram [source: <https://digitalagencynetwork.com/7-types-of-instagram-ads-for-your-next-social-media-campaign-strategy/>]

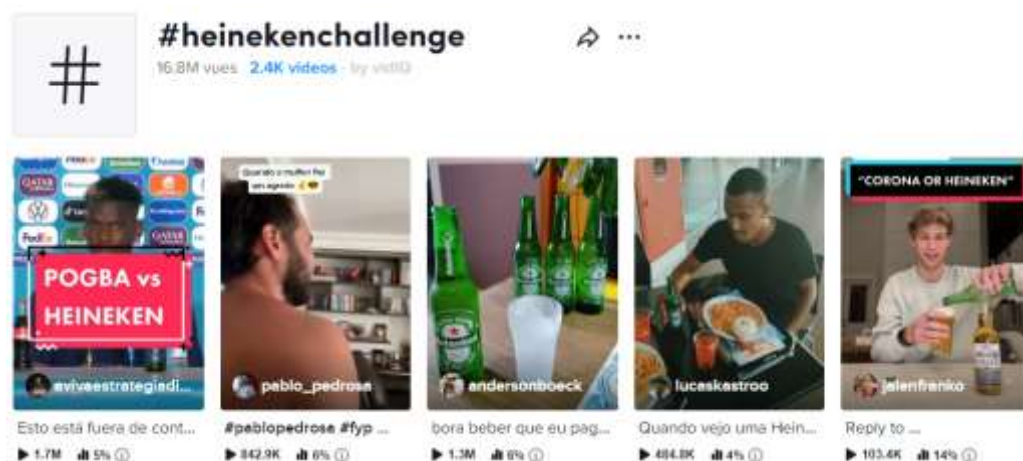
## 5.5 Special considerations regarding specific categories of advertising (ie. alcoholic beverages, gambling, etc.)

Some vloggers' content happens to have a negative impact on users/consumers, including vulnerable consumers. Indeed, according to the EASA study (see above), vloggers' marketing practices can influence consumer purchase decision-making and are potentially harmful for consumers, including:

- Lack of transparency or unclear disclosure on the contractual relationship between the vlogger and the brand;
- Lack of separation between advertising and editorial content (see above brand content section);
- Misleading messages;
- Targeting vulnerable consumer groups, in particular minors

Commercial communications in vloggers' content raises issues especially concerning forbidden or regulated categories of products or services. Indeed, certain commercial communications happen to advocate harmful products such as alcoholic products, tobacco and vaping products, gambling. The promotion of a well-known liquor brand on social media can be challenging in terms of public health, consumer protection and vulnerable public protection.

### ➤ Common influencer marketing practices potentially harmful: alcoholic products





*For instance, even though the brand Heineken is not at the initiative of the posts, the hashtag #heinekenchallenge gathers more than 16 million views on TikTok and 2,400 video capsules.*

Vloggers' content can target vulnerable consumers, such as children, and induce them to buy harmful products or services, exploiting their inexperience or credulity. Several potentially harmful vloggers' marketing practices related to alcoholic beverages, tobacco products and gambling are to be considered. The EASA study gives several examples of such practices, such as the case of a German vlogger in the beauty, gaming and lifestyle fields, whose target audience are teenagers. One of his contents featured him promoting alcohol consumption while playing a drinking game.

Influencer marketing can be regulated by a combination of the legislation applicable to both advertising and consumer protection, considering that advertising regulation often aims at protecting the consumer. Thus, it might seem uneasy for vloggers to apprehend the rules to which their professional activity should abide without proper legal advice.

In order to fill this gap, voluntary commitments have been developed for the alcoholic beverage sector. The **International Alliance for Responsible Drinking (IARD)**<sup>76</sup> together with advertisers, public relations and influencer agencies, jointly committed to **responsibility standards for the use of social influencers in alcohol marketing**<sup>77</sup>.

In this frame, IARD members adopted **Influencer Guiding Principles (IGPs)**<sup>78</sup> to recognize the responsibility for disclosure and transparency within five safeguards that will be incorporated into their business practices and through contracts with actors involved with the supply chain. The safeguards cover the selection, engagement and monitoring of influencers:

#### *"SELECTION*

- 1. Where available, all paid influencers must use age-affirmation mechanisms on digital platforms to prevent minors from seeing this content [...];*
- 2. Influencers used in the digital marketing and advertising of alcohol should be vetted and, to the best of the producer's knowledge, should have no reputational association with harmful use of alcohol, and should not feature posts that would not be compliant with the standards around irresponsible drinking behaviors outlined in our alcohol marketing codes;*

#### *ENGAGEMENT*

- 3. For paid content, all influencers should have a written agreement with the beer, wine, and spirits brand or its agency, signed by both parties [...];*

#### *MONITORING*

- 4. Influencer posts must be monitored by brands or their agencies for compliance and the influencer should fix or remove them within 72 hours if they are not compliant. If the influencer does not address issues within 72 hours of notification, or repeatedly posts non-compliant material, then we will reassess our relationship with them;*
- 5. Brands should regularly audit and monitor campaigns for compliance."*

IARD also proposes a "How not to market alcohol on social" video for influencers to follow its principles<sup>79</sup>.

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<sup>76</sup> A not-for-profit organization dedicated to reducing harmful drinking and promoting understanding of responsible drinking and supported by the leading global beer, wine, and spirits producers.

<sup>77</sup> For more information: <https://www.iard.org/IARD/media/Documents/14092021-Influencer-Pledge-FINAL.pdf>.

<sup>78</sup> [https://iard.org/getmedia/fa30bdb7-0567-4da8-87b1-50abc47fc1ac/14092021-Influencer-Guiding-Principles-FINAL\\_1.pdf](https://iard.org/getmedia/fa30bdb7-0567-4da8-87b1-50abc47fc1ac/14092021-Influencer-Guiding-Principles-FINAL_1.pdf).

<sup>79</sup> [https://cms.iard.org/IARD/media/Documents/IARD\\_Influencer-how-to-video.mp4](https://cms.iard.org/IARD/media/Documents/IARD_Influencer-how-to-video.mp4).

### ➤ **Misleading commercial practice: the monitoring of online financial scam practices**

As written before, the use of vloggers' services is now an important vector of promotion for advertisers. Vloggers can be compensated in free products or through commercial contracts. As such, they must in particular comply with the provisions of the Consumer Code.

For instance in France, the **DGCCRF** (the French Directorate-General for Competition, Consumer Affairs and Prevention of Fraud under the Ministry of Economy) monitors the practices implemented in this advertising sector (influencer marketing) to ensure the transparency and fairness of the allegations conveyed. Indeed, the content posted by vloggers on the Internet can have a significant impact on the economic behaviour of their subscribers, considered as consumers within the meaning of the Consumer Code.

Among the scam practices based on deception and developed by some vloggers are:

- Copy-trading or social trading (trading technique consisting of replicating transactions executed by another investor on the financial markets): a vlogger can encourage his subscribers to click on a link he offers and invest significant amounts of money to embed a messaging loop in which the vlogger misrepresents foreign currency investments;
- **Dropshipping or direct delivery** (remote selling method in which a consumer places an order on the website of web retailer, which transmits the order to a supplier and the latter sends the product directly to the consumer). This would be the case for advertising content posted by a vlogger, aimed at non-professional subscribers and promoting products sold at a higher price in dedicated online shops. The practice, although legal, is subject to many abuses (after entering the voucher code provided by the vlogger in the hope of getting a good deal, customers receive defective or counterfeit products, or even do not receive them).

In May 2021, the DGCCRF launched an awareness campaign on scams identified in the dropshipping sector. In April 2020, the Ministry of Economy and Finance offered a practical guide to preventing scams through the creation of a national task force to fight against scams. Finally, targeting influencers, the AMF (the French Financial Markets Authority) and ARPP (the French advertising self-regulatory organisation) announced on July 21, 2022 to extend their framework for collaboration on communication in the financial services sector to the new field of crypto-assets, and in particular to the practices of finance influencers.

Several government bodies (the AMF, the Paris Public Prosecutor's Office, the DGCCRF and the Prudential Supervisory Authority – ACPR) are committed to denouncing online financial scam practices and limiting their effects through their coordinated actions.

In addition, the **SignalConso** automated reporting platform, attached to the DGCCRF and created in February 2020, allows consumers who suspect misleading behaviour by influencers during hidden advertising to report them.

### ➤ **Two case studies**

1/ In January 2018, the influencer **Nabilla Benattia-Vergara** had promoted stock exchange services (trading training services offered by a website on the sale and purchase of bitcoins) in a Snapchat story without mention that she was paid in this context. In her story, the influencer had alleged that the service was free, the systematic recovery of the sums invested and returns of up to 80%. Thereby: she had omitted to indicate the advertising nature of her publication, leading her subscribers to believe

that the promotion was the result of a disinterested positive personal experience; her remarks were likely to mislead the consumer about the characteristics of the service and the results expected from its use.

Following an investigation by its national investigation service, the DGCCRF considered this process to be a misleading commercial practice. A transactional fine of €20,000 was proposed and accepted by the influencer, taking into account the profit derived from the promotion operation.

2/ **Mc Donald's France had called on child influencers** to encourage their communities to consume the group's products using staging (unboxing – unpacking of products – and role play). In October 2021, the consumer association UFC Que Choisir filed a complaint against the McDonald's France group before the Paris Court of Justice for misleading commercial practices. According to the association, "concealing the advertising nature of a message, thus letting the community of an influencer believe in disinterested advice, is a punishable misleading commercial practice". According to the association, McDonald was deviating from its children advertising policy, the brand having joined in 2011 a self-regulatory initiative by the food industry, the EU Pledge, committing its members not to product placement in non-advertising content of third-party materials intended for children. In addition, the so-called "Studer" law subjects the parents of children under 16 whose image is commercially used on the Internet to certain obligations in terms of income management and working time limits.

## **5.6 Activities focussing especially on providing guidance and encouraging transparency of advertising and other commercial communication**

In some countries NRAs and/or advertising standards associations have provided guidance on how vloggers can offer clarity to audiences about commercial arrangements.

The Media Authorities in Germany have had good experiences with preventive supervision in the field of audiovisual media services. This refers to various measures to inform vloggers about the necessity as well as the legally compliant way of advertising labelling.

To make it easier for vloggers to understand national regulations and their duties online, the state media authorities have developed a guideline, the so-called "Matrix". This explains on the basis of typical case groups when advertising is required (e.g. in the case of free products) and also how labelling must take place in different online media for the various forms of advertising. The matrix is regularly adapted when court rulings require it or when it is necessary to react to new phenomena.

Some Media Authorities offer regular workshops for vloggers and their managers in which the matrix is explained and questions about the regulation of advertising can be asked. Changes in the matrix and supervisory practice are presented and discussed with the sector at the annual "#watchdog" event. This event will bring together vloggers, their management, media agencies and other media professionals with regulators to discuss current issues affecting the industry.

If the Media Authorities detect advertising violations in the content of a vlogger, a general information e-mail is sent in the first step. The vlogger is made aware of the violation and receives further information about the cases in which an advertising label is required and what it should look like. These e-mails always contain the offer to contact the Media Authorities for queries. Fortunately, many vloggers take advantage of this opportunity and ask questions that are answered as soon as possible by mail or phone. One explanation for this seems to be that the addressees are not large media companies with their own legal departments, but some of them still rather young individuals. In

addition, many vloggers also have a strong interest in ensuring transparency in the labelling of advertising content in order to maintain their credibility.

In Belgium the VRM (Vlaamse Regulator voor de Media - Flemish Regulator for the Media) has published a Content Creator Protocol which explains how content creators such as vloggers can disclose commercial communication by content creators on video sharing platforms. Thanks to clear graphics per individual platform (YouTube, Instagram, TikTok and also Twitch) the protocol elaborates how clear unambiguous labels should look like. According to the Content Creator Protocol, the label “*advertentie*” or “*publiciteit*” must be written at the beginning of the video description. In this way the viewer can see the label at first glance when the video starts playing. Furthermore, the partner(s) should be tagged and the platform’s disclosure feature should be activated<sup>80</sup>.

In Ireland the Executive of the Advertising Standards Authority for Ireland (ASAI) has published a Guidance Notice<sup>81</sup> focusing on affiliate or advertorial ads that have been published by an influencer on social media. The ASAI’s Code of Standards for Advertising and Marketing Communications<sup>82</sup> applies to all commercial marketing communications, regardless of the medium in which they appear. It is and has always been an important principle of the ASAI Code that consumers can easily recognise when they are being addressed by a marketing communication so that they can make an informed decision about their engagement with the content. With a variety of advertising techniques now available, the question is asked; what is a marketing communication and how can it be flagged as such? The default position is that advertiser’s own posts or tweets are, when related to their own brand or products, marketing communications. Where celebrities are sponsored by brands or paid directly to promote a brand’s products, it must be clear that their posts are marketing communications or others. The context of the post or accompanying # may make it clear that it is a marketing communication. However, where the context or accompanying # does not make it clear, it is incumbent on the advertiser to ensure that clear guidance is given so that clear ‘flags’ are used, for example #ad, #sponsor. Such disclosures must be immediately apparent before consumers engage with the content.

According to the approach of the ASAI in Ireland when the influencer has not been paid or otherwise induced to write a review, then the material is not considered (commercial) marketing communication. If, however, an advertiser has paid the influencer (directly or in kind) and where the advertiser has significant control over the content of the review, then it is likely that the material would be considered a marketing communication. When an influencer enters into a commercial arrangement with an advertiser to promote the company’s products or services through their own social media channels, they are effectively acting as a publisher and they have a responsibility to indicate to their followers/audience what material is marketing communications material. When influencers create content for their own brands or services, or use affiliate links in their content, such content is marketing communications, and this must be clear from the context or the content.

Disclosures should be clear and legible, and visible for consumers to see before they interact with/read the relevant material. A disclosure below-the-fold on websites, in terms and conditions at the end of a piece of content, or in the ‘see more’ section is not sufficient. Disclosures should not be obscured by other content. When videos are involved care should be taken to ensure that it is clear to viewers before they engage with the content and immediately on engaging with the content that it is marketing communication material.

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<sup>80</sup> [https://www.vlaamseregulatormedia.be/sites/default/files/examples\\_of\\_clear\\_mentions\\_per\\_platform.pdf](https://www.vlaamseregulatormedia.be/sites/default/files/examples_of_clear_mentions_per_platform.pdf).

<sup>81</sup> <https://www.asai.ie/wp-content/uploads/ASAI-Guidance-Note-Recognisability-of-Influencer-Marketing-Communications-Feb-21.pdf>.

<sup>82</sup> <https://www.asai.ie/wp-content/uploads/ASAI-Guidance-Note-Recognisability-of-Influencer-Marketing-Communications-Feb-21.pdf>.

If an influencer uses affiliate links, on their own social media content, to products on external third-party website, they must declare the fact that the links are affiliate links. As they will receive a commission should a consumer ultimately make a purchase having followed the affiliate link, the influencer content is a commercial marketing communication. #AF is a common disclaimer. Where influencers use affiliate links on their own webpages, they must state at this at top of the webpage; disclosures at the end of the webpage or on other areas of the website do not present consumers with the opportunity to know immediately that they are engaging with marketing communications.

## 6 ERGA Workshop

During the workshop organised by ERGA subgroup 1 on 4 October 2022 one panel was dedicated to the theme Vloggers and commercial communication. The three panellists were representing the experiences of a national regulator, the European self-regulatory association and a vlogger.

Tine de Baere informed the audience about the Content Creator Protocol developed by the Flemish media regulator VRM, which lays down the rules for vloggers and has a special focus on transparency around commercial communication. The Content Creator Protocol consists of three main pillars: commercial communication on social media, protection of minors and prohibition of hate speech. In the VRM's interpretation of commercial communication it's characteristic that the vlogger receives a benefit from the brand, which can consist of many different features: payment but also various other advantages such as gift vouchers. The Content Creator Protocol places strong emphasis on adequately informing the public. Vloggers are required to label their commercial communication with 'advertising' or 'publicity' at the beginning of the description. Also, they should tag their partner(s) by using @partner. Last but not least, when uploading a video, vloggers should use the platforms disclosure tools to indicate that the video contains branded content. Tine de Baere stressed that the main characteristics of the VRM's approach are: clear and simple procedures, easy recognizable labels, and improving awareness and monitoring. The presentation of the VRM-representative demonstrated that the Content Creator Protocol can function as a great source of inspiration for other NRAs.

Another panellist, Alexandre Dérobert, Public Affairs and Policy Officer at EASA, explained how self-regulation can complement legal/formal regulation. He explained the different forms and levels of self-regulation, such as company codes, sector-specific codes, national and international codes. Pre-clearance, complaint handling and monitoring are important tools of self-regulation and Dérobert explained that data-driven monitoring is becoming increasingly important and can contribute to better compliance. At this moment 17 self-regulatory organizations are involved in data-driven self-regulation projects. Another important tool of self-regulation is training to enhance awareness of the latest rules. The EASA-representative mentioned in that regard a certification system in France, in which brands can choose to collaborate only with vloggers who acquired a certification after following an intensive training. EASA also published a guidance document setting out which rules of the AVMS Directive apply to vloggers.

The third panellist, Joost Bouhof, a popular vlogger in the Netherlands, mainly offering gaming content, stressed in his contribution the differences between traditional professional media and vloggers, or in his preferred notion: influencers. In his opinion the authenticity of influencers and their capability to issue opinions are distinctive key features. In addition to that, regulators need to keep in mind that they are often small-scaled business that are lacking in-house legal expertise. Bouhof indicated there is a need for distinguishing another category in the situation that vloggers receive products for free and recommended to use a label such as 'given' or a similar reference. The labels advertising, sponsoring or product placement not adequately inform the audience and raise the impression there

is a commercial arrangement made between an influencer and a brand, but that is certainly not always the case, according to Joost Bouhof.

Alexandre Dérobert mentioned that taking into account the AVMS Directive criteria such construction would still qualify as a form of commercial communication. Tine de Baere added that the interest of the audience to should prevail when choosing labels for disclosing. She wondered whether a label as “gifted” would fulfil the need for clear and unambiguous information. Joost Bouhof agreed that possible approaches would need further consideration. But he pointed out that vloggers are incomparable with traditional media and that regulators would need to think out of the box to incorporate the specific features of vloggers and their activities.

The vlogger also highlighted the added value of structural contacts between regulators and the vloggers community to increase awareness about the relevant rules and to identify possible bottlenecks. He mentioned the industry greatly appreciated the efforts of the media regulator to strike a balance between the need for transparency and the need for protecting the privacy of individual vloggers. As a consequence, the Dutch media authority stated that it is not necessary to disclose the full business address when this is equal to the private address.

## 7 Conclusion

An increasing number of ERGA members have started to regulate vloggers, or intensified existing regulation. They have set rules for commercial communication in and around vloggers material and for the protection of minors and other users against potentially harmful content. For the identification and assessment of the place of establishment regulatory authorities have a number of instruments at their disposal. Proper legal competences for requesting information and monitoring content can contribute a lot to effective supervision and enforcement. Also, the collaboration with other supervisory authorities, also under the future framework of the DSA, can significantly improve online supervision and enforcement. Furthermore, social media analytics platforms and influencer marketing platforms and services, often used by the industry can offer useful insights in the location and activities of vloggers targeting the local markets. NRAs should also pay attention to the way vloggers operate as professional parties by joining copyright associations and other interest organisations, and participating in festivals, awards and applying to funds schemes.

As far as the regulation of commercial communication is concerned it is important to note that in many countries self-regulatory organisations have developed rules and guidance specifically aiming at vloggers, social influencers and comparable actors. Also on European level we can witness several interesting initiatives to create better awareness amongst the industry and consumers. It is important to realise that commercial communication in and around vloggers content is not only governed by rules stemming from the AVMS Directive. In most cases also rules of general consumer protection legislation applies. And also it is not always easy to determine whether a vlogger or a platform should be hold primarily accountable since the initiative to and control over commercial communication is often divided over more parties. As a consequence, vloggers might tend to lose the overview of what rules are relevant and applicable. Transparency and explanation of the rationale of the rules to both the industry and audiences are key. Naturally and thanks to their experience and expertise NRA's are well positioned to provide a comprehensive overview and detect duplications of rules and/or gaps in protection. Special considerations should be given to the subtle but crucial distinction between sponsoring and product placement. Also the question whether supervision and enforcement should focus on commercial communication in the videos or should be extended to content which is not

audiovisual by nature has become very relevant. In that regard, special attention should be given to the self-regulatory initiatives since their scope is often broader.

## 8 Recommendations and best practices

- Consider the influencer market tools to obtain better insight into the population of vloggers that could fall into the scope of regulation

Many market parties offer software and applications that can help to trace, filter and categorise vloggers who are active on various video sharing and other online platforms. They can contribute to a better understanding of ongoing trends and an actual overview of the vloggers scene and the audiences and jurisdictions individual vloggers.

- Align with other NRAs to address all relevant parties in the media value chain

In the sphere of online distribution of audiovisual media content many parties play an intermediary role and could provide relevant information or need to be involved in possible enforcement actions. Since not all these parties will naturally fall into the scope of national media regulations supervision and enforcement needs to be carried out in close cooperation with other sector-specific regulators or general consumers and markets authorities.

- Use the new opportunities of the DSA regime to tackle specific challenges related to online distribution

NRAs need to assess which natural or legal person is editorially responsible for a vloggers account or channel and where this person or company is established. This exercise could face challenges, which are typically related to the online domain where many parties have preference or interest to stay under the radar. The upcoming implementation of the DSA regime in the various national jurisdiction should pay attention to these challenges. It will be crucial to build in efficient powers and procedures to deal with intermediary parties in the online distribution chain that might be unwilling to provide information or cooperate in general with public authorities.

- Consider a holistic approach when designing rules and supervisory policies regarding commercial communication in vloggers material

When it comes to the regulation of commercial communication in the offer of vloggers a very principle question is whether the part outside of the videos falls under the scope of media legislation and supervision or not. We can choose to focus exclusively on the video content. After all, the rules stem from the AVMS Directive and are originally written for audiovisual material. On the other hand, when it comes to setting rules for flagging the involvement of commercial parties it makes sense to include also the non-audiovisual parts of the vlogger account or channels such as video description boxes. In that regard and also bearing in mind the interests of the audiences the rules aim to serve and protect a more holistic approach without making a distinction between video and other content is could be the favourable option. Also, we need to realise that other self-regulatory mechanisms such as the advertising codes adopted in many countries apply to advertising in general and are not limited to the audiovisual part of vlogger's accounts and channels.

- Enhance awareness of vloggers and platforms and their audiences about all statutory and self-regulatory regimes that possibly apply to commercial communication

Commercial communication in and around vloggers material on platforms is governed by many different legislative frameworks and self-regulatory regimes on national and European level. Apart from the national rules following from the AVMS Directive ERGA's members are primarily dealing with, commercial communication by vloggers and on platforms will need to comply with requirements originating in the Unfair Commercial Practices Directive (UCPD), the eCommerce Directive, the Consumer Rights Directive (CRD) and the DSA. Furthermore, in many countries self-regulatory organisations have adopted principles for commercial communication, usually enshrined in codes of conduct and guidance notes. It is crucial for all key actors, especially the vloggers, platforms and their users to have a good overview of all applicable obligations. Due to their central and informed position NRAs are very well placed to play a key role in enhancing awareness and understanding of the main rules originating in media law, consumer protection legislation and self-regulation in these areas.

- Provide clear guidance on the distinction between sponsoring, product placement, advertising and other forms of commercial communication

There is a need for optimal clarity and better understanding of the main characteristics and differences between sponsoring, product placement, advertising and other commercial communication. Especially, given the fact that product placement is subject to stricter rules can lead to calculative behaviour within the vloggers community and create the incentive to disguise product placement as (regular) sponsorship. NRAs should be attentive to these possible risks. A guidance note, possibly provided by ERGA, could shed more light on the main definition criteria of the different types of commercial communication and their distinctive features.

- Use communication policies to enhance understanding of and support for regulation and supervision amongst vloggers and their audiences

In communication policies, especially where the rules regarding commercial communication are concerned, NRAs can focus either on the rules themselves or their relevance. The latter approach seems to be preferable since it can contribute to better understanding of and support for regulation and supervision.

## **Annex National examples**

### **1 Austria**

Austrian Law does not use an explicit definition of Vloggers. Vloggers may legally be classified as On-Demand Audiovisual Media Services (ODAVMS) depending on what content is distributed and the way of its distribution.



The competent Austrian authority, the Kommunikationsbehörde Austria (KommAustria) applies a high standard in terms of whether a Vlogger can be regarded as a ODAVMS, especially considering whether the services potentially has a mass media character.

As reported in the country examples annex of the previous ERGA report, Vloggers can request a declaratory decision by the regulator, creating legal certainty whether their service constitutes an ODAVMS and must comply with according provisions.

In a tiered and less strict fashion, the same regulations that apply to television apply to ODAVMS.

Therefore, for Vloggers who qualify as ODAVMS, in line with the AVMS Directive, implemented in a federal law, the Audiovisuelle Mediendienste-Gesetz (AMD-G), commercial communication has to be transparent and has to be easily recognizable as such. There are labelling provisions and further specifications for sponsorship and product placement. There is a general advertising ban for tobacco products and prescription Drugs, commercial communications for alcoholic beverages has to follow strict statutory provisions. Affected Vloggers must comply with commercial communication requirements for the protection of minors

Unlike the provisions for television, for affected Vloggers there need not to be a strict separation between advertising and the presented information and there are no time limits on ads and no limits on how often ads can be shown.

Since 2018 KommAustria monitors commercial communication on ODAVMS on a monthly basis.

The Austrian Chamber of Commerce, where regulated Vloggers must register their business, regularly refers Vloggers looking for clarification of their legal obligations to the Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR). The RTR, among other duties, supports the KommAustria in its regulatory affairs. Taken informative measures of the last years and the offered information services seem to have been effective. Infringements by monitored Vloggers are low.

KommAustria is legally obliged to promote self-regulation in the field of commercial communications by providing financial support to the Organization for Self-Regulation of the Advertising Industry in Austria ("Werberat", Advertising Council), which was established as an association for this purpose.

The Advertising Council assumes the tasks of establishing a body for the creation of self-regulatory guidelines, establishing and updating a code of conduct with regard to the observance of ethical and moral principles in advertising and establishing and managing a complaints office.

Only in a few cases, the KommAustria had to impose penalties on Vloggers, mainly for lack of reference to product placement and/or undue given prominence to products in product placements. One major vlogger complained against the authorities administrative decision - the legal proceeding is still pending with the Austrian Federal Administrative Court.

## **2 Belgium**

In December 2021, the Flemish Regulator for the Media (Vlaamse Regulator voor de Media: VRM) published a Content Creator Protocol (<https://www.vlaamseregulatormedia.be/en/content-creator-protocol>) for content creators, vloggers and influencers who post videos on social media platforms. This way, they can readily find out how to post online videos on social media platforms (such as YouTube, Instagram, TikTok, Twitch, etc.) in compliance with the media regulations.

The Content Creator Protocol is intended for any content creator, vlogger, and/or influencer who is established in Flanders and provides an audiovisual media service. There are no specific thresholds in terms of the amount of followers or subscribers.

The Content Creator Protocol consists of three themes: (1) commercial communications on social media, (2) commercial communications and content aimed at minors, and (3) prohibition of hate speech and violence.

When a vlogger brings commercial communication in their online video, they have to make this readily recognizable as such to their viewers and followers.

A vlogger brings commercial communication when they mention a brand, company product or service in their video and when the vlogger receives a benefit from the company behind that product, brand or service. This benefit is interpreted broadly: it can be a classic payment, but also a free product or an invitation to an event or other unique experiences.

Commercial communications is made readily recognizable to followers and viewers by following three steps: (1) Use the term “*advertentie*” or “*publiciteit*” at the beginning of the description. (2) Tag the partner(s): @partner and (3) use the platform’s disclosure feature.

The terms “*advertentie*” or “*publiciteit*” has to be clearly visible for the viewer at first sight. The terms “*reclame*” and “*advertising*” may also be used.

The Content Creator Protocol provides with clear graphics per individual platform (YouTube, Instagram, TikTok and Twitch), how this looks like in practice<sup>83</sup>.

Furthermore the Content Creator Protocol states that commercial communications aimed at children and young people should be readily recognizable to them as such and that videos aimed specifically at children under 12 cannot contain any product placement.

The VRM has developed the Content Creator Protocol in clear and readily understandable language to make the rules set out in the Media Decree uniform and easy to apply in practice. The CCP contains flowcharts, visual examples and FAQ’s<sup>84</sup>.

Before the Content Creator Protocol was published, the VRM organized several information and consultation sessions with content creators, vloggers, influencers and influencer (marketing) agencies. In addition, the VRM consulted with other public bodies and organizations that are also active on this theme, such as the Economic Inspectorate of the Belgian Federal Public Service (FPS) Economy (the authority for consumer protection), the Communication Center (the self-regulatory body for advertising), and others.

In 2022, the authority for consumer protection, the FPS Economy, published best practices for content creators and influencers<sup>85</sup> and the self-regulatory body for advertising, the Communication Center, published “Recommendations on influencer marketing”<sup>86</sup>.

VRM provides an accessible point of contact for questions about this theme and ensures daily monitoring of video content of Flemish vloggers on social media platforms.

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<sup>83</sup> [https://www.vlaamseregulatormedia.be/sites/default/files/examples\\_of\\_clear\\_mentions\\_per\\_platform.pdf](https://www.vlaamseregulatormedia.be/sites/default/files/examples_of_clear_mentions_per_platform.pdf).

<sup>84</sup> <https://www.vlaamseregulatormedia.be/en/downloadable-visuals>.

<sup>85</sup> <https://economie.fgov.be/nl/themas/verkoop/reclame/u-bent-contentcreator>.

<sup>86</sup> [https://www.jep.be/wp-content/uploads/2022/04/influencers\\_NL.pdf](https://www.jep.be/wp-content/uploads/2022/04/influencers_NL.pdf).

### 3 France

In France, more than half of the 100 most popular YouTube channels are administered by vloggers. Some vloggers are particularly popular in terms of followers (e.g. Léna Situations who provides lifestyle and fashion content) while others reach a specific audience with niche or specific topics (e.g. HugoDécrypte on press reviews and political topics, Jamy – Epicurieux or the vloggers' coalition Le Vortex on science popularization).

Influencer marketing is not specifically regulated under French legislation. Actual legal framework raises questions about the applicable regime and legal status of vloggers. Nevertheless, French legislation is applicable to vloggers producing content that has an impact on consumers.

In regard to consumer protection law, the French Digital Economy Act of June 21, 2004 provides that any advertisement must be distinctively identified as such. Vloggers providing promotional services are required to clearly mention that any paid-for promotional content included in their social media post, is an advertisement. Failure to disclose a commercial partnership between a vlogger and a brand could be considered as a deceptive commercial practice under the article L. 121-3 of the French Consumer Code.

In France, self-regulation practices are offered to vloggers for the monitoring of their commercial communications and provide a specific framework for supplementing the legislation.

#### 1) Self-regulation practices of the French advertising regulation authority (ARPP)

The Autorité de Régulation Professionnelle de la Publicité (ARPP) is non-governmental body in charge of enacting and enforcing ethic advertising rules among advertising actors in France. The authority offers multiple tools related to the vloggers' commercial communications, such as:

- The **ARPP Code**<sup>87</sup> is constituted of several Recommendations setting up the ethical framework for advertising expression, applicable to advertising communication in France. The ARPP Recommendations are based on the ICC Marketing Code (see above), reinforced, depending on their themes, by charters of commitments signed by the representatives of the professionals, the ARPP and public authorities;
- The "**Digital Advertising Communication**" Recommendation v5<sup>88</sup> (enacted on January 1, 2022) sets out the rules of influencer marketing through general provisions and practical sheets dedicated to specific topics. It includes provisions on influencer accountability<sup>89</sup> (Part 3) and emerging practices such as brand content (Part 4);
- Since September 2021, the organization offers a **Responsible Influence Certificate**<sup>90</sup> intended for content creators to ensure that they are aware of the organization's ethical

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<sup>87</sup> <https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/>.

<sup>88</sup> <https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/recommandation-communication-publicitaire-numerique/>.

<sup>89</sup> The ARPP defines an influencer as an individual expressing a point of view or giving advice, in a specific area and according to a style or treatment that is specific to him and that his audience identifies.

<sup>90</sup> <https://www.arpp.org/certificat-influence-responsable-inscriptions/>.

recommendations. The certificate covers the main ethical and legal rules enacted by the ARPP, including the transparency of partnerships, regulations (in terms of the environment, health, food products, gambling, etc.) and the major ethical principles governing influence marketing (loyalty, protection of minors, decency, dignity, etc.). The certificate includes 150 certified among 150,000 influencers identified in France and more and more brands, like L'Oréal or Club Med, require it before working with an influencer;

- Since July 2021, a **'Highway Code' of influence** developed with the digital communication agency Influence4You traces in the form of a test the rules and good advertising practices that apply to influencers;
- A **Responsible Influence Observatory** exists since 2019. Its 2021-2022 barometer reveals a clear improvement in transparency among influencers<sup>91</sup>;
- The ARPP offers a new educational concept on its social media accounts since June 2022: **"La Reco Rapido"** (as for "The Quicky Recommendation"). This is a series of short video capsules whose aim is to allow a rapid "assimilation" of the basic ethical rules governing digital commercial communications. The first themes unveiled relate in particular to brand content, greenwashing, child protection and eating habits.

## 2) Self-regulation practices from the UFC Que Choisir association

In addition, the UFC Que Choisir association, the French consumer group, published two self-regulation tools<sup>92</sup> in June 2021 for internet users on the one hand and influencers on the other hand:

- A **survey on influence peddling on social networks** aimed at warning internet users of the unfair commercial practices of influencers by denouncing these practices by sharing examples of reality TV celebrity collaborations and by giving certain advice to victims and potential victims;
- An **"influencer charter"** divided into five best practices to follow for "influence professionals".

## 3) The role of multi-channel networks / PR / talent / digital marketing agencies

Multi-channel networks (MCN), which can be hired by marketing agencies to identify vloggers able to reach specific audiences, or by vloggers themselves in need of commercial partnerships, also play an important part in the web content creation ecosystem that should be highlighted.

<sup>91</sup> <https://www.arpp.org/actualite/observatoire-influence-responsable-2021-2022/> (September, 2022).

<sup>92</sup> <https://www.quechoisir.org/enquete-reseaux-sociaux-attention-traffic-d-influence-n92454/>.

In France, multi-channel networks (MCN) play a key role in accompanying the vloggers in their content creation and monetisation. Some vloggers are accompanied by MCN, which are companies acting as agents to provide **promotional, technical and creative support**<sup>93</sup> to their talents (i.e., vloggers) on the platforms and social networks<sup>94</sup>. MCN manage portfolios of vloggers, some of which constitute online spaces (channels or accounts) generating millions or even billions of views. Some MCN work alongside traditional television networks (e.g. Studio71 France belongs to Groupe TF1) and build bridges between digital creation and television creation by offering mixed productions (e.g. participation of the vlogger Enjoy Phoenix on The Voice show; production of content for Arte by Nota Bene, a history vlogger). They can also provide vloggers with professional studios and recording equipment.

Among the MCN established in France, the most important in terms of audience are:

- Companies wholly or partly owned by major media networks, including Webedia Creators (Webedia), StudioFY France (TF1), Endemol Beyond (Endemol Shine), Golden Network including Golden Moustache, Rose Carpet, Vlogger (M6), France.tv Distribution (France Télévisions), Studio Bagel (Canal+) and We Are Era France (RTL Group);

Companies not related to audiovisual networks but sometimes subsidiaries of audiovisual or musical producers: Wizdeo, Believe Digital Studios (subsidiary of the independent music distributor Believe), Left Productions, Xilam Animation, Millimages, etc. Some of them have developed high value-added software<sup>95</sup> (technological platforms for statistics, audience targeting, quantitative audience analysis or invoicing).

## 4 Germany

The first generation of vloggers started out as a group of creatives producing videos as a hobby. They used the videos to share their interests and experiences with viewers. In the early days, when a vlogger recommended products, it was usually because they actually wanted to share their own experience with them. Vloggers not only shared these interests, but also large parts of their private lives with the public. Through comments, messages, and meetings, they - unlike film stars - entered into direct communication with their fans. This approachability made them an object of identification for young viewers, who put great trust in the opinion of vloggers. This trust was severely shaken when it became known a few years ago that vloggers present products not only because they really like them, but because they were paid by the manufacturers to do so. Video production changed from a mere hobby into a way to make a living out of it. Many viewers began to doubt the statements of the vloggers and felt betrayed because they had not made the payment transparent.

However, the advertising impact of vloggers is largely based on this trust in the online idols. Many vloggers have realised this themselves. Transparency with regard to advertising in videos ensures their credibility and thus the effect of their advertising and thus provides them with further jobs. For this reason, many vloggers are at least trying to comply with the regulation on transparency of advertising.

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<sup>93</sup> MCN develop marketing strategies to improve the visibility of vloggers alongside users and advertisers: use of key performance indicators, search engine optimization tools, statistical and analytical tools, etc.

<sup>94</sup> For more information, refer to the Arcom study, January 2019 "The production of audiovisual content for the internet", p. 44-51: <https://www.csa.fr/Informer/Collections-du-CSA/Focus-Toutes-les-etudes-et-les-comptes-rendus-synthetiques-proposant-un-zoom-sur-un-sujet-d-actualite/La-production-de-contenus-audiovisuels-pour-internet-2019>.

<sup>95</sup> For instance, the French company Wizdeo offers a social media statistics tool (Wiztracker, now Wizdeo Analytics) sold to various players (YouTubers, brands or agencies).

In Germany, provisions on vloggers were adjusted during an overhaul of the Broadcasting State Treaty (Rundfunkstaatsvertrag – RStV), which then was re-named and amended to become Interstate Media Treaty (Medienstaatvertrag - MStV). Moreover, and more relevantly, the objective of the laws to regulate vloggers was to establish a legal basis regarding online-media produced and distributed by vloggers. Within the revised State Treaty, the Landesmedienanstalten have been given a statutory power to clarify some provisions of the Treaty. During the process of drafting the advertisement statute (Werbesatzung – WerbeS), the Association for Influencer Marketing was heard on the new provisions.

The advertising statutes contain specifics on the labelling of sponsoring, product placement and classic advertising. The regulations made there apply to television as well as to vloggers.

Even though these regulations are already more concrete and also somewhat more comprehensible than classic laws, they are not always easy to understand for laypeople like vloggers.

To make it easier for vloggers to understand national regulations and their duties online, the state media authorities have developed a guideline, the so-called “Matrix”. This explains on the basis of typical case groups when advertising is present (e.g. in the case of free products) and also how labelling must take place in different online media for the various forms of advertising. The matrix is regularly adapted when court rulings require it or when it is necessary to react to new phenomena.

Some media institutions also offer regular workshops for vloggers and their managers in which the matrix is explained and questions about the regulation of advertising can be asked.

Changes in the matrix and supervisory practice are presented and discussed with the sector at the annual “#watchdog” event. This event will bring together vloggers, their management, media agencies and other media professionals with regulators to discuss current issues affecting the industry.

The workshops and the annual events make it possible to reach many vloggers and educate them about the obligations related to advertising. This is to prevent violations of the law in advance.

Usually, when it comes to violations of advertisement obligations (e.g. violations of the obligation to label advertisements as such), the competent federal media authority sends out an information letter making the vlogger aware of his/her violation and asking for correction. If the vlogger makes the adjustments requested, there are no further sanctions. If, however, no adjustment is made or violations occur repeatedly, a formal procedure is triggered.

However, the experience of the last few years shows that the awareness-raising-measures and information-letters are well received by vloggers and, at least for established channels, infringements have decreased. It is very rare that formal procedures have to be initiated and, for example, a fine has to be paid.

## 5 Greece

Identification and localization of the content and the (editorial responsible) service provider (vlogger)

In Greek law, there is no explicit legal definition of vloggers. According to the general approach adopted by ERGA, these are on demand audiovisual services. All difficulties on the interpretation of the AVSM Directive (and the of the law 4779/2021 transposing the Directive in Greek law), that have been discussed inside ERGA, are raised when it comes to the application of legal texts in the case of vloggers.

However, some elements of the legal qualification of vloggers exist on a recent Regulatory Decision 1/2022 (published last July) of the NCRT (“Registration of audiovisual media services and related providers in the business register”). This Decision aims at facilitating our work of documentation of all existing audiovisual services in Greek market.

Especially for audiovisual services provided by vloggers, article 3 of this Decision stipulates in which conditions the provider of such a content has to be registered.

The production and the uploading of a/v content is qualified as audiovisual media service, as long as this activity is officially acknowledged as a profession. This can be resulted by these evidences:

- a) The regularity of uploads in one or more other platforms or social networks,
- b) The registration of the provider in databases and other online tools that provide statistics and other elements for viewing its content,
- c) The advertising of audiovisual content,
- d) The use of tools provided by the video sharing platform or social network to the user for classification of the videos he uploads,
- e) The existence of commercial announcements on the posts of the vlogger,
- f) Drawing up contracts with the video sharing platform or the social network on the advertising revenue.

#### Identification of the content of vloggers

NCRT has established last year a special Committee charged with the task of supervising these new services and of examining any complaints. Certainly, it would be unrealistic to organize a systematic monitoring of vloggers, due to the lack of sufficient personnel. For the moment, we are trying to detect all aspects of this new market and, essentially, to understand mechanisms used on advertising matters.

It is also of a great importance to elaborate a Code with all existing rules on vloggers. This is a work to be organized on a co-regulatory basis, that’s why the Committee has contacted all relevant organizations of the advertising market in order to discuss on these matters, trying also to reach personally some of the most famous of the vloggers.

#### Localization of vloggers

One of the existing problems raised during the work of this special Committee of NCRT is how to localize these new services. The imprint obligation resulting from article 5 AVMSD (transposed by Article 7 of Greek law 4779/2021) is not regularly applied by the vloggers, due to the fact that most of them don’t have yet any organized professional team.

However, an important work of localization of the most famous vloggers has already started and this is also to be discussed with the involved parties.

## 6 Netherlands

In the country examples annex of the previous ERGA report *Analysis and recommendations concerning the regulation of vloggers*<sup>96</sup> it was reported regarding the Netherlands that the CvdM was in the process of preparing policies regarding vloggers, also called “uploaders” or “content creators” in the terminology of the CvdM. The CvdM has chosen for a more neutral and platform-independent concept than “vloggers” or “YouTubers”, because it captures better similar services offered on other online (video sharing) platforms than YouTube. Meanwhile a new policy rule has been adopted, outlining when such service providers on YouTube and other online (video sharing) platforms meet all definition criteria of a commercial video on-demand service.

As part of the new policy rule, the CvdM has developed a decision scheme consisting of some steps to determine which service providers fall at least under its supervision. As indicated already in the previous country report, the CvdM has introduced some thresholds to assess when a provider would need to register and would need to comply with the Media Act.

First, needs to be determined whether a service provider has an (1) active account on one or more of the following platforms: YouTube, Instagram and TikTok, and whether a single account has (2) at least 500,000 followers or subscribers. If so, the following step in the process is to assess whether (3) at least 24 videos in the last year have been uploaded to the account. Furthermore, the editorially responsible party should (4) earn revenues with the service or receive products or services in return and is (5) registered in the trade register of the Chamber of Commerce. By applying these requirements and thresholds, the CvdM aims to incorporate in its supervision policies, the main elements of the definition of an on-demand audio visual media service that can be derived from the AVMS Directive, such as video catalogue, mass medium and economic service.

As of July 1, 2022, video uploaders must register with the CvdM and comply with the rules in the Media Act. The CvdM has identified the following principles as key in order to provide more clarity to viewers of online videos and to protect them from harmful content.

- Be transparent about advertising.
- Take into account special considerations for minors.
- Be transparent about who you are.

Provided that video uploaders have more than 500,000 followers and they meet the other criteria for registration they will fall under active supervision of the CvdM and must register with the authority through an online form.

If an uploader falls under the CvdM’s active supervision and the video offer contains advertisements it is also obliged to affiliate with the Advertising Code Foundation (Stichting Reclame Code: SRC). In addition, it has to notify its channel or other service to the Netherlands Institute for the Classification of Audiovisual Media (Nederlands Instituut voor de Classificatie van Audiovisuele Media: NICAM). The NICAM will then check whether the video uploader has to join NICAM because he offers video material which could be harmful to minors. Such material would then need to be labelled by the video uploader according to criteria of Kijkwijzer, the classification system developed and supervised by NICAM.

The Media Act includes a number of other rules that video uploaders must adhere to. For example, a certain percentage of the videos of video uploaders must consist of so-called European productions,

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<sup>96</sup> <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Vloggers.pdf>.



the video uploader must have an editorial status and must take measures to improve accessibility for the visually and hearing impaired in particular. Finally, and obviously it is forbidden to incite violence or hatred in the video offer or to provoke a terrorist crime.

The CvdM has chosen to introduce its supervision of these rules step by step. This means that the three main rules mentioned above are actively monitored. Compliance with the aforementioned other rules is initially not actively supervised by the Dutch Media Authority. If this changes over time, the Media Authority will first communicate about this. Then the video uploaders are also informed what is expected of them for compliance with these other rules.

It cannot be stressed enough that even if an uploader will not be subject to active supervision, he still needs to pay attention to and be compliant with these rules. After all these rules serve the interests of the general public and young viewers in particular.

The rules regarding transparency about advertising and other commercial communication applied by the CvdM can be summarised as follows.

In line with the AVMS Directive, implemented in the Dutch Media Act, the CvdM distinguishes between advertising, sponsorship and product placement. Whether it is advertising, sponsorship or product placement it is crucial that video uploaders and other audiovisual media service providers clearly indicate in their videos that they contain one of these types of commercial communication.

As soon as a video uploader has the intention to sell products or services (or have them sold), then there is advertising. So there is a certain motivation to speak as positively as possible about that product or service. The CvdM assumes that an uploader has this intention if he is paid (in cash or by similar compensation) for that content. If someone receives money (or another benefit) to talk positively about a product or service, the CvdM will most likely qualify this as advertising. This will also be the case if you offer a personal discount code, or if you use affiliate advertising. So it doesn't matter whether you get paid or whether you can keep the product yourself instead.

Not every positive expression is immediately advertising. For example, when a video uploader is really enthusiastic about a product or service that he has purchased himself, without any compensation. In such a case, the video uploader is considered to have no interest in calling on your audience to buy that product or service. So an unboxing video, haul/shoplog video, or product review doesn't have to be advertising under every circumstance.

If a video contains advertising the video uploader has to be transparent about this. This can be done, by saying or showing 'advertising', 'advertising' or 'paid promotion'. But other words or images are also good, such as #ad. For example, an uploader is entitled to use the options that YouTube and Instagram offer when (partially) marking a video as 'advertising'. Such labels are all permitted as long as the designation as advertising is clearly recognizable. In addition, it is recommended to indicate in the video description that the video contains advertising. This will enable the viewer to check at any time whether there is advertising in the video content, even if he chooses to not watch the whole video (item).

If a video is aimed at children under the age of twelve, it should be taken into account when making clear that a video contains advertising. Children of that age are generally less able to distinguish between content and commercial messages. As a consequence, the labelling of advertising should secure that minors understand the commercial nature of these videos.

Furthermore, it is always forbidden to advertise medical treatments in the videos. These are treatments that someone can only get with a doctor's prescription. In addition, it's forbidden to use so-

called subliminal techniques in the videos. These are hidden, usually ultra-short messages that bring a product or service to the attention of a viewer, while he is not even conscious of the existence of these message.

The CvdM has elaborated the rules governing advertising and how to make advertising recognizable in a recently adopted policy guideline *Commercial Media Institutions Advertising Policy Rule 2022* (Beleidsregel reclame commerciële media-instellingen 2022)<sup>97</sup>.

### Sponsorship

Under sponsorship arrangements a video uploader or other audiovisual media service provider receives money from a company, or a product/service to use for your content. For example, a company gives a video uploader a camera, beauty products or clothing. It can also include free admission to a film location or hotel. The product a video uploader will receive from the sponsor may also be featured under certain conditions.

An important difference with advertising is that in the case of sponsoring there is not the primary intention to sell the product or have it sold. This must be reflected in the agreements between the video uploader and the sponsor. They should not state that a video uploader also has to talk about the product in a promotional way. Is that included or does the video uploader decide to make a promotional statement about the product? Then it is advertising and as a principle the video uploader must therefore adhere to the rules that apply to advertising.

In the case of sponsoring the video uploader must clearly indicate the sponsor at the beginning or at the end of the video, for example by saying: 'This video is sponsored by' or 'made possible by'. But that can also be done in other ways, just like with advertising. It is important that it is always sufficiently clear from your video who the sponsor is. That is why it is also important that a video uploader indicates in the description that and by whom the video is sponsored. Texts such as 'thanks to', 'with the cooperation of', or 'in collaboration with' are not considered suitable by the CvdM. They do not make it clear that it concerns sponsorship. The same goes for labels such as 'partner' or 'collab'.

In line with the regime of the AVMS Directive the Dutch Media Act Media states that offerings consisting of news, current affairs or political information may never be sponsored.

In its policy guideline *Policy Rule on sponsoring commercial media institutions 2022* (Beleidsregel sponsoring commerciële media-instellingen 2022)<sup>98</sup> the CvdM has further elaborated the applicable rules and requirements regarding sponsorship.

### Product Placement

With product placement, the commercial agreements go further than with sponsoring. Also with product placement a video uploader or other audiovisual media service provider will receive money or a free product/service. But in this case the video uploader also agree to really incorporate a product or service in the script of the video. As a result of such arrangements with the commercial party the product or service becomes an integral part of the storyline, for example by mentioning it, discussing it or using it. That can also be done in a positive way. Examples of this are unboxing videos or product reviews, where a video uploader agrees with the company or brand that the product is embedded manifestly in the video. Another example, often witnessed in practice, are situations where a video

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<sup>97</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2022-12443.html>.

<sup>98</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2022-12446.html>.

uploader will get free access to an amusement park under the condition that certain attractions are mentioned/shown in a positive way.

As with sponsoring, there should be no primary intention to sell a product or have it sold should. As a consequence, the product should therefore not receive too much attention. Therefore, the agreements with the commercial partner should mainly be about how to include a product or service in the script in a natural way.

When a video includes product placement, it should be clearly indicated, both at the beginning and end of your content, and also when resuming after a commercial break. This can be done, for example, by saying 'This video contains product placement'. Other words or images are also allowed.

Videos that consist of news, current affairs or consumer affairs, media offerings of a religious or spiritual nature, and videos specifically intended for children under the age of 12 must not contain product placement. This also follows from the AVMS Directive as implemented in the Dutch Media Act, and means that among other things, videos in which children's toys (such as merchandise) are unpacked and shown for a fee are not allowed.

An extensive overview and explanation by the CvdM of the rules on product placement can be found in the CvdM policy guideline Policy rule on product placement for commercial media institutions 2022. (Beleidsregel productplaatsing commerciële media-instellingen 2022)<sup>99</sup>.

The Advertising Code Foundation (SRC) based on a long-existing scheme of self-regulation in the Netherlands was established to promote responsible advertising. The rules that advertising must comply with are described in the Dutch Advertising Code<sup>100</sup>. The code has been drawn up by representatives of advertisers, agencies and media, in consultation with consumer organizations. This code describes, among other things, what advertising is, that advertising must be recognizable and may not be misleading or offensive.

If a video uploader wants to include advertising messages in his video offer, he must join the Advertising Code Foundation and adhere to the Dutch Advertising Code.

Both the CvdM and the SRC monitor the recognizability of advertising in videos. However, where the SRC only deals with advertising, the CvdM has a larger number of rules that it supervises. In the case of commercial content, the CvdM also monitors the rules on sponsorship and product placement. As a supervisory authority, the CvdM has also legal instruments to enforce compliance with the rules, for example by issuing a warning or imposing a fine.

More information about the Advertising Code Foundation and how to register can be found at: <https://www.reclamecode.nl/mediawet-uploader/>.

Being transparent about who is responsible for the video content is crucial. Earlier, the CvdM stated that the video uploader had to disclose on its channel or other service at least the name of the responsible company, the place of establishment and contact details. The media authority received feedback from various video uploaders who expressed serious concerns about their privacy being jeopardized. They were indicating that privacy-sensitive information, such as the home address, could be obtained on the basis of the requested data. By knowing the name of the company someone can look up its address in the business registers of the Chamber of Commerce. Since in the specific situation of video uploaders the company address is often the private address of the video uploader this resulted

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<sup>99</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2022-12448.html>.

<sup>100</sup> <https://www.reclamecode.nl/nrc/>.

in the disclosure of privacy-sensitive information. For that reason the CvdM decided that disclosing the account name and offering a contact option to the audience is sufficient.

## 7 Spain

The New Spanish Audiovisual Law [General Law Nº 13/2022 of 7 July on Audiovisual Media (hereinafter, Law 13/2022)] which transposes the AVMSD 2018 into the national legislation has incorporated a specific article regarding vloggers with the nomenclature of “users of special relevance who use video sharing services through a platform”.

Indeed, article 94 sets:

“Article 94. Obligations of users of special relevance who use video sharing services through a platform.

1. Users of special relevance who use video-sharing services through a platform shall be considered audiovisual communication service providers for the purposes of compliance with the principles of Title I in accordance with the provisions of Article 86 and with the obligations for the protection of minors in accordance with the provisions of Article 99, sections 1 and 4. Likewise, such users shall respect the provisions of sections 1 and 2 of Chapter IV of Title VI when marketing, selling or organising the commercial communications that accompany or are inserted in their audiovisual content.

Users of special relevance shall take the appropriate measures to comply with these obligations and shall use the mechanisms that the provider of the video sharing platform service makes available to them, in particular, those established in Articles 89.1.d) and 91.2.b).

2. For the purposes of this law, those users who use the video sharing services through the platform and simultaneously fulfil the following requirements shall be considered to be users of special relevance:

- a) The service provided entails an economic activity whereby its owner obtains a significant income from its activity in video-sharing services through the platform;
- b) The particularly relevant user is editorially responsible for the audiovisual content made available to the public on his service.
- (c) The service provided is targeted at and may have a clear impact on a significant proportion of the general public.
- (d) The function of the service is to inform, entertain or educate and the main purpose of the service is the distribution of audiovisual content.
- (e) The service is offered over electronic communications networks and is established in Spain in accordance with Article 3(2).

3. In no case shall the following subjects be understood to be subject to the obligations of section 1:

- a) Educational or scientific centres when their activity falls within their remit or is of an informative nature.

- b) Museums, theatres or any other cultural entity for the presentation of their programming or activities.
- c) Public administrations or political parties for the purposes of information and presentation of the functions they perform.
- d) Companies and self-employed persons for the purpose of promoting the goods and services produced or distributed by them.
- e) Associations and non-governmental organisations for the purpose of self-promotion and presentation of the activities they carry out in accordance with their purpose.

4. Users of special relevance in video exchange services through a platform must register in the State Register of Audiovisual Communication Service Providers provided for in Article 39.

5. For the purposes of compliance with the obligations provided for in section 1, the adoption of codes of conduct for self- and co-regulation provided for in Article 15 by users of special relevance of video exchange services shall be encouraged.”

In this sense, Law 13/2022 recognises vlogger as an audiovisual media service providers when they meet the criteria set in article 94.2. At the same time, establishes a list of obligations that these agents must fulfil, such as: the general principles of the Law, the protection of minors and the protection of the public regarding commercial communication. By contrast, paragraph 3 sets a list of entities that even if they could be considered as “users of special relevance” when provide audiovisual services there are precisely excluded to comply with this regulation.

The standards established in article 94.2 shall be developed by the Ministry of Economic Affairs and Digital Transformation through a Royal Decree. In this sense, this Law sets a transitional period of application of this article 94.

Indeed, according to Ninth final provision related to the entry into force of the Law, article 94, related to “users of special relevance”, shall enter into force with the approval of the Royal Decree that specifies the requirements to be considered as a user of special relevance.

Thus, the new Spanish audiovisual legislation (Law 13/2022) recognises Vloggers as audiovisual media services. To reach that conclusion, Vloggers shall fulfil cumulatively all the criteria set in article 94.2. These criteria shall be developed by the Ministry of Economic Affairs and Digital Transformation specifying, among other issues, when it is possible to consider that they provide an economic activity or provide a mass media service. Until the approval of this Royal Decree, these agents do not fall within the Audiovisual Framework.

On the other hand, in January 2022 Spain announced new rules for how social media influencers and others can advertise cryptocurrency assets<sup>101</sup>. As a result, the Spanish National Securities Market Commission (CNMV) will require people and companies to notify it at least 10 days before running campaigns for crypto assets. The rules apply to influencers with more than 100,000 subscribers who are paid to promote cryptocurrency, a practice that’s drawn criticism and even lawsuits worldwide.

As a consequence, advertisers will need to release the content of their upcoming campaigns to the CNMV, and they must include warnings about the risks of what they’re selling. The rules are designed

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<sup>101</sup> <https://www.theverge.com/2022/1/17/22887752/spain-cnmv-crypto-asset-advertising-influencer-rules>.

to let the CNMV monitor the marketing ecosystem around crypto assets and make sure audiences are aware of risks.

Cryptocurrency and social media advertising are both areas with significant regulatory ambiguity, and the combination has sometimes proven troublesome. Earlier, a proposed class action suit targeted Kim Kardashian, boxer Floyd Mayweather, and others for promoting the currency EthereumMax — raising its price dramatically before the asset crashed into near worthlessness. The CNMV's new rules won't stop influencers from telling their followers about cryptocurrency, but they'll let the agency keep closer tabs on what exactly is being offered.

Finally, since January 2021 there is in force in Spain a Self-regulatory Code of Conduct on the use of Influencers in advertising that deals from a horizontal perspective with all kinds of commercial communications that these agents may undertake and establishes different methods in labelling those promotions, as well as sets mechanisms to enforce the Code.

## 8 Lithuania

The Audiovisual Media Services Directive (AVMSD) has been transposed to the Lithuanian legal system as of 1 February 2021. Following the transposition of the AVMSD, the Lithuanian Law on the Provision of Information to the Public (Law on PIP) has been amended accordingly.

Part 6 Article 404 of the amended Law on PIP provides that where an audiovisual media service provider provides its services through a video-sharing platform service, the measures implemented by the video-sharing platform provider shall not remove the requirements for the audiovisual media service provider laid down by this Law and the Law on the Protection of Minors against Detrimental Effect of Public Information. Following this, on 30 March 2022 the Radio and Television Commission of Lithuania (RTC) has adopted the Guidelines Regarding Qualifying and Requirements Applicable to the Audiovisual Media Services Providers, Who Provide the Services Using a Video-Sharing Platform (Guidelines for Vloggers).

The main idea of the Guidelines for Vloggers is to establish criteria, having assessed which a Vlogger should be considered as audiovisual media services provider. Guidelines for Vloggers also explains that the Vloggers, that are considered as audiovisual media services providers shall be regulated and supervised as on-demand audiovisual media services providers. Those audiovisual media services providers have to notify in writing the RTC about the services they provide and comply with certain legal requirements.

Even though each situation is different and is assessed separately, according to the Guidelines for Vloggers, the following must be considered when assessing, if a Vlogger is providing audiovisual media services:

- If the services provider pursues economic and commercial activities;
- If the services provider provides programmes;
- If the main aim of the services provider is to provide programmes for information, entertainment, or educational purposes;
- If the services provider has an editorial responsibility in respect of the provided programmes;
- If the services provider proposes to watch the programmes at the user's request and at the moment chosen by the user;

- If the target audience of the services provider is a significant proportion of the general public and a clear impact is made on it.

The requirements that are applicable for such Vloggers, who are considered as audiovisual media services providers are mainly related to advertising and protection of minors:

- The videos (programmes) are required to be labelled with indexes N-7, N-14, S
- The placed advertising shall meet the requirements raised by the Law on PIP: it shall be easily recognizable; users have to be informed about the existing sponsorship agreements. Users also have to be informed about the product placement agreements by including the index P at the bottom left corner for no less than 5 seconds.

The Guidelines for Vloggers are of recommendatory nature, however the RTC always takes into account the provisions of the Guidelines for Vloggers, when assessing if a Vlogger is to be considered as audiovisual media services provider and what requirements to be applied for him.

As of this day, there are 8 Vloggers, who have provided notification for the RTC and are registered as audiovisual media services providers. The RTC performs continuous monitoring of YouTube, as well as other video-sharing platforms' channels in order to identify the Vloggers, who are to be considered as audiovisual media services providers.