



KU LEUVEN
FACULTY OF LAW
Academic year 2017- 2018

The rise of the vloggers: integrated advertising and the current regulatory framework
The case of YouTube

Promotor: Prof. Dr. P. Valcke
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Master's thesis, submitted by
Nadia Feci
as part of the final examination for the degree of
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PLAGIARISM DECLARATION

I confirm that this thesis is my own work, that all ideas contained in the thesis are expressed in my own words and that I have not literally or quasi-literally taken anything over from other texts, except for fragments cited between quotes for which I provided full and accurate bibliographical data.

Nadia Feci

ABSTRACT

Continuous technological developments have been leading to changes in the media landscape. These changes have spilled over into the advertising world. With children increasingly spending their time online, more specifically on video-sharing platforms such as YouTube, advertisers have no choice but to make this move along with them. This has led to the emergence of the phenomenon of vlogger advertising, i.e. a way of advertising by content creators on video-sharing platforms by which the commercial message is integrated into the editorial content of the video. Questions have been raised regarding the level of protection children enjoy against such advertising. After all, children are subject to specific protection concerning commercial communication on traditional media. Three major EU directives within this context, the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive and the e-Commerce Directive, have been examined and are argued to be applicable. Furthermore, many self-regulatory initiatives relating to advertising exist on national, European and international level. Even though many of them contain specific provisions for advertising aimed at children, very few provide tailor-made provisions for vlogger advertising. Another major issue throughout the entire regulatory framework is the fact that it is built on the identification principle. This principle, however, is not suitable for integrated advertising towards children within vlogs. All of the above has led me to conclude that there definitely remains work to be done. Recommendations in this regard are formulated.

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SCOPE

MATERIAL SCOPE

This research focusses on the phenomenon of ‘vlogger advertising’, i.e. the practice of integrated advertising by content creators on video-sharing platforms. I have chosen to look at YouTube in particular. Nevertheless, the results of this thesis will be applicable, *mutatis mutandis*, to other video-sharing platforms.

The phenomenon will be looked at from a regulatory perspective. The level of protection that children enjoy under current legal and self-regulatory framework will be critically assessed. Shortcomings will be emphasised and ways for improvement will be looked for.

Within the context of video-sharing platforms, data protection and privacy are also very relevant. However, this mainly comes into play regarding personalised pre-, mid- and end-rolls or banners. As these advertising techniques do not fall under the heading of ‘integrated advertising’, data protection and privacy remains outside the scope of this research.

PERSONAL SCOPE

Vloggers are mainly appealing to children – both young children and adolescents – and are sometimes referred to as ‘celebrities 2.0’. This brings about certain challenges for children and their ability to critically assess and recognise commercial statements made by these vloggers. The personal scope of this research will therefore be limited to children, i.e. persons under the age of eighteen.

GEOGRAPHICAL SCOPE

As there are several relevant directives on EU level, the focus will mainly be on EU legislation. When looking at alternative regulatory initiatives, the scope will be broadened to the international level to include important international codes. The ultimate goal of this thesis, however, is to formulate recommendations for Belgian legislators, policymakers and the industry.

RESEARCH QUESTION

The main research question throughout this thesis will be: “Which (legal) remedies can currently be found in the toolbox of children and their parents, in case of an encounter with unacceptable integrated advertising in vlogs?” In order to answer this question, the following sub-questions will be researched:

1. Does today’s legal framework provide children with a level of protection that allows them (or their parents) to take action when faced with integrated advertising by vloggers?
2. What self- and co-regulation exists on this issue and do these measures provide children (or their parents) with the possibility to act against disputable advertising practices in vlogs?
3. What procedural hurdles can be identified in case a child or its parents want to act against integrated advertising in vlogs?
4. In what way do the Netherlands and the UK – two countries that have been confronted with the vlogger phenomenon for a longer time – deal with vlogger advertising?
5. Based on the identified shortcomings, what substantive and procedural improvements does the regulatory framework need in order to effectively tackle the issues of integrated marketing aimed at children on video-sharing platforms?

RESEARCH OBJECTIVE

The overall research objective is to examine whether and to what extent advertisers and vloggers are currently bound by regulation when promoting their products or services to children through vlogs. Are they operating in a legal vacuum? Since the legislation on commercial communication is rather fragmented, the aim is to bundle the relevant rules which advertisers and vloggers have to abide by. Because developments in technology and online social environments can easily outpace provisions of law, self- and co-regulation have been put forward to provide flexibility. To formulate a sound answer to the main research question, alternative regulatory instruments must also be unravelled. Because vlogging is a relatively new phenomenon – especially in Belgium – there is not yet any jurisprudence on this subject. Hence, the final aim is to assess if the legislation currently in force is able to arm and empower minors to cope with vlogger advertising on video-sharing platforms, in particular YouTube. In case there is room for improvement, recommendations will be formulated to fill these gaps for the future. And finally, an important issue is that children can easily watch ‘influencers’ of other countries, therefore the answer – and emphasis of the research – is to be found on EU and international level.

METHOD

The **first phase** will try to bring method in the madness. It scrutinises the current legislative framework on commercial communication aimed at children. The legal rules will be analysed regarding their ability to shield children from surreptitious advertising, encountered through vlogs. This phase will be carried out based on a descriptive-comparative method. Because advertising rules constitute a patchwork, both consumer law (UCP Directive, E-Commerce Directive) and media law (AVMS Directive) will have to be regarded. The legal instruments will be assessed separately to determine if any overlaps or contradictions exist, as well as to determine if they provide child and parent with effective legal tools when faced with integrated commercial communication in vlogs. The Proposal for a new AVMS Directive will also be part of the research. The foregoing justifies an evaluative research method.

The **second phase** analyses alternative regulatory instruments in a descriptive-comparative way. Self-regulatory instruments play a preeminent role in commercial communication, both at national and international level. Different initiatives will be compared and critically evaluated.

The **third phase** focuses on enforcement. To which – governmental or self-regulatory – authorities should parents address their concerns and how should they file a complaint? Via a descriptive approach, competent authorities will be lined up and by using an evaluative approach, practical issues relating to enforcement of the regulatory framework on advertising will be identified. This phase acknowledges both, purely internal and cross-border situations. The latter refers to the common practice in which children watch videos of foreign vloggers.

The **fourth phase** will consist of a comparative approach. By way of inspiration, attention will be paid to other countries' methods for tackling advertising issues in vlogs. Since both, the Netherlands and the United Kingdom have been home to vloggers for quite some time now, the focus will be on these two countries. During this phase, their initiatives in this field will be critically look into and evaluated on their effectiveness.

The **fifth phase** identifies shortcomings in today's regulatory framework. Based on information acquired during previous phases, recommendations will be made for the regulation on vlogger advertising. This phase requires a normative approach.

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PART I: SETTING THE SCENE

1. The shift of the media landscape

Advertising plays a leading role in the establishment and functioning of the EU internal market. By opening up frontiers, consumers enjoy a larger choice of goods and services. Hence, consumers need to be sufficiently informed about the available goods and services. Freedom to advertise allows businesses to reach all Member States. Within the context of EU consumer protection¹, consumers must be informed in order to be sufficiently confident to engage in cross-border transactions.² Furthermore, many of today's internet services are advertising-based, which makes them available free of charge.³ Thus, advertising is definitely not per definition a negative thing.

Nevertheless, freedom to advertise could conflict with the fundamental interests of consumer protection and child protection. Especially children are a major concern. When it comes to recognising the commercial intent of advertising, children are more credulous and inexperienced compared to adults. Advertising can be of large impact on children's consumption choices, health and well-being.⁴

In the light of ongoing developments in technology and online social environments, the media landscape is changing. The rapid evolvement of the market has led to the gradual convergence of audiovisual media, which not only allows traditional broadcasters to extend their activities online, but also new players offering audiovisual content via the internet have emerged.⁵

This convergence is a breeding ground for new business models.⁶ People are able to participate in all sorts of online applications such as social media and video-sharing platforms

¹ Art. 114 and 169 TFEU; art. 38 Charter of Fundamental Rights of the EU.

² A. Garde, 'Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?' (2011) 19 *The International Journal of Children's Rights* 523, p.524.

³ ICC, 'ICC Toolkit: Marketing and Advertising to Children' <<https://cdn.iccwbo.org/content/uploads/sites/3/2017/10/ICC-Toolkit-Marketing-and-Advertising-to-Children-2017.pdf>>.

⁴ *Ibid.*

⁵ M. De Cock Buning, 'Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media' (2014) 10 *Utrecht Law Review* 9, p18.

⁶ G. Wang and others, 'An Efficient Method of Content-Targeted Online Video Advertising' (2018) 50 *Journal of Visual Communication and Image Representation* 40, p.40.

by uploading ‘user-generated content’.⁷ The latter will be the focus within this research. With audio-visual media services available ‘on the go’: many viewers consume video content on-demand and on portable devices (e.g. tablets and smartphones). This is exactly what is appealing about video-sharing platforms: you can decide which video you want to watch and when upon your own initiative, whereas traditional television is bound to a predetermined broadcast schedule. Especially children are increasingly turning their backs on traditional television by choosing to spend their screen time online.⁸ Data indicate video viewing as one of the earliest internet activities favoured by young children.⁹ Video-sharing platforms are getting stronger and are competing for the same audiences as traditional media.¹⁰

The popularity of user-generated content and video sharing platforms (e.g. YouTube) have caused a new generation of celebrities to emerge amongst minors: ‘YouTubers’ or ‘vloggers’.¹¹ ‘Vlog’ stands for ‘video blog’. With little or no funding they daily entertain their online following.¹²

The shift in video consumption challenges regulators, in particular regarding the protection of minors from harmful content and covert advertising. As the appeal of these vloggers is to be situated with their relatability and accessible personalities, children perceive them as credible. This allows them to influence their viewers’ consumption behaviour.¹³ The fact that children

⁷ Explanatory Memorandum (comm.) to the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 25 May 2016, COM(2016)287 fin.

⁸ EP, The Audiovisual Media Services Directive, Briefing EU Legislation in Progress, <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI%282016%29583859_EN.pdf> (accessed on 19/04/2018).

⁹ Impact assessment (comm.) accompanying the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 25 May 2016, SWD(2016)168 fin.

¹⁰ S.L. Calvert, ‘Children as Consumers: Advertising and Marketing’ (2008) 18 *The future of children* 205, p.205.

¹¹ K. Wu, ‘YouTube Marketing: Legality of Sponsorship and Endorsements in Advertising’ (2016) 22 *JL Bus. & Ethics* 59, p.69.

¹² D. Zeynep Bayazit, Beril Durmuş, and Figen Yıldırım, ‘Can Vloggers Characteristics Change Online-Shopping Intentions? The Role of Word of Mouth Effect as a Communication Tool’, *AJIT-e Online Academic Journal of Information Technology* 8, no. 26 (15 February 2017).

¹³ C. Chapple and F. Cownie, ‘An Investigation into Viewers’ Trust in and Response Towards Disclosed Paid-for-Endorsements by YouTube Lifestyle Vloggers’, *Journal of Promotional Communications*, 5 (2) (2017), 120-122.

and adolescents are more easily persuaded by commercial communication, adds to their commercial vulnerability.¹⁴

The world of marketing is also affected by the shift. With ‘online’ taking up an increasingly prominent role in our lives, advertisers had no choice but to jump on the bandwagon.¹⁵ Their interest in children as a consumer group is increasing. The reasons for this are fourfold: (1) children have their own – growing – buying power, (2) they are a big influence on their parents shopping behaviour, (3) at the same time children are the consumers of the future and (4) digital interactive technologies have facilitated the targeting of children.¹⁶

The digital age has provided advertisers with new advertising techniques and formats to target minors. Advertisers teaming up with vloggers to promote their products or services in videos is only one example. In these videos, commercial messages are often mixed with media content and characterised by their fun and engaging nature.¹⁷ Several studies have shown that both children and adolescents experience difficulties to recognise these forms of commercial communication, compared to traditional television commercials.¹⁸ Making youngsters into critical ad viewers is rightfully an important point on the agenda of policy makers, legislators, the industry, parents and educators.¹⁹

European regulation does not prohibit marketing towards children, nevertheless restrictions guarding the interests of minors have been put in place. Convergence of the differently regulated media has proven to be problematic:²⁰ a lack of a level playing field exists amongst the audiovisual media sector. Online environments are less heavily regulated, resulting in a lower level of consumer protection. The question throughout this research is whether children enjoy a satisfying level of protection by legislation and alternative regulatory instruments.

¹⁴ E. Langerock, *Rechtspraak Jury Ethische Praktijken Inzake Reclame* (Story Publishers 2012), p.107.

¹⁵ Wang and others (n 6) p.40.

¹⁶ Garde (n 2) p.526.

¹⁷ I. Vanwesenbeeck et al. (2016), *Minors’ advertising literacy in relation to new advertising formats. Risk analysis overview and policy recommendations*, A report in the framework of the AdLit research project, www.AdLit.be, p.16.

¹⁸ V.Verdoort and E. Lievens (2018). *Evaluation of the current regulatory framework on commercial communication in light of emerging trends. A report in the framework of the AdLit research project*, www.AdLit.be, p.8.; Pieter De Pauw and others (2017), ‘Disclosing Brand Placement to Young Children’, *International Journal of Advertising*, p.1.

¹⁹ Calvert (n 10) p.205.

²⁰ De Cock Buning (n 5) p.18.

2. Children versus emerging trends in the advertising world

Before going into the actual assessment of vlogger advertising, attention should be drawn to certain emerging trends in the world of commercial communication, identified by VERDOODT and LIEVENS.

INTEGRATION. The advertising technique that takes the leading role within this research is integration. The digital environment has caused this persuasive tactic of blending commercial messages into non-commercial content to blossom. As there is no way to escape the commercial message when consuming the informational element, it serves as an answer to consumer fatigue and ad blocking technologies.²¹ The underlying presumption is that commercial communication which is not recognised as such by consumers is most effective.²² By seamlessly integrating commercial messages into the storyline, advertisers are exploiting children's disability to critically engage with commercial communication.²³ Children and adolescents are particularly vulnerable due to their great receptiveness, curiosity, lack of maturity, limited free will and high potential to be influenced, especially via new means of communication and technologies.

INTERACTIVITY. Another trend that can be witnessed in vlogging advertising is interactive commercial communication, built on the continuous connectivity of youngsters and their extensive use of digital media.²⁴ Minors are being encouraged to create and share content promoting products and services within their personal networks (e.g. through likes, comments).²⁵ These are of major importance to children and adolescents, causing them to perceive these messages as credible.²⁶ Interactivity in vlogs can also be a vlogger encouraging viewers to buy a certain product by stating "let me know if you like X as much as I do".

EMOTIONAL APPEAL. A third marketing technique that is relevant for this research is emotional appeal. By triggering an emotional response with consumers, vloggers aim to create awareness, positive brand association and an emotional desire for the product or service. On

²¹ D. Clifford and V. Verdoodt (2016), 'AD-Blocking-the Dark Side of Consumer Empowerment: A New Hope or Will the Empire Strike Back?', p.12.

²² Verdoodt and Lievens (n 18) p.10.

²³ L. Hudders and others (2016), 'Children's processing of new advertising formats: how to improve children's dispositional and situational advertising literacy?'

²⁴ Verdoodt and Lievens (n 18) p.13.

²⁵ K Daems and P De Pelsmacker (2015), Marketing Communication Techniques Aimed at Children and Teenagers. A Research Report within the Frame of the AdLit Project, www.AdLit.be, p.11.

²⁶ I Vanwesenbeeck and others (2016), Minors' advertising literacy in relation to new advertising formats. Identification and assessment of the risks, p. 60, www.AdLit.be; Verdoodt and Lievens (n 18) p.13.

the one hand, positive appeals associate positive emotions with purchasing the advertised product or service. On the other hand, negative appeals link negative consequences to not obeying the marketing message.²⁷ An emotional appeal can take the form of a countdown, which calls upon the sentiment of loss aversion.²⁸ Within the same line of reasoning, one could think of a vlogger promoting certain goods or services, stressing either the limited availability of or the popularity involved with using the good or service. This negatively influences children's motivation and ability to thoroughly process an advertisement, as well as the activation of their advertising literacy.²⁹

3. Unravelling YouTube and its Revenue Model

Disentangling the revenue model of YouTube and the different marketing forms children can cross paths with there is crucial to understand present research. In YouTube's ecosystem, four major stakeholders are present: (1) the content creators, (2) the viewers, (3) YouTube and (4) the companies turning to YouTube for advertising reasons.³⁰

Today, more creators than ever are earning a living on YouTube.³¹ This is possible because of the advertisers: YouTube relies on ad revenue to pay creators, help YouTube projects and pay the engineers and coders who run the platform.

A first way to make money on YouTube is through 'AdSense YouTube Partner Program'. Following the 2017 'adpocalypse'³², YouTube was forced to update its rules. Nowadays, to monetise videos³³, the YouTube Partner Program³⁴ poses two cumulative criteria: content creators must have reached a total minimum watch time of 4.000 hours in the past twelve

²⁷ V. Verdoodt and others (2016), 'Toying with Children's Emotions, the New Game in Town? The Legality of Advergaming in the EU', 32 Computer Law & Security Review, p.3.

²⁸ The tendency to experience potential losses as larger and more significant than equivalent gains.

²⁹ E. Rozendaal, 'Advertising Literacy and Children's Susceptibility to Advertising', p.116.

³⁰ Wu (n 11) p.59.

³¹ N. Mohan and R. Kyncl, 'Additional Changes to the YouTube Partner Program (YPP) to Better Protect Creators' (16 January 2018) <<https://youtube-creators.googleblog.com/2018/01/additional-changes-to-youtube-partner.html>> (accessed on 20/02/2018).

³² In March 2017, advertisers started pulling their ads from YouTube because they were being shown on content they did not want to endorse, e.g. extremist videos and videos containing hate speech. As a result, YouTube started a new review system. Currently, when you upload a YouTube video, it can get flagged for demonetisation, which means that YouTube is not sure whether your video is appropriate for all audiences.

³³ To make creators eligible to advertisements on their videos, which allows them to earn money.

³⁴ A collective whose channels can be monetized through Google AdSense.

months, as well as at least 1.000 subscribers to their channel.³⁵ For the purpose of this thesis a ‘YouTube Partner’ is a ‘professional YouTuber’, that needs to be distinguished from ‘amateur YouTubers’. I have chosen this dividing line as from this point on vloggers start earning money. Do note that it is possible for vloggers to earn money without reaching this threshold, by directly partnering with brands. However, this is not very common as brands will go for the more popular vloggers. When the aforementioned thresholds are met, the creators earn a certain percentage when an overlay ad or a video advertisement is shown before, during or after their vlog.³⁶ However, YouTube leaves people in the dark as to how much this is exactly and how this is calculated. Thus, AdSense concerns the more obvious commercial messages, such as banners³⁷ and the inStream advertisements (pre-rolls, mid-rolls and end-rolls³⁸).³⁹ These advertising forms provide YouTube with advertising revenue.⁴⁰ However, they exceed the scope of this research as they do not qualify as integrated ads.

Another way to make money on YouTube is through integrated advertisements (*supra* I.2). Here, a direct relationship exists between the content creators and the advertisers. This implies that YouTube is being bypassed as regards advertising revenue.⁴¹

Endorsement deals are one of the shapes which integrated advertising can take. It is very common on YouTube. It concerns the creation of pieces of content to the benefit of an advertiser, portraying a message that consumers are likely to believe reflects the opinions, beliefs or experiences of the content creator.⁴² YouTube endorsement marketing can be divided into three subcategories: (1) Direct sponsorship, where a partnership exists between the creator and the sponsor to create video content; (2) affiliate marketing, where the creator works on commission: he gets a percentage on sales of a good or service, attributable to the creator. By participating in a company's affiliate program, purchases made through a specific

³⁵ Mohan and Kyncl (n 31).

³⁶ <<https://creatoracademy.youtube.com/page/lesson/m10n-analytics?hl=en-GB>> (accessed on 20/04/2018).

³⁷ Banners resemble traditional billboard ads but instead they are placed on top of an internet page or video.

³⁸ These in-stream ads appear before, during or at the end of videos being streamed on YouTube. Viewers sometimes have the choice to watch the entire video advertisement or to skip it after five seconds.

³⁹ <<https://support.google.com/displayspecs/answer/6055025?hl=nl>> (accessed on 20/04/2018).

⁴⁰ Wu (n 11) p.70.

⁴¹ Ibid.

⁴² Ibid. p.76.

URL or coupon code are attributed to the YouTuber; and finally (3) free product sampling, where creators receive certain products for free in order to feature it in one of their videos.⁴³

Paid product placement is another form of integrated advertising. Pieces of content are created for a third party in return for compensation.⁴⁴ By embedding brands on props within the user-generated content marketers aspire to reach more consumers.⁴⁵

⁴³ Ibid p.77.

⁴⁴ <<https://support.google.com/youtube/answer/154235?hl=en>> (accessed on 20/04/2018).

⁴⁵ M. Deghani and others, 'Evaluating the Influence of YouTube Advertising for Attraction of Young Customers' (2016) 59 Computers in Human Behavior, p.166.

PART II: CURRENT LEGAL AND SELF-REGULATORY TOOL BOX

In this section, it will be scrutinised whether vloggers get off scot-free when it comes to integrated advertising towards children on video-sharing platforms, YouTube in particular. The regulatory framework, both legal and self-regulatory, as well as private regulation by YouTube itself will be elaborated below.

A. The legal framework

First, the existing legal framework will be assessed from an EU perspective. The reason for this is that several important directives exist, that could be of interest to the advertising issues central to this thesis. For each directive, the scope and relevant provisions will be elaborated. Further, some attention is given to enforcement and afterwards shortcomings of the directives will be uncovered.

1. AVMS Directive⁴⁶

The Audiovisual Media Services Directive⁴⁷ (AVMSD) is the cornerstone of media regulation in the EU. It brings about a minimum harmonisation of certain aspects of national legislation facilitating the circulation of audiovisual media services (AVMS) in the EU market. EU countries are free to apply stricter rules under the condition that those rules are consistent with the general principles of EU law.⁴⁸ The Directive is built upon the principle of technological neutrality: it covers all services with audiovisual content⁴⁹, irrespective of the technology used to deliver the content.⁵⁰ For the purpose of this thesis, it is of the utmost importance to see whether the definition of AVMS could include vloggers.

1.1 Scope

The notion ‘audiovisual media service’ forms the foundation of the AVMSD as it delineates

⁴⁶ In Flanders, the Directive is implemented in the Flemish Media Decree of 27 March 2009.

⁴⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, *OJ L* 15 April 2010, 95, 1-24. (AVMSD)

⁴⁸ Art. 4 AVMSD (n 47); E.g. Flanders has chosen to be stricter in certain aspects of the Flemish Media Decree.

⁴⁹ E.g. TV broadcasts, VOD services and audiovisual advertising.

⁵⁰ E.g. TV, the internet, cable or a mobile device; E. Simon, ‘New Media Legislation’ in Beata Klimkiewicz (ed), *Media Freedom and Pluralism. Media Policy Challenges in the Enlarged Europe* (Central European University Press 2013).

the scope *ratione materiae*.⁵¹ The definition of ‘AVMS’ can be found in art. 1.1(a). The drafting of this article is quite complex as it seems to suggest that an AVMS can either be an AVMS (a service meeting seven criteria)⁵² or an audiovisual commercial communication (ACC)⁵³. Remarkable is that, compared to the previous version of the AVMSD, the explicit reference to ‘and/or’ has been removed, leaving us in the dark with regard to their relationship. However, the portrayal of ACC as ‘accompany or are included in a programme’⁵⁴ appears to suggest that the provision of ACC is not a service in its own right.⁵⁵ However, the CJEU does not seem to agree with this statement. In a recent case, the court assessed the AVMS definition and the ACC definition separately, implicitly recognising that they can exist separate from each other (*infra* 1.1.3). The latter approach will be followed in this thesis.

1.1.1 AVMS

The definition of an AVMS is generally divided into seven cumulative elements: a service (1) under editorial responsibility and (2) of economic character, (3) of which the principal purpose is (4) the provision of programmes (5) in order to inform, educate or entertain (6) the general public (7) through electronic communications networks.⁵⁶ Both linear (television broadcasting) and non-linear (on-demand) AVMS are covered. This implies that television services delivered via the internet are regulated.⁵⁷ Noteworthy is that video-sharing platforms do not (yet) have to fear this Directive as they are excluded from the scope.⁵⁸ This has led to the exclusion of vloggers in the same breath. Aforementioned assumption will be countered *infra* when assessing the distinct elements of the definition.⁵⁹

EDITORIAL RESPONSIBILITY. An AVMS is characterised by the editorial responsibility of a media service provider. This requirement aims to clarify that the Directive only envisages

⁵¹ O. Castendyk, E. Dommering and A. Scheuer, *European Media Law* (Kluwer law international 2008) p.812.

⁵² Art. 1.1(a)(i) AVMSD (n 47).

⁵³ *Ibid.*, art. 1.1(a)(ii).

⁵⁴ *Ibid.*, art. 1.1(h).

⁵⁵ Castendyk, Dommering and Scheuer (n 51) p.819.

⁵⁶ P. Valcke and J. Ausloos, ‘Television on the Internet. Challenges for Audiovisual Media Policy in a Converging Media Environment’ in Yu-li Liu and Picard (eds), *Policy and marketing strategies for digital media* (Routledge 2014), p.24-42.

⁵⁷ K. Lefever et. al., *Audiosiveel Materiaal Op Internet* (Vanden Broele 2009), p.8-9.

⁵⁸ *ibid.*

⁵⁹ Rec. 29 AVMSD (n 47).

AVMS in which a professional media service provider is responsible for the editorial design and final compilation of a programme for broadcasting in accordance with a fixed programme schedule or for viewing on-demand from a catalogue.⁶⁰ When discussing editorial responsibility, two major questions need to be discussed.

The *first question* that needs to be asked is: who is responsible for the choice of the content? It is who chooses the content to appear in the programme service. It is irrelevant who makes the content or who does the transmission. Video-sharing platforms such as YouTube solely provide users with a platform on which they can upload videos, they do not preselect content. Therefore, they fall outside of the scope of the AVMSD today.⁶¹ Nonetheless, they are in a position to exercise some level of control over the programmes: they provide the possibility to flag inappropriate or illegal content which triggers review of the content and potential removal from the platform. This negative *post hoc* intervention is not enough to qualify as ‘effective control’ over both the selection and the organisation of programmes.⁶²

Video-sharing platforms and the actual content creators need to be distinguished. Vloggers themselves are in charge of the content that gets uploaded. They carry editorial responsibility. As vlogs are often thoughtfully edited and are not one-take videos, it is argued that user-generated content of professional vloggers (n 36) is mostly editorial. However, YouTube sometimes commissions people to make certain videos, which justifies a different judgement.⁶³

The *second question* under this heading is: who determines the way in which the matter is organised? Here, YouTube’s strapline ‘Broadcast Yourself’ is particularly relevant. YouTube wants to refute editorial responsibility by clarifying that they are not determining the organisational aspects. Vloggers themselves are doing the broadcasting and control the way of organisation. Besides the editorial design, they also take care of the final compilation of a programme for viewing on-demand from a catalogue. In my view, a YouTube channel of a

⁶⁰ Castendyk, Dommering and Scheuer (n 51) p.813.

⁶¹ Lefever and others (n 57). p.13.

⁶² Castendyk, Dommering and Scheuer (n 51) p.837.

⁶³ E.g. a content creator could start off by making a video of puppies and upload it to YouTube. Up until that point, YouTube has no editorial responsibility. If a certain amount of people is watching the videos, the creator will start receiving an advertising revenue share. If the creator decides to quit making these videos about puppies, YouTube could ask the creator to continue to make this type of videos. Within this context, YouTube does bear editorial responsibility.

particular content creator can be regarded as a catalogue. Many YouTubers distinguish between different series on their channel. A series being a programme consisting of several episodes with independent plots which are connected, for instance by the same characters and same setting.⁶⁴ E.g. travel vlogs, beauty vlogs, vlogs in which they play video games...

A notable argument in favour of holding YouTube responsible under the AVMSD is that by unleashing an algorithm on its platforms' content it singles out certain videos. These videos are enlisted in the 'trending' section, which gives the content more visibility. This way, YouTube is promoting particular content and hence exercises control over the organisation of the entire catalogue that is YouTube. Nevertheless, those who post the content retain the ability to edit their video's metadata.⁶⁵ The AVMSD provides no solution to this problem of divided control. By way of nuance: the mere listing of available content by YouTube will most likely not be sufficient to qualify as organisational control, rather as presentational techniques.⁶⁶

ECONOMIC CHARACTER. A second prerequisite to qualify as an AVMS is that the service has to constitute an economic activity – a service as defined by articles 56 and 57 TFEU. Excluded are activities of a primarily non-economic nature and not in competition with television broadcasting.⁶⁷ Normally, this means the service is provided in return for remuneration.⁶⁸

First, although vloggers do not receive remuneration directly from their viewers, their main source of income is advertising revenue. This suffices to qualify as an economic activity.⁶⁹ When YouTube was still in its infancy, it was not possible to make money off of it, let alone to earn a living by uploading videos. The platform was mainly used to share 'home videos' with family and friends.⁷⁰ Most likely, this is the type of UGC the legislator envisaged in the exclusion of recital 21. Nonetheless, account should be taken of the evolution and increasing

⁶⁴ Castendyk, Dommering and Scheuer (n 51) p.529.

⁶⁵ E.g. information relating to the programme synopsis, rating information and other content warnings.

⁶⁶ R. Craufurd Smith, 'Determining Regulatory Competence for Audiovisual Media Services in the European Union' (2011) 3 *Journal of Media Law* 263.

⁶⁷ E.g. services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing within communities of interest.

⁶⁸ Rec. 21 AVMSD (n 47).

⁶⁹ Valcke and Ausloos (n 56) 25.

⁷⁰ W.L. Hosch, 'YouTube', *Britannica Academic*, Encyclopædia Britannica, 29 March 2017 (accessed 22 March 2018).

importance of video-sharing platforms in today's society. Many services on the market are complex and subject to regular expansion or modification, hence they cannot simply and durably be categorised. Under the current digital climate, content creators are paid by YouTube and advertisers, which completely alters the situation.⁷¹ As a service changes, the legal qualification of the service may do so as well. With the improvement of quality, the nature and means of access to the service, users may reasonably expect regulatory protection within the scope of the Directive.⁷² Further reinforcement of this argument can be found within the Directive, stating that the concept of 'programme' should be interpreted in a dynamic way, taking into account developments in television broadcasting.⁷³ This demonstrates the willingness of the legislator to include new media services that comply with the definition.

Applied to vloggers this means the principal motivation for providing audiovisual content needs to be economic. If only ancillary to uploading AVMS content the vlogger makes money, it does not constitute an economic activity. The key issue is: how much income can a vlogger generate, before it stops being a 'primarily non-economic activity'? It might be when the creator makes the next video simply for the sake of making money. In this context, it is useful to distinguish between professional and non-professional YouTubers. For the purposes of this thesis professional YouTubers are the ones who have reached the advertising revenue threshold (*Supra* I.3) and who regularly upload content to YouTube. It can be held with certainty that these professionals are no longer pursuing an economic advantage on an incidental basis. Moreover, professional content creators are self-employed, usually managed by an agency and pay taxes. Many YouTubers can even be seen as content companies, employing cameramen and editors.⁷⁴ It would be very counterintuitive to not qualify this as a service with an economic character.

Secondly professional vlogging constitutes an activity which is in competition with television broadcasting. Studies have shown children increasingly choose to trade traditional television

⁷¹ Smith (n 66).

⁷² Castendyk, Dommering and Scheuer (n 51) p.836-837.

⁷³ Rec. 24 AVMSD (n 47).

⁷⁴ G. Zagers, 'Acid, de Vlaamse vlogger die meer kijkers heeft dan De Ideale Wereld', *Knack Focus* (20 March 2018), <http://focus.knack.be/entertainment/tv-radio/acid-de-vlaamse-vlogger-die-meer-kijkers-heeft-dan-de-ideale-wereld/article-longread-978679.html> (accessed on 21/03/2018)

screen time for online video-sharing platforms.⁷⁵ Moreover, some clips on video-sharing platforms constitute straight copies of films and television shows.⁷⁶

What constitutes an economic activity is an evolving criterion. Vloggers always start out as non-economic services. When a video is uploaded and the creator has not yet reached the thresholds of view time, the creator is not regulated under the AVMSD. From the moment the video reaches the threshold, the content creator can become a ‘YouTube Partner’ and start generating advertising revenue. Additionally, if they reach a significant number of subscribers, companies will offer sponsorship and endorsement deals.

However, when YouTube takes on an active role and commissions⁷⁷ the videos of the content creator, it becomes YouTube’s own economic activity, as it has editorial responsibility and determines the manner in which it is organised.

PRINCIPAL PURPOSE. Regarding the content of the service, the Directive differentiates between the audiovisual element being the ‘principal purpose’ or being ‘merely incidental’.⁷⁸ This element aims to distinguish AVMS from information society services as defined in the e-Commerce Directive. If the audiovisual element is solely ancillary, the service is excluded from the Directive.⁷⁹ This requirement does not pose many problems for vloggers because the main aim of video-sharing platforms – as the name already indicates – is sharing videos.

THE PROVISION OF PROGRAMMES. The Directive’s scope is further limited to services that mainly aim to provide programmes.⁸⁰ The definition of a ‘programme’⁸¹ serves to exclude audio-only broadcasting services and audiovisual services which are not sufficiently ‘television-like’.⁸² The definition does not constitute a hurdle to bringing vloggers within the Directive’s scope. As mentioned before, vlogs can cover all sorts of content, which can also

⁷⁵ Report (EP) on the Impact of Online Marketing on Children’s Behaviour (2010/2052(INI)), 23 November 2010, p.6.

⁷⁶ Castendyk, Dommering and Scheuer (n 51) p.836.

⁷⁷ This does not take place very often. However, YouTube owns ‘channels’. They paid for exclusive rights to broadcast Indian premier league cricket.

⁷⁸ Rec. 22 jo. art. 1.1(a)(i) AVMSD (n 47).

⁷⁹ Castendyk, Dommering and Scheuer (n 51) p.813.

⁸⁰ Art. 1.1(a)(i) jo. Rec. 23 AVMSD (n 47).

⁸¹ A ‘programme’ is defined as: “...a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting...” (Art. 1.1(b) AVMSD).

⁸² Castendyk, Dommering and Scheuer (n 51) 815.

be found on television.⁸³ However, on YouTube it is typically of a shorter duration and of a more personal nature.⁸⁴ BBC Worldwide's 'Top Gear' monitoring site is a YouTube channel that contains 'professional' commercial content.⁸⁵ Since it only concerns short clips, BBC argues this is not comparable to TV-like programmes. It is said to lack narrative from the beginning until the end.⁸⁶ This reasoning is not indisputable. Within one programme, there mostly are several different storylines. When only one storyline gets uploaded separately on YouTube this should also be regarded as a programme. This finding is supported by CJEU case law: the AVMSD does not require a programme to be a certain length.⁸⁷ As the main purpose of the directive is to apply the same rules to media service providers that are competing for the same audience, professional UGC should be qualified as television-like.⁸⁸ Up to a certain extent, television and YouTube are substitutes.⁸⁹

INFORM, ENTERTAIN OR EDUCATE. Further, the definition of an AVMS envisages audiovisual services which are intended to inform, entertain and educate.⁹⁰ In general, showing audiovisual content via a webcam⁹¹ is not considered as providing services which inform, entertain, or educate.⁹² This raises questions. A traffic webcam, for instance, informs the viewer about traffic conditions. In practice, the requirement intends to eliminate all audiovisual content lacking editorial aspects. This, however, does not seem to be relevant to this element of the definition.⁹³ Still, vlogs will generally not encounter difficulties qualifying as either informative, entertaining or educating. As mentioned above, professional vlogs are

⁸³ Sketches, make-up tutorials, challenges, video games, product reviews, holiday guides etc.

⁸⁴ Vlogs will usually be longer than 10 minutes, since this positively affects generating advertising revenue. YouTube's algorithm favors videos of 10 minutes or longer: the longer the video, the more advertisements can be run against it.

⁸⁵ Smith (n 66).

⁸⁶ Ofcom, Top Gear YouTube, Decision published on 18 January 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/top-gear-youtube-decision.pdf>; Ofcom, On-demand services: understanding consumer choice, October 2012, https://www.ofcom.org.uk/data/assets/pdf_file/0025/28906/research_report.pdf (Accessed on 26 March 2018).

⁸⁷ CJEU 25 October 2015, no. C-347/14, ECLI:EU:C:2015:709, §20.

⁸⁸ *Ibid.*, §22.

⁸⁹ Report (EP) (n 24).

⁹⁰ Rec. 22 AVMSD (n 47).

⁹¹ E.g. audiovisual content showing the condition of ski slopes in winter sports' regions.

⁹² Lefever and others (n 66) p.13-14.

⁹³ Castendyk, Dommering and Scheuer (n 51) p.815.

editorial, they are not just one-take videos.⁹⁴ A nuance should be added for livestreaming on video-sharing platforms: this is excluded under this provision.

TO THE GENERAL PUBLIC. The fifth condition demands services to be intended for reception by – and possibly of clear impact on – a significant proportion of the general EU public.⁹⁵ This excludes narrowcasting such as in-store television. Content on video-sharing platforms is accessible by an indeterminate number of viewers with an internet connection.

BY ELECTRONIC COMMUNICATION NETWORKS. The final element refers to the fact that programmes need to be provided by electronic communications networks⁹⁶, as defined in art. 2(a) of the Framework Directive.⁹⁷ This is interpreted very broadly. UGC is delivered via the internet in electronic form.⁹⁸ Thus, it is argued that vlogs could constitute AVMS within the meaning of art. 1.1(a)(i) AVMSD.

1.1.2 ACC

The second aspect of an AVMS is audiovisual commercial communication (ACC), defined by three cumulative elements.⁹⁹ The first element determines the subject matter of ACC as ‘images with or without sound’.¹⁰⁰ This is pretty straightforward. Secondly, these images need to be ‘designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity’. Finally, these images ought to accompany or to be included in a programme ‘in return for payment or for similar consideration or for self-promotional purposes’.¹⁰¹ The directive explicitly mentions, amongst others, sponsorship and product placement as forms of ACC. These practices are encountered on YouTube on a daily basis. Knowing that a lot of popular vloggers bring their own merchandise onto the market, self-promotion also regularly takes place in vlogs.

⁹⁴ YouTube is currently developing features to facilitate live streaming on its platform, this type of content would be able to stay under the radar of the AVMS <http://datanews.knack.be/ict/nieuws/youtube-wil-je-laten-livestreamen-vanuit-de-camera-app-van-je-telefoon/article-normal-980135.html> (accessed on 23 March 2018).

⁹⁵ Rec. 21, 22 and 39 jo. art. 1.1(a)(i) AVMSD (n 47).

⁹⁶ *Ibid.*, art. 1.1(a)(i).

⁹⁷ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ L* 24 April 2002, 108, 33-50.

⁹⁸ Castendyk, Dommering and Scheuer (n 51) p.818-819.

⁹⁹ Art. 1.1(a)(ii) jo. 1.1(h) AVMSD (n 47).

¹⁰⁰ This corresponds to the definition of ‘programme’.

¹⁰¹ Castendyk, Dommering and Scheuer (n 51) p.839.

1.1.3 CJEU: vloggers implicitly included in the AVMSD scope

The CJEU seems to implicitly support the claim that those uploading content to YouTube could fall within the scope of the Directive. The question of what constitutes an AVMS came before the court on 21 February 2018.¹⁰² The key take-away of this case is that a purely promotional video channel or videos as such are, on the one hand, excluded from being an AVMS for lacking the principal purpose to provide programmes to inform, entertain or educate the general public¹⁰³; On the other hand, they are excluded from qualifying as an ACC because of the absence of inclusion in or accompanying of a programme.¹⁰⁴ The fact that the video was promotional in its entirety was central to this case. This certainly is a point of attention when assessing vlogs. Generally, vloggers create a storyline (=programme) of which the commercial message does not form a part. The CJEU leaves the door open to include such videos under the AVMSD. However, sometimes videos contain a narrative that is entirely built around the promoted product or service.¹⁰⁵ Such vlogs do not fall under the scope of the AVMSD. This is not an easy line to draw and needs to be assessed case by case.

1.2 Provisions relevant for advertising by professional vloggers

Besides the Directive's graduated approach¹⁰⁶, it comprises three tiers of provisions: those applicable to all types of AVMS providers, those exclusively applicable to on demand providers and those exclusively applicable to television broadcasters. The last-mentioned category will not be looked at as it is of no relevance to vloggers. On-demand AVMS are characterised by user choice and control over the content and the time of viewing, and by the impact on society.¹⁰⁷ The ecosystem of video-sharing platforms allows the viewer to choose when and what to watch. This justifies imposing lighter regulation on on-demand AVMS, which should comply only with the basic rules provided for in this Directive, e.g. with regard to commercial communications and the protection of minors.¹⁰⁸

¹⁰² CJEU 21 February 2018, no. C-132/17, ECLI:EU:C:2018:85; The dispute concerned the publication of a short video concerning a new car model by Peugeot Deutschland GmbH on their own YouTube channel, without providing information on the official fuel consumption and CO2-emissions of that model. A complaint was lodged because of this lack of information in the video.

¹⁰³ *Ibid.* §§21-24.

¹⁰⁴ *Ibid.* §§27-31.

¹⁰⁵ <https://www.youtube.com/watch?v=SDpiEsepg1s> (accessed on 25/04/2018).

¹⁰⁶ i.e. differing between television broadcasting (linear services) and on demand programmes (non-linear services).

¹⁰⁷ Castendyk, Dommering and Scheuer (n 51) p.920.

¹⁰⁸ Rec. 58 AVMSD (n 47).

The following are provisions that could come into play within the context vlogger advertising. Hence, the focus will be on commercial communication within – and not the content of – vlogs.

ARTICLE 9. Article 9 establishes certain minimum qualitative requirements for ACC.¹⁰⁹ First and foremost, it entails the identification principle, to protect consumers from hidden commercial messages: ACC shall be readily recognisable as such.¹¹⁰ Further, surreptitious ACC¹¹¹ and the use of subliminal techniques are prohibited.¹¹² Surreptitious ACC is constituted by the representation in programmes, in words or pictures, of goods, services, the name, the trademark or the activities of a company, under the condition that the AVMS provider does this for advertising purposes and might mislead the public as to its nature. In particular if such representation is done in return for payment or for similar consideration, it will be considered as intentional.¹¹³ Subliminal advertising is understood as commercial messages which only subconsciously affect the viewer. E.g. extremely short images so that spectators cannot consciously be aware of them.¹¹⁴

Essentially, it should be clear to the viewer that he is watching an advertisement. On the one hand these principles pursue traditional consumer protection, but on the other hand the goal is to protect the integrity of the programme and the independence of the media. The latter is beneficial to the authors and creators of programming.¹¹⁵

Besides the identification rules, all ACC should respect a basic tier of qualitative rules to meet clear public policy objectives.¹¹⁶ Moreover, ACC needs to respect human dignity and shall not be discriminatory in any way, with regard to sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. Neither can commercial messages

¹⁰⁹ Castendyk, Dommering and Scheuer (n 51) p.892.

¹¹⁰ *ibid.*

¹¹¹ Art. 9.1(a) AVMSD (n 47).

¹¹² *Ibid.*, art. 9.1(b).

¹¹³ *Ibid.*, art. 1.1(j); Note that this does not cover legitimate product placement where the viewer is adequately informed.

¹¹⁴ Castendyk, Dommering and Scheuer (n 51) p.509.

¹¹⁵ L. Woods, 'The Consumer and Advertising Regulation in the Television without Frontiers and Audiovisual Media Services Directives', *Journal of Consumer Policy* 31, no. 1 (March 2008): 63–77.

¹¹⁶ Rec. 79 AVMSD (n 47).

encourage behaviour prejudicial to health, safety or grossly prejudicial to the protection or the environment.¹¹⁷

All advertisements with regard to cigarettes and other tobacco products are strictly forbidden.¹¹⁸ The same goes for medicinal products and medical treatment available only on prescription.¹¹⁹ Advertisements for alcoholic beverages shall not be aimed specifically at minors, nor shall encourage immoderate consumption thereof.¹²⁰

Finally, ACC cannot cause physical or moral detriment to minors. New platforms can be challenging in this regard.¹²¹ Thus, direct exhortations to minors to buy or hire a product or service by exploiting their inexperience or credulity is prohibited. Also, directly encouraging them to persuade their parents or others to purchase, or exploiting the special trust minors place in parents, teachers or others, fall under this prohibition. Finally, unreasonably showing minors in dangerous situations is also prohibited.¹²²

Flemish YouTuber ‘Acid’ devotes an entire video – titled ‘KOOP NU MIJN SOKKEN!’ – to promoting his own merchandise. He instructs his viewers to pester their parents to get their debit or credit card, PayPal or any other means to buy the socks.¹²³ The link to the website where the merchandise can be bought, is provided in the description below the video. He takes the viewer through the necessary steps to order the socks. Also, it is regularly stressed that only a limited number of socks are available. At the end of the video, he repeats multiple times ‘*Koop ze nu*’ (or: buy them now) while this is simultaneously written across the screen. Important to keep in mind is that in the description Acid rates his content as fun for the average teenager and little children on YouTube.¹²⁴

SPONSORSHIP. The AVMSD also contains specific provisions on sponsorship. This is any contribution made by undertakings or natural persons not engaged in the provision or

¹¹⁷ Art. 9.1(c) AVMSD (n 47).

¹¹⁸ *Ibid.*, art. 9.1(d).

¹¹⁹ *Ibid.*, art. 9.1(f).

¹²⁰ *Ibid.*, art. 9.1(e).

¹²¹ *Ibid.*, rec. 59.

¹²² *Ibid.*, art. 9.1(g).

¹²³ He literally states: ‘*Ga gelijk nu al naar je ouders en zeg: “fix jullie bankkaart, fix jullie PayPal, fix jullie Visa, alles waarmee ik kan betalen zodat ik sowieso sokken heb.”*’.

¹²⁴ <https://www.youtube.com/watch?v=ZvUhxwZ5C8Y> (accessed on 18/04/2018).

production of audiovisual works, to the financing of AVMS or programmes with a view to promoting their name, trademark, image, activities or products.¹²⁵ Sponsorship separates itself from an advertising spot by the fact that it cannot incite consumption. During sponsored programmes, explicit references to the products or services of the sponsor or third parties are not allowed, except where this serves the sole purpose of identifying the sponsor or making explicit links between the programme and the undertaking sponsoring it.¹²⁶ A sponsor reference cannot contain specific promotional elements, for instance elements referring to the quality or efficacy of the product or service.¹²⁷ There is no harm in showing a sponsor's logo, however, showing its website, phone number or the price of its goods or service will most likely lead to a requalification to an advertising spot.

When a vlogger has scored a sponsorship deal, the sponsored content has to fulfil certain conditions. First, sponsorship is prohibited where it influences the programme's content by affecting the responsibility and editorial independence of the media service provider,¹²⁸ e.g. thematic placement: referencing a product or service in a dialogue or other form of programme integration.¹²⁹ Such practices seem to be at odds with editorial responsibility. Thematic placement can also refer to the sponsor paying for a general theme, related to a product or service.

Second, no direct encouragements shall be made to purchase or rent the sponsored goods or services, in particular by making special promotional references to those goods or services.¹³⁰ Sometimes content creators praise certain products or services within their video and ultimately share a reduction code with their viewers.

Finally, viewers have to be clearly informed about the existence of the sponsorship deal. Therefore, the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof should be mentioned in an appropriate

¹²⁵ Art. 1.1(k) AVMSD (n 47).

¹²⁶ Castendyk, Dommering and Scheuer (n 51) p.915.

¹²⁷ Lefever and others (n 57) p.42.

¹²⁸ Art. 10.1(a) AVMSD (n 47).

¹²⁹ *Ibid.*, rec. 93.

¹³⁰ *Ibid.*, art. 10.1(b).

way for programmes at the beginning, during and/or at the end of the programmes.¹³¹ YouTube provides vloggers with a feature to easily disclose paid promotion.¹³²

Vloggers should also bear in mind that AVMS are not allowed to be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.¹³³ Neither can specific medicinal products or medical treatments, only available on prescription in the Member State within of the media service provider, be promoted.¹³⁴

Dutch YouTuber 'Gio' houses a series of him playing 'The Sims' on his channel. One of those videos was sponsored by 'Doritos'. 40 seconds into the 26-minute-long video, he interrupts the game for 30 seconds to disclose that the video is sponsored by 'Doritos'. The sponsorship does not influence the programme's content, nor are there direct encouragements made to purchase the sponsor's goods. Regarding the identification requirement, early on in the video viewers were made aware of the sponsorship deal with 'Doritos'. There was also a written warning in the description box. The directive requires a disclosure at the beginning – which happened in this video – but also during and/or at the end. Such a disclosure is lacking. The sentence '*Deze video is gesponsord door Doritos*' in the top line of the description box should not be deemed to fulfil this requirement as this is not within the audiovisual content itself and will be invisible to the viewer when he or she watches the video in full-screen mode or when the video is embedded in a website. Finally, only the name of the sponsor is mentioned, the logo is nowhere to be found.¹³⁵

PRODUCT PLACEMENT. The AVMSD starts from a prohibition on product placement.¹³⁶ This is any form of ACC including or referring to a product, service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.¹³⁷ The protection of consumers against disguised commercial messages is the main underlying

¹³¹ Art. 10.1(c) AVMSD (n 47).

¹³² <https://support.google.com/youtube/answer/154235?hl=en> (accessed 24/04/2018).

¹³³ Art. 10.2 AVMSD (n 47).

¹³⁴ *Ibid.*, art. 10.3.

¹³⁵ <https://www.youtube.com/watch?v=wnCaB5wHTcw> (accessed on 24/04/2018).

¹³⁶ Art. 11.2 AVMSD (n 47).

¹³⁷ *Ibid.*, art. 1.1(m).

reason for this prohibition.¹³⁸ Product placement basically entails the integration of a certain product within the programme, causing the boundary between commercial and editorial content to blur.¹³⁹

Product placement is admissible in cinematographic works, films and series made for AVMS, sports programmes and light entertainment programmes, with the exception of children's programmes.¹⁴⁰ However prop placement and prizes in children's programmes are admissible under the Directive.¹⁴¹ The provision of goods or services for free only falls under the heading of product placement if the goods or services in question are of significant value, in relation to the production budget.¹⁴² CASTENDYK puts forward, as a rule of thumb, that the sum of the value of props donated by the same donator with a value under one per cent of the budget is insignificant.¹⁴³ In this case, the four principles governing legitimate product placement must be observed.¹⁴⁴

When does content qualify as a children's programme? In case of vlogs, it should be assessed whether the content and form of the programme are targeted at persons below a certain age.¹⁴⁵ However, practical guidance is lacking. Vloggers sometimes state they are not making child friendly content to relieve themselves from responsibility, deliberately disregarding the fact that the majority of their viewers are underage. For works suitable for the entire family, the rule is that if the objective of the prohibition is protecting minors in compliance with article 9 AVMSD, the large child audiences such programmes attract suffice to exclude product placement (*infra* II.A.3.2).¹⁴⁶

Programmes containing product placement have to meet several requirements. Like with sponsorship, content shall not be influenced in such a way that responsibility and editorial independence of the AVMS provider is affected.¹⁴⁷ Neither are direct encouragements to

¹³⁸ Castendyk, Dommering and Scheuer (n 51) p.909.

¹³⁹ Lefever and others (n 57) p.43.

¹⁴⁰ Art. 11.3(a) AVMSD (n 47).

¹⁴¹ *Ibid.*, art. 11.3(b); The Directive leaves room for Member States to opt-out of these derogations.

¹⁴² *Ibid.*, rec. 91; If a product of insignificant value is provided free of charge, to be included in a children's programme, no regard should be had to the four requirements imposed by article 11.3.

¹⁴³ Castendyk, Dommering and Scheuer (n 51) p.913.

¹⁴⁴ C. Angelopoulos, 'Product Placement in European Audiovisual Productions' 18.

¹⁴⁵ Castendyk, Dommering and Scheuer (n 51) p.536.

¹⁴⁶ Angelopoulos (n 144).

¹⁴⁷ Art. 11.3(a) AVMSD (n 47).

purchase or rent goods or services, in particular by making special promotional references to those goods or services, allowed.¹⁴⁸ Another important element is that no undue influence can be given to the product in question.¹⁴⁹ This refers to the situation where a product is clearly recognisable and is not warranted on editorial grounds.¹⁵⁰ This requirement stems from the difficulty to prove promotional intention of the service provider. The EC has put forward the criterion of ‘undue prominence of the good, service, brand or company name’ in its Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising, to serve as the main test for surreptitious advertising.¹⁵¹ Finally, viewers need to be clearly informed of the existence of product placement, at the start and the end of the programme as well as when a programme resumes after an advertising break.¹⁵² By ticking the unpaid promotion box upon uploading a video, content creators opt-in to a visible disclosure which appears as a text overlay for the first few seconds of the video. YouTube itself makes the creators aware of the fact that additional disclosures may be required under applicable laws.¹⁵³ This is the case under the AVMSD.

The identification requirement often is where the shoe pinches. Although this provision does make some suggestions on how to ‘clearly identify’, more detailed guidance is needed in order to establish clarity and coherence in practice. For instance, is it enough to mention paid promotion in the bottom line of the description box? Most likely the answer will be no, bearing in mind that a reasonable consumer usually does not read the entire screen or website.¹⁵⁴ Simply providing the name or logo of the advertiser will not necessarily make children aware of the fact that they are facing commercial communication. They might be led to believe that the content creator is genuinely enthusiastic about the product or service.

¹⁴⁸ Art. 11.3(b) AVMSD (n 47).

¹⁴⁹ *Ibid.* art. 11.3(c).

¹⁵⁰ Castendyk, Dommering and Scheuer (n 51), p.917.

¹⁵¹ Interpretative communication (Comm.) on certain aspects of the provisions on televised advertising in the ‘Television without frontiers’ Directive, 28 April 2004, 2004/C 102/02, 2-11, §33.

¹⁵² Art. 11.3(d) AVMD; Recital 90 suggests a neutral logo as a warning device. Neutral in the sense that no references to products or services should be included again. This way additional advertising effect like in sponsor credits, is avoided.

¹⁵³ https://support.google.com/youtube/answer/154235#paid_promotion_disclosure (accessed on 30 March 2018).

¹⁵⁴ Wu (n 11) 77–78.

Additionally, programmes shall not contain product placement related to tobacco products or cigarettes or specific medicinal products or medical treatments available on prescription only.¹⁵⁵

A very common practice among vloggers is uploading videos – typically titled ‘unboxing...’ – of themselves opening packages they received from certain undertakings. These undertakings send this to influencers of their choice, free of charge, hoping that their products or services will be included – and even more so, praised - in the influencer’s video. This falls under the heading of endorsement, more specifically free product sampling (*supra* I.3).¹⁵⁶

A characteristic of product placement is that the reference to the product is built into the action of the programme. Whereas sponsor references may be shown during the programme but are not part of the plot.¹⁵⁷

Dutch vlogger ‘Ties’ has engaged his little brother in a video dedicated to a certain game. During a video of four minutes and 27 seconds they play the game, explain how it works and stress how much fun they are having. Halfway through the video, as well as at the end, he instructs his brother to inform their viewers where the game can be bought.¹⁵⁸ At no point the commercial nature is disclosed, nor is it mentioned in the description box. The game is part of the plot here. It is commonplace for vloggers to (sneakily) integrate products or services into the storyline. This raises questions with regard to editorial responsibility: the placement in question influenced the script and dialogues.

1.3 Territorial jurisdiction

AVMS are subject to the country of origin principle.¹⁵⁹ This principle entails the great regulatory advantage of only having to be regulated in the state of origin, not the state of receipt. The country of origin refers to the country where the service provider is established.¹⁶⁰ The AVMSD fixes a cascade of criteria to ensure one Member State is

¹⁵⁵ Art. 11.4 AVMSD (n 47).

¹⁵⁶ Wu (n 11) p.80.

¹⁵⁷ Rec. 91 AVMSD (n 47).

¹⁵⁸ <https://www.youtube.com/watch?v=SDpiEsepg1s> (accessed on 24/04/2018).

¹⁵⁹ Art. 2 AVMSD (n 47).

¹⁶⁰ *Ibid.*

exclusively designated to have jurisdiction over a given AVMS.¹⁶¹ The place of establishment is where an AVMS provider has its head office and editorial decisions are made in that same state.¹⁶² If a provider has its head office in one State but takes editorial decisions in another, the place where a significant part of the workforce is located becomes relevant.¹⁶³ If the workforce is evenly distributed, jurisdiction is given to the State in which the company has its head office.¹⁶⁴ Rules have even been put in place for the scenario in which no significant workforce is involved, where decisions relating to the service are taken in a third country¹⁶⁵ or where none of the situations are applicable.¹⁶⁶

In case of vloggers, the country of establishment will mostly boil down to the country of residence since the place of editorial decision-making as well as the place of a significant part of the workforce are important criteria. Vlogs are predominantly videos about the daily life of the content creator, therefore the biggest bulk of the content is recorded close to home. This is where the workforce is to be situated. Subsequently, the content is edited and uploaded, typically from their bedroom. Thus, designating that as the place of editorial decision-making.¹⁶⁷

Concerns may be raised regarding the fact that a viewer, browsing YouTube's content, is unlikely to be aware of the providers being subject to different jurisdictions. Article 5 AVMSD addresses this concern by requiring the name, geographic address, contact details (e.g. email) of the provider to be made 'easily, directly and permanently accessible' to recipients of AVMS. Where applicable, it also requires information on the competent regulatory or supervisory body.¹⁶⁸ After thorough inspection, this requirement seems to be disregarded by most vloggers.

There are certain circumstances in which the Member State of reception can regulate foreign broadcasters. These derogations are different depending on whether it concerns linear or non-

¹⁶¹ Rec. 35 AVMSD (n 47).

¹⁶² *Ibid.*, art. 2, 3. (a).

¹⁶³ Smith (n 66). (accessed on 26 March 2018)

¹⁶⁴ Art. 2, 3. (b) AVMSD (n 47).

¹⁶⁵ *Ibid.*, art. 2, 3. (c).

¹⁶⁶ *Ibid.*, art. 2.5.

¹⁶⁷ G. Zagers (n 74).; Nuance: nowadays, certain popular vloggers are managed by companies, even in other jurisdictions (e.g. Germany). Not seldom the management does the editing or suggest certain topics. Then the country where the management is established will be the country of origin.

¹⁶⁸ Smith (n 66).

linear services. For on-demand services, the possibilities for derogations are fewer.¹⁶⁹ Given the limited scope of this thesis, this will not be further discussed.

1.4 Enforcement

Enforcement of the AVMSD is taken care of on national – or even regional – level, by independent regulatory authorities.¹⁷⁰ In the Flemish Community, the Flemish Regulator for the Media (VRM) supervises compliance with the Flemish Community Media Decree¹⁷¹. It is competent to settle disputes and to issue media recognition and licences in this regard. Complaints have to be motivated and can be filed by anyone able to show interest. A standard complaint form can be found on their website and can be sent in physically or electronically – free of charge. Today, they still only have powers relating to television broadcasting and on-demand audiovisual programmes, keeping vloggers and video-sharing platforms outside their scope of competences.¹⁷² However, with the revision of the AVMSD (*Infra* II.A.1.6) this might change very soon.

1.5 Shortcomings

The biggest shortcoming, evident from the elaboration above, is the unclear manner in which the AVMSD is drafted.¹⁷³ For instance, it excludes UGC for reasons that are no longer (entirely) true.¹⁷⁴ This allows people to come up with their own interpretation – as done in this thesis – leading to uncertainty. Another big shortcoming is the fact that the AVMSD is very much outdated, e.g. the exclusion of video-sharing platforms is no longer defensible in today's media climate. However, many shortcomings will be remedied by the revision of the AVMSD. Finally, the reference to 'children's programme' remains vague since no definition is provided.

¹⁶⁹ *ibid.*; Art. 3.4 (a)-(b), art. 3.5, art. 3.6 AVMSD (n 47).

¹⁷⁰ Art. 30 AVMSD (n 47).

¹⁷¹ The implementation of the AVMSD in Flanders.

¹⁷² <https://www.vlaamseregulatormedia.be/nl/over-VRM/over-ons/veelgestelde-vragen-over-de-VRM> (accessed 14/05/2018).

¹⁷³ E.g. the relation between AVMS and ACC.

¹⁷⁴ I.e. the non-economic nature of their activities.

1.6 Revision AVMSD

A modernisation of the provisions of the AVMSD was long overdue. The AVMSD is currently undergoing reform, which is to pave the way for more modern and fair rules for the entire AVMS sector.¹⁷⁵ The revision takes into account the technological developments that have taken place over recent years and that have caused traditional broadcasters to not only have to compete with other broadcasters and on-demand services offering similar content, but also with video-platforms. After a legislative process of two years, on 13 June 2018, Coreper confirmed the final compromise text on the rules for audiovisual media in the European Union. It took no less than ten trilogue meetings to get the European Parliament, the Council of Ministers and the European Commission on the same page.¹⁷⁶ The revision will bring about change for both vloggers and video-sharing platforms.

VIDEO-SHARING PLATFORMS. The recognition of VSPs by the legislator is one of the most anticipated and controversial changes in the new Directive. People – especially youngsters – watch less and less traditional television and spend more and more time on online video platforms. The share of video in private internet traffic is expected to increase from 64 percent in 2014 to 80 percent in 2019.¹⁷⁷ The fact that video platforms have escaped the application of the AVMSD up until now, has provided them with a competitive advantage over linear and on-demand services.¹⁷⁸ Since VSPs compete for the same audience as audiovisual media services, they also need to be regulated to a certain extent.

To establish a level playing field for all actors in the audiovisual media sector, the broadening of the scope of the AVMSD is an essential factor: in addition to audiovisual media services – i.e. traditional linear television and video-on-demand services – video platforms now also fall under the scope of the Directive. Nevertheless, VSPs enjoy a special regime – they will have to obey a slimmed-down version of the Directive. Moreover, recital 3(a) of the agreed text¹⁷⁹ clarifies that in certain circumstances audiovisual content on social media platforms is also

¹⁷⁵ Press Communication (comm.), ‘Audiovisuele Mediadiensten: Doorbraak in Onderhandelingen over Moderne En Eerlijkere Regels in de EU’, 26 April 2018.

¹⁷⁶ <http://www.consilium.europa.eu/en/policies/audiovisual-media/> (accessed 05/09/2018).

¹⁷⁷ EC Fact Sheet (June 2018), ‘Digital Single Market: updated audiovisual rules’, http://europa.eu/rapid/press-release_MEMO-18-4093_en.htm (accessed 06/09/2018).

¹⁷⁸ DG CONNECT, ‘REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD)’, <https://ec.europa.eu/digital-single-market/en/news/ex-post-refit-evaluation-audiovisual-media-services-directive-201013eu> (accessed 06/09/2018).

¹⁷⁹ Version of 13 June 2018.

caught by the scope. Considering that these social media platforms also play a leading role in spreading videos, I believe this inclusion is an asset. Although recitals do not have a binding force, this does indicate the intention of the legislator. When the provision of programs and user-generated videos is an 'essential functionality' of the service offered by the platform, the AVMSD – albeit in a slimmed-down form – appears on the scene. In other words, the audiovisual content may not be merely incidental or form only a minor part of the activities of that social media service. Most likely, uncertainties will rise as the notion 'essential functionality' leaves room for interpretation and no further explanation is provided.

Article 1 (aa) of the revised directive defines what should be understood by 'video platforms'. First of all, it must be a service – or a dissociable section thereof – that normally occurs against payment ('economic benefit'). It is important to note that the aforementioned condition is also met when it concerns advertising-funded platforms such as YouTube.¹⁸⁰ The main purpose or essential functionality of the service in question should also consist of the delivery of programmes and/or user-generated videos for the purpose of informing, entertaining or educating the general public. Furthermore, the definition requires that the provider does not exercise editorial responsibility. Nonetheless, the organisation ought to be determined by the provider, according to the definition. This also touches upon situations in which automated means or algorithms are used (e.g. display, tagging and ranking). In the context of this requirement, YouTube can serve as an example: although the videos themselves are uploaded by the users of the platform, it is YouTube that pushes certain content by means of algorithms by, for example, putting them in the 'trending section'. Finally, the service must be made available via electronic communication networks.

The foregoing implies that VSPs such as YouTube will have to take into consideration a number of provisions in the new legislative framework. The rules that will apply to the services of these platforms are particularly enshrined in Article 28a of the new directive. They are expected to take appropriate measures to protect minors from content that may affect their physical, mental and moral development. Each Member State will have to ensure that the platforms take such measures. The directive provides a list of concrete interpretations of

¹⁸⁰ P. Valcke and J. Ausloos, "What If Television Becomes Just an App? Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence", *ICRI Research Paper* 17, 20 December 2013, 7.

measures that platforms can take in this context, e.g. an age verification system, a system that allows parental control or the possibility of reporting inappropriate content.

In addition, VSPs are expected to protect all citizens from content that incites hatred and violence against a group of persons, or a member of that group, as referred to in Article 21 of the Charter of Fundamental Rights of the EU. Content of which the dissemination constitutes a specific criminal offense (inciting terrorism, child pornography, racism and xenophobia) is also part of this obligation. The European legislator expects that a ban on such content will be imposed on users through the general terms and conditions of the video platforms. Installing a transparent and user-friendly mechanism to report inappropriate content is another measure suggested by the directive.

Finally, audiovisual commercial communication distributed via video platforms, will also be subject to rules. The platforms, like the AVMS, will have to work in accordance with the provisions protecting consumers against inappropriate or subliminal advertising. The European legislator requires that Article 9 (1) be included in the terms and conditions of the video platforms for audiovisual commercial communications that are not offered, sold or ordered by the video platform providers. The latter envisages integrated advertising by the content creators themselves, which from now on must also comply with the transparency requirement. It is certainly a good thing to protect the many minors who spend their day on these video platforms. When it comes to commercial communications not offered, sold or ordered by the video platform, they only bear responsibility when the commercial purpose behind the media content is indicated by the user or if they are aware of it.

As the rules for video-sharing services are rules of minimum harmonisation, Member States may impose stricter rules. Do note that Article 28a establishes a guarantee that recalls the limited liability of intermediaries, anchored in the e-commerce Directive. A proactive monitoring obligation is still out of the question. It is remarkable that the regulation will also extend, although in a more limited form, to commercial messages that are not arranged by the platform itself. Moreover, the possibility is provided for implementing the new rules (partly) through self- or co-regulation.

VLOGGERS. Under recital 21 of the current AVMSD, user-generated content is explicitly excluded from the scope. This exclusion was mainly linked to the absence of an economic

aspect. Given the drastic changes in the ecosystems of video platforms such as YouTube, it is now recognised in recital 3 of the revised AVMSD that content creators on these platforms – the vloggers – must indeed comply with the requirements of the directive.

In short, vloggers must take the directive into consideration as soon as they qualify as an AVMS (*supra* 1.1.1 and 1.1.2), while the VSPs they use need to abide by fewer, specific rules. It is unfortunate that the legislator makes no distinction between professional vloggers and amateur vloggers (e.g. how much money should a vlogger earn to qualify as pursuing 'an economic advantage?'). Guidelines by the European Commission or self-regulation would certainly not be superfluous in this context.

Note that the rules solely envisage EU platforms.¹⁸¹ YouTube is a subsidiary of Google, the latter has its EU headquarters in Dublin.¹⁸²

At the time of writing it is up to the European Parliament and the Council to formally adopt the compromise text. The final text is forwarded to the European Parliament for endorsement and adoption in the first reading. The final adoption of the directive will be done by the Council during autumn this year.¹⁸³

2. E-Commerce Directive¹⁸⁴

2.1 E-Commerce Directive vs AVMSD

Certain on-demand AVMS can also qualify as “information society services” (ISS) within the meaning of the e-Commerce Directive.¹⁸⁵ Then, the service will have to comply with both

¹⁸¹ i.e. if a parent company, subsidiary or a company in the same group is established in the EU.

¹⁸² <<https://careers.google.com/locations/dublin/>> (accessed on 15/05/2018).

¹⁸³ L. Sboarina, 'Update of AVMS Directive – Parliament and the Council Reach Agreement on “substantial Rules”' (Cullen International) <<http://www.cullen-international.com/product/pdf/FLMEEP20180015>> (accessed 28/04/2018); <http://www.consilium.europa.eu/en/policies/audiovisual-media/> (accessed 05/09/2018).

¹⁸⁴ Book VI (“Market practices and consumer protection”) of the Belgian Code of Economic Law implements this Directive (n 200).

¹⁸⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L* 17 July 2000, 178, 1-16. (e-Commerce Directive)

directives. In case of conflict¹⁸⁶, the AVMSD will prevail, unless otherwise provided for in that Directive.¹⁸⁷

The e-Commerce Directive aims to eliminate obstacles to cross-border online services and to provide legal certainty for businesses and consumers.¹⁸⁸ Hence, by way of minimum harmonisation, it establishes freedom to provide ISS throughout the EU.¹⁸⁹ The Directive is drafted in a horizontal¹⁹⁰, technologically neutral way. The latter avoids the need to adapt the legal framework with every new development.¹⁹¹

2.2 Vloggers as ‘ISS’?

The Directive’s material scope is delineated by the notion “ISS”.¹⁹² This refers to a wide variety of online services, amongst which online advertising and entertainment services.¹⁹³ For a vlogger to qualify as an ISS, five elements need to be present.

First of all, it must concern a **service**. Vloggers are providing services by recording videos and uploading them to video-sharing platforms. Secondly, this service normally has to be provided **for remuneration**. Even though vloggers are not directly paid by their viewers, the presence of advertising suffices to meet this requirement.¹⁹⁴ They not only receive a percentage of the advertising revenue from YouTube, they often also receive financial remuneration or free products or services from other companies or promotion for their own products. Thirdly, the provision of the service needs to take place **at a distance**, i.e. without the parties being simultaneously present, and by **electronic means**, i.e. the service is sent and received by means of electronic equipment for processing and storage of data, and entirely transmitted, conveyed and received by wire, radio, optical means or by other electromagnetic means.¹⁹⁵ Both conditions are fulfilled: YouTube videos are to be found on the internet,

¹⁸⁶ Low risk of conflicts as both entail the country of origin principle and the e-Commerce Directive hardly holds any content provisions.

¹⁸⁷ Rec. 17 jo. art. 4.8 AVMSD (n 47).

¹⁸⁸ Castendyk, Dommering and Scheuer (n 51), p.1083.

¹⁸⁹ Art. 3 e-Commerce Directive.

¹⁹⁰ It applies across all areas of law which touch upon the provision of ISS, e.g. related to consumer law, copyright rules, hate speech, criminal content, defamatory statements etc.

¹⁹¹ Castendyk, Dommering and Scheuer (n 51), p.1084.

¹⁹² Rec 17 and art. 2(a) e-Commerce Directive jo. art. 1(2) Directive 98/34/EC as amended by Directive 98/48/EC.

¹⁹³ Castendyk, Dommering and Scheuer (n 51), p.1083.

¹⁹⁴ Rec. 18 e-Commerce Directive; CJEU 15 September 2016, no. C-484/14, ECLI:EU:C:2016:689, §§40-42.

¹⁹⁵ Castendyk, Dommering and Scheuer (n 51), p.1086.

meanwhile the vlogger and viewer are not physically present in the same space. Finally, the service needs to be provided **at individual request of the recipient**.¹⁹⁶ The recipient – and not YouTube or the vloggers themselves – is in charge of what he gets to see. Videos are shown at request of the viewer.

Thus, it can be held that vloggers are ISS providers. This brings along certain obligations.¹⁹⁷ Within the ambit of this research, only Section 2 on Commercial communication will be considered. As “commercial communication”¹⁹⁸ is broadly defined by the regulator, vlogger advertising will seamlessly fit under this heading. This qualification results in the duty for vloggers to ensure that both commercial communication and the person responsible for it are clearly identified.¹⁹⁹

2.3 Enforcement

Again, enforcement is taken care of nationally, based on Book VI and XV Economic Law Code²⁰⁰. The Federal Public Service for Economy offers an online complaint mechanism regarding unfair and misleading practices.²⁰¹ Via a set of scenarios and examples on their website, they provide consumers and professionals with a preliminary answer on whether an – and which – infringement was committed, accompanied by advice on how to enforce their rights. The complaint is analysed by the competent authorities, who are free to instigate an investigation. Nonetheless, they will not intervene in the claimant’s individual problem.

2.4 Shortcomings

The protection provided by the e-Commerce Directive on its own is unsatisfactory, due to the limited number and abstract nature of the relevant provisions.

¹⁹⁶ This excludes television broadcasting where the viewer is bound to a predetermined schedule.

¹⁹⁷ R. van de Laak, ‘Zijn Vloggers Ongrijpbaar Voor Het Commissariaat van de Media?!’ (24 July 2017) <<https://ictrecht.nl/2017/07/24/vloggers-ongrijpbaar-commissariaat-media/>>.

¹⁹⁸ ‘any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession’ (art. 2(f) e-Commerce Directive).

¹⁹⁹ Art. 6 e-Commerce Directive.

²⁰⁰ Code of Economic Law 28 February 2013, BS 29 March 2013, 19.975.

²⁰¹ FPS Economy, Meldpunt, <https://economie.fgov.be/nl/over-de-fod/waar-en-hoe-een-probleem> (accessed 14/05/2018).

3. The Unfair Commercial Practices Directive²⁰²

The Unfair Commercial Practices Directive (UCPD)²⁰³ was introduced to eliminate barriers to the internal market, represented by national laws on unfair commercial practices, and to provide a high common level of consumer protection.²⁰⁴ The UCPD constitutes a generic²⁰⁵ horizontal framework which aims to counter unfair influencing of consumers in marketing, sales and after-sales activities of traders in business-to-consumer transactions. This way, practices unfairly distorting consumers' economic choice-making are tackled.²⁰⁶ To pursue this aim, maximum harmonisation is established.²⁰⁷ This results in a pan-European level playing field ensuring legal certainty and a fair balance between traders' duties and consumers' rights.²⁰⁸

3.1 Scope

Whilst setting out the scope below, it will be directly applied to the situation of vlogger advertising. Under 3.1.2, the scope will be looked at from video-sharing platform's point of view.

3.1.1 Vloggers

The scope of the Directive is delineated in article 3: unfair business-to-consumer (B2C) commercial practices²⁰⁹ before, during and after a commercial transaction in relation to a product.²¹⁰

BUSINESS-TO-CONSUMER. The definition of 'B2C commercial practices' is a major determining factor. Such practices encompass any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader,

²⁰² Book VI ("Market practices and consumer protection") of the Belgian Code of Economic Law (n 200) implements this Directive.

²⁰³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ L* 5 June 2005, 149, 22-39.

²⁰⁴ Rec. 23 UCPD (n 203).

²⁰⁵ The scope is not limited to specific sectors of economic activity or specific elements of economic exchange.

²⁰⁶ W. van Boom, 'Unfair Commercial Practices' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) p.388.

²⁰⁷ Art. 4 UCPD (n 203); DWF Verkade, *Oneerlijke Handelspraktijken Jegens Consumenten* (Kluwer 2009) p.1.

²⁰⁸ Rec. 12 UCPD (n 203).

²⁰⁹ See art. 5 UCPD (n 203).

²¹⁰ *Ibid.*, art. 3.1.

directly connected with the promotion, sale or supply of a product to consumers.²¹¹ The sole exclusion is national legislation relating to unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders.²¹² The Directive only protects the economic interest of the consumer, interests such as health, safety, taste and decency are not covered.²¹³ It does cover offline as well as online transactions and is technology neutral.²¹⁴

CONSUMER. An unfair commercial practice within the sense of the Directive, presupposes an interaction between a trader and (a) consumer(s). A 'consumer' is any natural person who, in commercial practices covered by this Directive, is acting for purposes outside his trade, business, craft or profession.²¹⁵

TRADER. A 'trader' is any natural or legal person acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.²¹⁶ Whether a vlogger qualifies as a "trader" requires a case-by-case assessment. A legal person acting according to its statutory objective or according to the line of business mentioned in the Trade Register, will automatically qualify as a trader, without having to look at quantitative criteria. This also applies to natural persons registered at the Trade Register.

When there is no registration at the Trade Register by the natural person, several criteria are relevant:²¹⁷ profit-seeking nature (including whether remuneration or another form of compensation was received for acting on behalf of a given trader)²¹⁸, sales-turnover, frequency and quantity regarding 'acting for purposes relating to his trade, business...' etc. This excludes incidental, freelance, side activities.²¹⁹ Hence, I argue that non-professional YouTubers – those who do not regularly upload and earn a living by this (n 36) – are excluded.

²¹¹ *Ibid.*, art. 2(d).

²¹² *Ibid.*, rec. 6.

²¹³ <http://europa.eu/rapid/press-release_MEMO-07-572_en.htm?locale=EN> (accessed on 13/04/2018).

²¹⁴ Guidance (comm.) on the implementation/application of directive 2005/29/EC on unfair commercial practices, 25 May 2016, SWD(2016)163 fin., 109.

²¹⁵ Art. 2(a) UCPD (n 203).

²¹⁶ *Ibid.*, art. 2(b).

²¹⁷ Verkade (n 207) p.19.

²¹⁸ Guidance (comm.) (n 214), 30.

²¹⁹ Verkade (n 207) p.19.

By way of example, Flanders' most popular vlogger 'Acid'²²⁰ is registered at the Trade Register, as a natural person, for the practice of performing arts by self-employed artists and for other supporting activities for performing arts.²²¹ Consequently and without further ado, he qualifies as a trader.

IN THE NAME OF OR ON BEHALF OF A TRADER. The scope also covers those acting 'in the name of or on behalf of a trader'. Evidently, this refers to all individuals within the organisation, e.g. employees and directors conducting activities on behalf of the trader. One may assume that even activities of individual persons who are not themselves traders, nor employed by traders, are within the scope of the Directive if they are performing in the name of or on behalf of a trader. This addition may also serve to include agents of various kinds, such as the providers of advertising services.

In 2012, a Latvian judge held that a company placing advertisements in the media on behalf of and in the interests of another company, the service provider, qualified as a trader under the national provisions implementing the UCPD.²²² However, these agents themselves are qualified as 'traders' by the Directive. Therefore, it looks like this part was added to the definition to indicate the trader in whose interest an advertising is performed, bears primary responsibility for the activity, even where it is performed by an independent agent.²²³ Notwithstanding, the UCPD in conjunction with relevant national laws on liability, can hold a trader jointly liable with another trader for infringements of the UCPD committed by the latter on his behalf.²²⁴

CONCLUSION. It can be concluded that professional vloggers (n 36) can qualify as traders, when they are registered or when they meet frequency and quantity thresholds. In subsidiary order, one could argue that vloggers act 'in the name of or on behalf of a trader'. This could provide a solution for micro-influencers who do not qualify as a 'trader' because of the incidentalness of their activities. They do not meet certain viewing time thresholds (*supra* I.3) but do get advertising deals every now and then.

²²⁰ G. Zagers (n 74).

²²¹ <https://kbopub.economie.fgov.be/kbopub/toonvestigings.html?ondernemingsnummer=683738548>.

²²² Administravīvas rjona tiesas spriedums lieta Nr. A420632710, 8 March 2012, <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=384&articleID=230&elemID=230&countryID=LV> (accessed on 12/05/2018).

²²³ G. Howells, H-W. Micklitz, and T. Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Routledge 2016).

²²⁴ Guidance (comm.) (n 214), 30.

3.1.2 Video-sharing platforms

TRADER. Another point of view is that of the video-sharing platform providers. To assess whether the Directive applies to them, it should be evaluated whether a certain online platform provider qualifies as a "trader". Because YouTube draws revenues from targeted advertising, the platform could be qualified as acting for business purposes.²²⁵ Neither does YouTube's role solely consist of storing content on its platform, it actively classifies and systemises the videos. In particular, YouTube draws up a "trending" list (which is not personalised).²²⁶

B2C COMMERCIAL PRACTICES TOWARDS USERS. Secondly it should be evaluated whether the platform complies with article 2(d) by engaging in B2C commercial practices towards users – which can be both suppliers and recipients – that qualify as consumers under article 2(a). As soon as a platform qualifies as a "trader" it must comply with EU consumer and marketing law as far as its own commercial practices are concerned.²²⁷

CONCLUSION. So, on the one hand online platforms can qualify as "traders" in their own right, whilst on the other hand, these platforms are often used by third party traders to engage directly in unfair commercial practices towards consumers.²²⁸ For third-party advertising such as vlogger advertising, the VSP provider will not carry direct obligations under the UCPD.

An example of the latter:

In a video of 14 April 2018, 'Acid' promotes his new fan merchandise (sweaters). Primarily Flemish and Dutch consumers are addressed in the video. He stresses that only a limited number of sweaters are available and that they are exclusively meant for real fans. Once sold out, there will be no restocking. He informs his viewers that the sweaters are 100% made of cotton, embroidered with 'Acid' and covered by sheep wool on the inside. He is wearing the sweater. The available sizes, the delivery time and release date are clarified. Viewers are notified that to buy the sweaters they will have to navigate to his website at the specified

²²⁵ Ibid., 110-111.

²²⁶ Trending displays the same list of trending videos in each country to all users and the list is updated roughly every 15 minutes, <https://support.google.com/youtube/answer/7239739?hl=en> (accessed on 18/04/2018).

²²⁷ Guidance (comm.) (n 214), 111.

²²⁸ Ibid., 129.

time. Viewers are advised to decide quickly: the first 50 buyers will get rewarded by a free pair of ‘Acid socks’. All accepted payment methods are enlisted, he even states that children can pay with a credit card or PayPal stolen from their parents if they are not allowed to buy the sweater.²²⁹

This vlog will be referred to throughout the rest of chapter 3 of this section: ‘Example’.

3.2 The Black List

To examine whether a commercial practice is unfair, the UCPD employs a structure that is threefold. In the first place, one should check whether the alleged unfair commercial practice is included in the ‘black list’ of Annex I. This enlists those commercial practices which are, under all circumstances, considered unfair and are consequently banned.²³⁰ Only these commercial practices can be categorised as unfair without a case-by-case assessment against the provision of articles 5 to 9.²³¹ The same list applies in all Member States²³², as such I argue it could contribute to legal certainty. Only the provisions that are considered to be relevant to vlogger advertising will be discussed.

POINT 1 AND 3. In certain Member States, several codes and guidelines, applicable to vlogger advertising, have recently come into existence (*infra* II.B). Points 1 and 3 of the black list aim to ensure that traders make use of codes of conduct on marketing in a responsible way.

POINT 7. Furthermore, the blacklist bans the practice of falsely stating that a product will only be available (on particular terms) for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice. This practice is very common amongst vloggers. A hurdle to the application of this ban is that it will be difficult to ascertain whether a product is genuinely only available for a very limited time or whether this is a marketing trick.

Example – Here it is obvious that the vlogger is trying to speed up the decision-making process by continuously repeating that there are not many sweaters available, however, he

²²⁹ <https://www.youtube.com/watch?v=brbW02_sYUE> (accessed on 14/04/2018).

²³⁰ <http://europa.eu/rapid/press-release_MEMO-07-572_en.htm?locale=EN> (accessed on 13/04/2018).

²³¹ Rec. 17 UCPD (n 203).

²³² *Ibid.*, art. 5.5.

never mentions a specific number. Moreover, he rewards the first fifty consumers by granting them free socks.

POINT 11. It is also prohibited to use editorial content in the media to promote a product when a trader has paid for this, without disclosing this in the content or by images or sounds clearly identifiable by the consumer. This is a major problem within vlogs. Nonetheless, recently initiatives have been taken in this regard (*Infra* Part III).

POINT 20. Additionally, the black list holds a ban on describing products as ‘gratis’ etc. if the consumer has to pay anything besides unavoidable costs of responding to the commercial practice and collecting or paying for delivery of the item.

Example – The title of the video at issue reads ‘GRATIS ECHTE BROER TRUIEN’, yet when watching the video, it becomes clear that payment is required. This clearly violates point 20 of the black list.

POINT 22. Another unconditional ban has been placed on falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer. A common practice amongst vloggers is, for instance, recording the unboxing of a package which they claim to have ordered themselves, nevertheless the appraisals that follow suggest an underlying commercial intent.²³³

POINT 28 Children are granted specific protection through a ban on direct exhortations to them to buy advertised products or to persuade their parents or other adults to buy the products for them. This provision prohibits pressuring children into buying a product or using their ‘pester power’ towards adults.

Example – in this scenario it will be difficult to claim the marketing is not directed at children. Acid implicitly acknowledges that his audience consists of minors by repeatedly referring to parental permission.

A relevant case relating to point 28 is a dispute before the commercial court of Vienna. A representative of a bank visited schools and distributed commercial material to children. By

²³³ Point 22 UCPD (n 203).

using slogans such as “*Visit us with your parents in the nearest Raiffeisenbank and collect your personal Burton rucksack and Junior Card*” the material incited children to open a bank account.²³⁴

A similar practice was found in the digital world. Dutch vlogger ‘Gio’ was called upon by a Dutch bank (Rabobank) to advertise ‘PASSI’ – a debit card specifically designed for youngsters – in one of his vlogs.²³⁵ He did so by devoting an entire video to answering viewer questions relating to money. The card is addressed both at the beginning and the end of the video. Based on the Austrian dispute, this practice should raise some eye brows.

Moreover, a claim made by many traders is that the distinction between marketing directed at children and marketing directed at other consumers is not always clear. This requires a case-by-case analysis in which national enforcement authorities or courts are not bound by the trader’s own definition of the target group, nevertheless, that definition may be taken into account.²³⁶ A determining factor in this regard can be if marketing is sent through a medium directly targeting children. Today, as a matter of fact, vlogging on YouTube is often aimed at children and adolescents. Therefore, these content creators know their audience mainly consists of minors. Moreover, within the context of online games, authorities of the Consumer Protection Cooperation (CPC) Network held that articles 5.3., 5.5. UCPD and point 28 of Annex I to the UCPD do not only apply to games specifically targeted at children but also to those likely to appeal to children.²³⁷ I believe a similar reasoning can be employed regarding vlogging: many content creators can reasonably be expected to foresee their videos are likely to appeal to children.

The German BGH applies the same line of reasoning. It held that it is by no means necessary that the exhortation exclusively addresses children.²³⁸ It suffices for the advertisement to be also directed to children. The defendant company claimed 85 percent of the targeted group

²³⁴ BEUC, Enforcement of consumer rights: strategies and recommendations, May 2016, 12 https://lirias.kuleuven.be/bitstream/123456789/608431/1/beuc-x-2016-051_cojef_ii-enforcement_of_consumer_rights.pdf (accessed on 17/04/2018).

²³⁵ <https://www.youtube.com/watch?v=PBRE3MNFk0E>; <https://www.youtube.com/watch?v=RYzm-rdUecw> (accessed on 18/04/2018).

²³⁶ Guidance (comm.) (n 214), 90.

²³⁷ CPC, Common Position Paper, July 2014, https://ec.europa.eu/info/sites/info/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf (17/04/2018).

²³⁸ Bundesgerichtshof 18 September 2014, Az.: I ZR 34/12, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2014-9-18&nr=69114&pos=8&anz=29> (accessed on 17/04/2018).

were adults and the average age was 32. The BGH dismissed this claim and stated a target group mainly consisting of adults does not hamper the applicability of point 28. The overall context of the advertising needs to be taken into account.²³⁹ Further, a direct exhortation does not imply that the advertised products need to be immediately visible, e.g. a link is allowed if consumers consider the sites as a whole.²⁴⁰

Interestingly, the Austrian Supreme Court (OGH) had to decide on a similar case. Contrary to the BGH, it ruled that when an extra step – clicking a hyperlink – was necessary between the invitation to purchase and the actual decision to buy, no ‘direct exhortation’ took place since the purchase decision was not taken on one and the same website. Another decisive factor was that the additional step had to be taken by the addressees – the children – not the advertiser.²⁴¹

This reasoning seems rather odd. In my opinion, one will never buy a product just by watching an advertisement, additional steps will always be necessary, e.g. going to a store, clicking a hyperlink... Thus, the German interpretation is preferable as it grants a higher level of protection to children as consumers.

Example – Acid would get off scot-free before the OGH as the extra step of visiting his website (by clicking the hyperlink provided) is necessary to buy the products.

3.3 Misleading and Aggressive Commercial Practices

3.3.1 *Misleading Commercial Practices*

When the alleged unfair commercial practice cannot be brought under the black list, the second step is to scrutinise whether the practice constitutes an aggressive or a misleading practice. Video-sharing platforms can form an increased risk for misleading advertisements, given they often form the breeding ground for mixing commercial elements with user-generated content. Consumers – especially children – might perceive video-sharing platforms solely as services for exchanging content between consumers, and therefore are not aware of

²³⁹ E.g. simple, child friendly language.

²⁴⁰ BEUC, Enforcement of consumer rights: strategies and recommendations, May 2016, 13 https://lirias.kuleuven.be/bitstream/123456789/608431/1/beuc-x-2016-051_cojef_ii-enforcement_of_consumer_rights.pdf (accessed on 17/04/2018).

²⁴¹ Oberster Gerichtshof 9 July 2013, 4 Ob 95/13v, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130709_OGH0002_0040_OB00095_13V0000_000 (accessed on 19/04/2018).

traders using the platform for marketing purposes.²⁴² The Directive classifies misleading practices into misleading actions and misleading omissions.

MISLEADING ACTIONS. Three types of misleading actions can be distinguished.²⁴³ First, a commercial practice is considered a misleading action if it (1) contains false information and is therefore untruthful, or (2) even if the information is factually correct, in any way deceives or is likely to deceive the average consumer regarding the product, its existence, nature, characteristics, price, the trader identity, qualifications or relevant consumer rights.²⁴⁴ Moreover, in either case it should cause or be likely to cause the consumer to take a transactional decision that he would not have taken otherwise.²⁴⁵ Following CJEU case law²⁴⁶, the UCPD identifies an average consumer as being ‘reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors’.²⁴⁷ Thus, in the presence of (a likelihood of) deception concerning the elements under (a)-(g), it is irrelevant whether the information provided by the trader was false or not. For vlogger practices, ground (c) – stipulating deception regarding the motives for the commercial practice – could be of relevance. They often want to come across as genuine and consequently deny the commercial purpose behind their videos. Support can also be found in recital 14 stating misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice, should be included.

A second type of misleading actions is creating confusion with competitors’ products, trademarks, names and distinguishing marks.²⁴⁸

The final type of misleading actions is non-compliance with codes of conduct, covered by article 6(2) UCPD.²⁴⁹

Note that proof of the fact that the consumer was actually misled is not necessary: the possibility of deception alone can suffice. The CJEU has opted for a wide interpretation of

²⁴² Guidance (comm.) (n 214), 129.

²⁴³ van Boom (n 206) p.392.

²⁴⁴ Art. 6.1 (a)-(g) UCPD (n 203).

²⁴⁵ Ibid., art. 6.1.

²⁴⁶ CJEU 16 July 1998, no. C-210/96, ECLI:EU:C:1998:369, §31.

²⁴⁷ Rec. 19 UCPD (n 203).

²⁴⁸ E.g. copycat packaging.

²⁴⁹ Guidance (comm.) (n 214), 58.

‘transactional decisions’: any form of action towards making a purchase, e.g. deciding to go to a shop.²⁵⁰ Neither should a financial loss be proven.²⁵¹ This could mean that when children do not actually buy the product that was advertised to them by their favourite vlogger, the mere pestering of their parents in this regard can already be a transactional decision.

MISLEADING OMISSIONS. To tackle misleading omissions, articles 7.1. and 7.2. establish a general positive obligation on traders to provide all the information necessary for the average consumer to make an informed purchasing choice. This is referred to as ‘material information’.²⁵² An intentional element is no prerequisite, establishing that the omitted information has influenced the purchase decision of the consumer suffices.²⁵³

An omission is considered to be misleading if it hides or discloses in an unclear, unintelligible, ambiguous or untimely manner, material information that the average consumer needs – regarding the context – to take an informed transactional decision causing or likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.²⁵⁴

Failing to identify the commercial intent of the practice – if not already apparent from the context – is misleading.²⁵⁵ In practice, vloggers often make use of hidden marketing by not being outspoken about commercial purposes behind their videos. When children and adolescents see their favourite ‘YouTuber’ praise certain products or services they believe this to be editorial content. Together with their susceptibility to peer pressure, this puts them in a vulnerable position.²⁵⁶ It is not unthinkable that the average consumer decides to buy the product or service in question, whilst they might not have done so if they knew about the commercial nature behind the appraisal. A discrete appearance of “in collaboration with” plus the trader’s trademark will most likely not suffice.²⁵⁷

²⁵⁰ CJEU 19 December 2013, no. C-281/12, ECLI:EU:C:2013:859.

²⁵¹ <http://europa.eu/rapid/press-release_MEMO-07-572_en.htm?locale=EN> (accessed on 13/04/2018).

²⁵² Guidance (comm.) (n 214), 63.

²⁵³ C. Delforge, ‘Les pratiques commerciales déloyales à l’égard des Consommateurs’ in N Nicolas (ed), *Actualités en matière de pratiques du marché et protection du consommateur* (Anthemis 2010) p.32.

²⁵⁴ Art. 7.1. and 7.2 UCPD (n 203); van Boom (n 206) p.393.

²⁵⁵ Art. 7.2. UCPD (n 203).

²⁵⁶ GS. O’Keeffe, K. Clarke-Pearson and Council on Communications and Media, ‘The Impact of Social Media on Children, Adolescents, and Families’ (2011) 127 PEDIATRICS 800, p.800.

²⁵⁷ Guidance (comm.) (n 214), 65.

Article 7.4. introduces the positive duty on traders to disclose a limited number of ‘material information’, necessary for the average consumer to make informed choices in case of ‘an invitation to purchase’²⁵⁸ to a consumer.²⁵⁹ This does not imply that the message in fact provides the consumer with the possibility to purchase the product at hand.²⁶⁰ The information required includes for instance the main characteristics of the product or the price inclusive of taxes.²⁶¹ An invitation to purchase which ticks all the boxes of article 7.4 is not exempt from being misleading based on article 6.1. or 7.2.²⁶² Additionally, article 7.5. clarifies that information requirements established by EU law in relation to commercial communication shall also be disclosed.²⁶³

Example – Acid is straightforward about the commercial intent of the video and describes the nature and certain characteristics of the product. During the video, no mention was made of the price, nor the delivery cost. These are essential elements for a purchase decision²⁶⁴, nevertheless traders are free to choose whether to include the price in their commercial communications. Since the price element is lacking, Acid is not making an invitation to purchase within the meaning of article 2(i).²⁶⁵

In case there is no invitation to purchase, national authorities and courts – when deciding whether key information has been omitted – need to keep an eye on all features and circumstances of a given commercial practice, for instance limitations of the medium used.²⁶⁶ If the latter brings about limitations in time or in space, those limitations need to be taken into consideration together with the measures taken by the trader to transmit the information to

²⁵⁸ ‘Invitation to purchase’ is defined by art. 2(i) UCPD as ‘a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enabling the consumer to make a purchase’.

²⁵⁹ van Boom (n 206) p.393.

²⁶⁰ J Stuyck and AM Vandromme, ‘Misleading B2C Commercial Practices’ in G Straetmans and J Stuyck (eds), *Commercial practices* (Larcier 2016) p.89-90.

²⁶¹ Art. 7.4.(a)-(e) UCPD (n 203).

²⁶² CJEU 26 October 2016, no. C-611/14, ECLI:EU:C:2016:800, §71.

²⁶³ A non-exhaustive list of such EU rules can be found in Annex II to the UCPD.

²⁶⁴ Guidance (comm.) (n 214), 68.

²⁶⁵ *Ibid.*, 48.

²⁶⁶ *Ibid.*, 63.

consumers through alternative means.²⁶⁷ This provision specifically envisages the situation where a consumer is misled due to holding back information²⁶⁸: a classic vlogger scenario.

An important final note is that a product's main characteristics vary according to the type of product: a computer will justify more extensive product information compared to a sweater.²⁶⁹

3.3.2 *Aggressive Commercial Practices*

Selling techniques are considered aggressive if the average consumer's freedom of choice or conduct is significantly impaired, causing or likely to cause the consumer to take a transactional decision that he would not have taken otherwise. For this assessment, all features and circumstances need to be taken into account.²⁷⁰ The Directive presents a list of criteria to help determine whether a commercial practice uses harassment, coercion, including physical force, or undue influence.²⁷¹ It can concern both behaviour at the marketing stage and practices occurring during or after a transaction has taken place.²⁷² The use of psychological pressure such as exploiting the vulnerability of consumers fits the bill of an aggressive practice.²⁷³

Example – children's vulnerability is exploited by the vlogger exercising undue influence²⁷⁴ – in the form of psychological pressure – on his viewers. Acid suggests only 'real fans' will buy his merchandising. This creates pressure amongst children wanting to be part of the fan base.

3.3. General Clause

The final step in assessing a commercial practice is the general open norm under article 5 UCPD, which serves as a safety net for unfair commercial practices not caught by the other

²⁶⁷ Art. 7.3. UCPD (n 203).

²⁶⁸ R Steennot, A De Boeck and Y Montangie, 'De Gevolgen van de Nieuwe Regelgeving Inzake Oneerlijke Handeldsparktijken Op Reclame En Promotechnieken', *De nieuwe bepalingen in de Handeldspraktijkenwet* (Vanden Broele 2008) p.73.

²⁶⁹ *Ibid.*, 69.

²⁷⁰ Art. 8 UCPD (n 203).

²⁷¹ *Ibid.*, art. 9; <http://europa.eu/rapid/press-release_MEMO-07-572_en.htm?locale=EN> (accessed on 16/04/2018).

²⁷² Guidance (comm.) (n 214), 78.

²⁷³ Art. 8 and 9 UCPD (n 203); van Boom (n 206) p.394.

²⁷⁴ 'Undue influence' is defined by art. 2(j) as exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, which significantly limits the consumer's ability to make an informed decision.

provisions.²⁷⁵ The latter implies that when a practice can be found on the black list or is categorised as misleading or aggressive, there is no need to look at article 5.²⁷⁶ The general clause sets two cumulative criteria to decide to an unfair practice: it must (1) conflict with requirements of professional diligence and (2) materially distort or be likely to materially distort the economic behaviour of the average consumer regarding a product or service.²⁷⁷ Nota bene, the notion of causality is hypothetical: it looks at what the average consumer would have done, actual consumers are dropped from consideration.²⁷⁸ This provision future-proofs the Directive as it keeps the door open for emerging unfair practices.²⁷⁹

‘Professional diligence’ is a concept referring to the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice and/or (b) the general principle of good faith in the trader’s field of activity.²⁸⁰ The ‘professional diligence’ standard is an open-textured normative yardstick. The notions special skill and care, honesty, and good faith are not defined.²⁸¹ No requirement of ‘taste and decency’ exists.²⁸²

Example – Within the vlog a disturbing fact can be perceived. Children are being encouraged to make use of their parents’ credit card or PayPal account – even without their permission. This is by no means in accordance with the principle of good faith in the marketing field.

3.4 Vulnerable consumers

The UCPD highlights the vulnerability of certain consumer groups.²⁸³ The average consumer yardstick needs to make room for an assessment from the perspective of the average member of a group when commercial practices likely to materially distort the economic behaviour only of a clearly identifiable group of consumers, who are particularly vulnerable to the

²⁷⁵ van Boom (n 206) p.391.

²⁷⁶ CJEU 19 September 2013, no. C-435/11, ECLI:EU:C:2013:574, §45.

²⁷⁷ Art. 5.2. UCPD (n 203).

²⁷⁸ van Boom (n 206) p.392.

²⁷⁹ Guidance (comm.) (n 214), 50.

²⁸⁰ Art. 2(h) UCPD (n 203).

²⁸¹ Hugh Collins, ‘Harmonisation by Example: European Laws against Unfair Commercial Practices’, *Modern Law Review* 73, no. 1 (January 2010): 89–118, <https://doi.org/10.1111/j.1468-2230.2009.00785.x>, accessed on 17/04/2018.

²⁸² Rec. 7 UCPD (n 203).

²⁸³ Garde (n 2) p.526.

practice or the underlying product because of their mental or physical infirmity, age or credulity, in a way which the trader could reasonably be expected to foresee.²⁸⁴ Recital 19 clarifies that the list of characteristics that make a consumer ‘particularly susceptible’ is of a non-exhaustive nature. These consumers require a higher level of protection compared to the average consumer.²⁸⁵

The vulnerable consumer benchmark requires three elements to be present. First, the vulnerable group must be clearly identifiable.²⁸⁶ This is not always easy to determine and can form a significant barrier for application of the benchmark. Secondly, the commercial practice must materially distort the economic behaviour of only the vulnerable group. The wording of article 5.3. seems to imply that other consumers remain unaffected. If the word ‘only’ is to be regarded as a requirement, it will be difficult (maybe impossible) to satisfy, which would be detrimental to consumer protection. An alternative interpretation is desirable.²⁸⁷ Finally, the benchmark only applies if the harm caused by a commercial practice was reasonably foreseeable to the trader.²⁸⁸

The vulnerable group benchmark also applies if the practice is aimed at a broader public, yet affects the economic behaviour of a particularly vulnerable group. This implies that content creators on YouTube – engaging in commercial practices – should always have children in the back of their mind.²⁸⁹

In considering if the commercial practice is unfair to the identifiable consumer group, traders are not required to do anything beyond what is deemed reasonable. Extreme naivety or ignorance should not put in the equation by the trader.²⁹⁰ The final sentence of article 5.3. allows traders to rely on ‘exaggerated statements or statements which are not meant to be taken literally’.²⁹¹

²⁸⁴ Art. 5.3. UCPD (n 203).

²⁸⁵ Guidance (comm.) (n 214), 42.

²⁸⁶ E.g. minors from the age of thirteen up to seventeen.

²⁸⁷ E.g. ‘only’ solely clarifies that article 5(3) does not address the economic behaviour of the average consumer or target group, but rather of a vulnerable group.

²⁸⁸ B.B. Duivenvoorde, *Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) p.25.

²⁸⁹ Ibid. p.24.

²⁹⁰ Guidance (comm.) (n 214), 46.

²⁹¹ Garde (n 2).

Example – The statement about stealing parents’ credit card could be an ‘exaggerated statement’. Whether children recognise the humorous note in there, I believe, depends on their age. This implies that before making such statements, vloggers need to know their audience.

In case of advertising to minors, the benchmark will be the average child/adolescent of the relevant age group.²⁹² A European Commission study on online marketing to children showed that children experience difficulties in recognising and consciously defending themselves against online advertising. They more easily understand the commercial intent of a TV advertisement, compared to online.²⁹³ Hence, integrated advertising by vloggers will pose a challenge. Generally, children are not capable of entirely understanding the underlying purpose of advertising until the age of eleven/twelve,²⁹⁴ leaving them unable to take on a critical attitude and to distinguish between editorial and commercial content.²⁹⁵ Furthermore, children’s capacity to understand advertising varies, depending on age and maturity.²⁹⁶ This can only be taken into account to a certain extent under article 5.3. UCPD, by assessing a commercial practice from the perspective of an average member of a specific age group.²⁹⁷

3.5 Enforcement

Supra II.A.2.3.

CROSS-BORDER. Many children regularly watch vloggers from other countries. What if the parents of a Belgian child catch a Dutch vlogger engaging in intolerable integrated advertising? In such a situation, the Consumer Protection Cooperation (CPC) – established by an EU Regulation – deserves to be mentioned.²⁹⁸ It is a network formed by the authorities

²⁹² EUAFR, CoE, ECtHR and Children's Rights Division, *Handbook on European Law Relating to the Rights of the Child* (Publ. Off. of the EU 2015) p.185.

²⁹³ EC Fact sheet (May 2016), ‘The impact of online marketing on children’s behaviour’, https://ec.europa.eu/info/sites/info/files/online_marketing_to_children_factsheet_web_en_0.pdf (accessed on 18/04/2018).

²⁹⁴ This does not mean that from the age of 11/12 children no longer need extra protection. Here the issue probably shifts to self-control and peer identification (Cutler *et al.* 2003).

²⁹⁵ Garde (n 2).

²⁹⁶ A. Garde, *EU Law and Obesity Prevention* (Kluwer Law International 2010) p.173.

²⁹⁷ E.g. 13- to 16-year-olds: teenagers are often characterised by their lack of attention or reflection and their risk-taking behaviour caused by their immaturity and credulity; Guidance (comm.) (n 214), 45.

²⁹⁸ European Parliament, ‘Provisional Agreement Resulting from Interinstitutional Negotiation on the Proposal for a Regulation of the European Parliament and of the Council on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws’

responsible for enforcing EU consumer protection laws in EU and EEA countries.²⁹⁹ When consumers' rights are being violated in one country, the consumer authority can ask its counterpart of the country where the trader is established for information or even to take action. Interesting is that authorities can also coordinate their approaches to apply consumer protection law to tackle widespread infringements. This requires the Commission's support.³⁰⁰

It is definitely positive to have such an EU-wide platform for cooperation and discussion. This, of course, requires high engagement from the authorities.³⁰¹

3.6 Shortcomings

It is laudable that the UCPD recognises children as particularly vulnerable consumers and therefore provides them with special protection. However, it is striking that exaggerated statements or statements which are not meant to be taken literally are acceptable within the context of vulnerable consumers. The latter – for instance children – are precisely the ones at risk of taking exaggerations literally.

A. GARDE criticises point 28 of Annex I as it being unlikely to meaningfully limit the development of marketing techniques specifically aimed at inducing children to buy or put pressure on their parents to buy, since it only bans 'direct exhortations'. It is alleged that indirect exhortations – e.g. covert marketing to children – fall through the net.³⁰² This should be nuanced since these commercial practices could still be caught under articles 5-9 UCPD, if problematic.

Also striking is that even though the UCPD is a full harmonisation measure and contains a black list, there still are different interpretations by national courts. This contradicts the purpose of the black list: legal certainty. National courts should be encouraged to refer these issues to the CJEU for a preliminary ruling as there clearly is a need for clarifying guidelines.

<[http://www.europarl.europa.eu/RegData/commissions/imco/inag/2017/07-11/IMCO_AG\(2017\)608048_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/imco/inag/2017/07-11/IMCO_AG(2017)608048_EN.pdf)> (accessed 18/04/2018).

²⁹⁹<http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/consumer_protection_cooperation_network/index_en.htm> (accessed on 15/05/2018).

³⁰⁰ G. Howells and C. Twigg-Flesner, 'Consumer Law Enforcement and Access to Justice', *Research handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) p.426.

³⁰¹ Ibid p.425.

³⁰² Garde (n 2).

So far, the CJEU has not dealt with unfair commercial practices towards children under the UCPD. Therefore, it is not possible to determine the Court's attitude towards minors within this context.

4. Interim conclusion Part II.A

There definitely is a legal basis on which actions against integrated advertising by vloggers can be based. Nevertheless, the existing legal framework is not ideal. (*Subquestion 1*)

None of the Directives ban advertising to children altogether, but they do all recognise the vulnerability of children within the context of advertising. Vlogger advertising, specifically, is not recognised within the Directives. However, I do not believe this is necessary (*infra* Part IV).

The identification principle is a recurring principle that seems to constitute the main pillar beneath the legal framework on advertising. Unfortunately, the principle does not work as it should. Three reasons can be given for this: (1) The fairly abstract nature of the principle leaves leeway for advertisers to fill it in as they please. This results in uncertainty and places the burden on children themselves, who will have to be able to critically assess ads; (2) Even where advertising cues are present, there is no guarantee that children will understand it, or (3) will not be influenced by advertising. Peer pressure is very prominently present in children's lives. This means that even if they understand something is an ad, they could still be persuaded because they want to be part of a certain group or culture.

Thus, increasingly the focus within legislation is placed on empowerment and advertising literacy, neglecting the protection level.

There also seems to be a problem with enforcement. Even though in Belgium both governmental³⁰³ and self-regulatory bodies³⁰⁴ are competent to enforce the existing legal framework, in practice no decisions relating to minors and vlogger advertising have been issued. (*subquestion 3*)

³⁰³ E.g. FPS Economy or the Flemish Media Regulator (the latter is not yet act against advertising on VSP's).

³⁰⁴ E.g. Jury for Ethical Practices in Advertising.

B. Self-regulation³⁰⁵

This section will be limited to the discussion of the international ICC Code as this Code is indispensable regarding advertising. Even though there are several European self-regulatory codes that could be applied to vloggers, they will not be discussed because their provisions largely overlap with the national self-regulatory codes elaborated under section III.

Self-regulation is very common in the advertising field. Its typical dynamic approach fits to address rapid developments within the sector.³⁰⁶ Reasons underlying the willingness of the industry to subject themselves to rules of conduct are reputation and consumer trust.³⁰⁷

1. The ICC

The International Chamber of Commerce is the largest business organisation, assembling enterprises of different sectors from all over the world. It promotes international trade, responsible business conduct and a global approach to regulation through advocacy and standard setting activities.³⁰⁸ A first version of the International Code of Advertising and Marketing Communication Practice was adopted in 1937³⁰⁹, introducing ethical guidelines creating a level playing field for all advertisers. It later served as a basis for many self-regulatory codes and even for national legislation.³¹⁰ In 2006, most ICC codes were bundled into a consolidated ICC Code, establishing a globally acceptable framework for the creation

³⁰⁵ Self-regulation is a system in which non-state groups draw up their own regulations in order to achieve their objectives and take full responsibility for monitoring compliance with those regulations (Palzer, 2003).

³⁰⁶ Report (EP) on the impact of advertising on consumer behaviour (2010/2052(INI)), 23 November 2010, A7-0338/2010, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0338+0+DOC+PDF+V0//EN>> (accessed on 28/04/2018).

³⁰⁷ P. Verbruggen, 'Case Study Report. Transnational Private Regulation in the Advertising Industry', p.xii, <<http://www.hiil.org/data/sitemanagement/media/HiiL%20Case%20Study%20Advertising%20Executive%20Summary.pdf>> (accessed on 28/04/2018).

³⁰⁸ The ICC represents business interests at the highest levels of intergovernmental decision-making (at the WTO, the UN or the G20). National ICC Committees or groups can appoint delegates to participate in meetings of the ICC Commission on Marketing and Advertising to revise drafts of codes, rules and opinions and to outline strategies for the future <<https://iccwbo.org/about-us/who-we-are/>> (accessed on 28/04/2018).

³⁰⁹ It has been subject to several adaptations since.

³¹⁰ M. Durovic and H. W Micklitz, 'International Law on (Un)Fair Commercial Practices' in M. Durovic and H.W. Micklitz, *Internationalization of Consumer Law* (Springer International Publishing 2017), p.36, <http://link.springer.com/10.1007/978-3-319-45312-5_3> (accessed 30 April 2018).

of responsible commercial communication.³¹¹ It also covers modern forms of commercial communication.³¹²

The ICC instruments can be divided into general and sector-specific codes.³¹³ The provisions enlisted below are not exhaustive, only those most relevant – based on the case studies – will be elaborated.

1.1 General Code

GENERAL PRINCIPLES. Vloggers will have to adhere to the basic principles of the ICC Code.³¹⁴ First of all, commercial communication needs to be honest and should not abuse consumer trust, i.e. it must not exploit consumers' lack of experience or knowledge. In relation to children this could be particularly important.³¹⁵ Secondly, national and cultural standards of decency should not be breached.³¹⁶ Another basic principle prohibits marketing communications from being untruthful and misleading.³¹⁷

The identification requirement is the main general principle in the ICC Code, regardless of the medium used. When an advertisement appears in a medium containing editorial content, the presentation should allow the advertisement to be readily recognisable as such and the identity of the advertiser should be apparent.³¹⁸ Article 9 also stipulates that a promotion of a product should not be disguised as, for instance, user-generated content or independent research. (*Supra* II.A.1.2).

CHILDREN AND YOUNGSTERS. As a “child” is defined differently across borders, the Code allows an interpretation of its provisions on marketing communications addressed to children and young people according to local rules.³¹⁹

³¹¹ ICC (2011). Advertising and Marketing Communication Practice, <[http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Advertising-and-Marketing-Communication-Practice-\(Consolidated-ICC-Code\)/>](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Advertising-and-Marketing-Communication-Practice-(Consolidated-ICC-Code)/>) (accessed on 29/04/2018).

³¹² Langerock (n 14) p.21.

³¹³ Durovic and Micklitz (n 310) p.25.

³¹⁴ Art. 1 ICC Code (n 311).

³¹⁵ *Ibid.*, art. 3.

³¹⁶ *Ibid.*, art. 2.

³¹⁷ *Ibid.*, art. 5.

³¹⁸ *Ibid.*, art. 9 jo. art. 10.

³¹⁹ ICC Code (n 311), p.4.

Article 18 is the key provision when judging marketing directed to or featuring children or young people. Special care should be exercised and their natural credulity and inexperience should be taken into account. Moreover, such advertising should not undermine positive social behaviour, lifestyles and attitudes. Furthermore, products unsuitable for children should not be advertised in media targeted to them and neither should advertisements targeted towards children appear on media where the editorial content is not suitable for children.³²⁰

Additionally, article 18 highlights three aspects that vloggers should consider:

<p>Inexperience and credulity</p>	<p>Upon demonstration of a product, commercial communications should not:</p> <ul style="list-style-type: none"> (1) minimise the skill or age level required (2) exaggerate the size, value, nature, durability and performance (3) hide the need for additional purchases <ul style="list-style-type: none"> - Children should be able to distinguish reality from fantasy - Commercial communications should be clearly distinguishable as such.
<p>Avoidance of harm</p>	<ul style="list-style-type: none"> - No use should be made of statements or visual treatments that are potentially harmful to minors, either mentally, morally or physically. - Children should not be portrayed in unsafe situations or encouraged to engage in hazardous actions.
<p>Social values</p>	<ul style="list-style-type: none"> - No suggestions should be made that possession or use of the product will give physical, psychological or social advantages over other children - Parental authority should not be disregarded. E.g. Children that are being incited to steal their parents credit card (supra II.A.3.1.2). It is debatable whether the humorous

³²⁰ Art. 18 ICC Code (n 311).

	<p>undertone is sufficiently obvious (infra III.1.1.2).</p> <ul style="list-style-type: none"> - Direct appeals to children to persuade their parents to buy the advertised product are also prohibited here - Indicated prices should give a realistic perception of the product's value. - Children should be encouraged to obtain parental consent.
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SALES PROMOTION. A sales promotion is a marketing technique, making products more attractive by offering some type of promotional item.³²¹ E.g. vloggers sharing discount codes.³²² Within this context, reasonable steps should be taken to guard children from unsuitable or inappropriate material.³²³

DIGITAL INTERACTIVE MEDIA. Chapter D highlights additional provisions in case of digital interactive media techniques, such as vlogging.³²⁴ Besides the known identification principle, it requires endorsements or reviews to be clearly indicated and not presented as coming from an individual consumer or independent body (*supra* II.A.1.2).³²⁵ Advertisers should encourage parents and/or guardians to participate and supervise their children's interactive activities. Another – very relevant – requirement vloggers need to deal with is that digital marketing aimed at children of a particular age group, should be appropriate for such children.³²⁶ Unfortunately, any practical guidance in this regard is lacking.

1.2 Sector-specific codes

FOOD AND BEVERAGES. The deepening concern over childhood obesity nowadays has led to increasing attention for regulation of food advertising.³²⁷ The ICC has drawn up a framework for responsible food and beverage marketing communication, providing translation of the ICC

³²¹ Chapter A ICC Code (n 311).

³²² https://www.youtube.com/watch?v=OpPjnG_5gmQ (accessed on 29/04/2018).

³²³ A5 ICC Code (n 311).

³²⁴ Langerock (n 14) p.21.

³²⁵ D1 ICC Code (n 311).

³²⁶ *Ibid.*, D5 ICC Code.

³²⁷ E. Handsley and others, 'A Children's Rights Perspective on Food Advertising to Children' (2014), p.94.

Codes' general provisions within the context of food and beverage communication.³²⁸ Article 18 should be read as prohibiting marketing communications directed towards children to create a sense of urgency or inappropriate price minimisation. Furthermore, children's imagination should not be exploited to mislead regarding the nutritional benefits of the product involved.³²⁹ Neither shall food and beverage marketing mislead children about potential health or other benefits, i.e. popularity with peers, success in sports or intelligence. Finally, the role of parents should not be undermined: again, no direct appeals to children to persuade their parents or other adults to buy advertised food or beverages for them.³³⁰

Milan Knol plays the 'Doritos Roulette Challenge' with a friend.³³¹ This game was invented as a marketing stunt by Pepsico³³². One out of ten chips in the bag is extremely spicy and consumers are dared to snack and risk landing on the spicy one. At the outset of the video, the commercial nature is disclosed by a visual overlay. However, at the end of the video viewers are encouraged to do the challenge themselves and to share a video of it on social media. By turning the consumption of these snacks into a game, children will likely be persuaded into buying unhealthy food.

ALCOHOL. The ICC has taken similar action within the field of alcohol advertising.³³³ Within this context, article 18 ICC Code should be read as a prohibition for marketing communications intended to primarily appeal to minors.³³⁴ Moreover, advertisements should not show minors – or people likely to be perceived as such – drinking alcohol. Lastly, promotions, prizes or games linked to marketing alcohol should not be open to minors. Advertisements should only be placed in media where it can reasonably be expected to meet

³²⁸ ICC (2012), 'Framework for Responsible Food and Beverage Marketing Communications' <<https://cdn.iccwbo.org/content/uploads/sites/3/2012/09/Framework-for-Responsible-Food-and-Beverage-Marketing-Communications-2012.pdf>> (accessed on 01/05/2018).

³²⁹ Eg. animation.

³³⁰ ICC (n 328) p.7-8.

³³¹ <<https://www.youtube.com/watch?v=nY4MKTG7Oos>> (accessed on 01/05/2018).

³³² Director of marketing for Doritos.

³³³ ICC (2014), 'ICC Framework for Responsible Marketing Communications of Alcohol' <<https://www.wfanet.org/app/uploads/2017/03/ICC-Framework-on-Responsible-Marketing-Communications-of-Alcohol.pdf>> (accessed on 01/05/2018).

³³⁴ Marketing communications should avoid featuring e.g. settings, music, games, language, characters or personalities that are primarily appealing to minors. Incidental or unintended appeal to persons under legal purchase age is not precluded.

applicable audience composition targets. This makes YouTube a dubious advertising environment.³³⁵

1.3 Enforcement

Enforcement of the ICC Code is taken on by national self-regulatory organisations. The competences and tasks of the latter vary from country to country. In Belgium, the Jury for Ethical Practices bears this responsibility (*Infra* III.1.1).³³⁶

CROSS-BORDER. The European Advertising Standards Alliance (EASA) is a non-profit entity that assembles national self-regulatory organisations and organisations representing the advertising industry in Europe.³³⁷ It promotes high ethical standards and best practices in self-regulation and allows cross-border advertising complaints to be brought. Generally, it will direct the complaint to the valid self-regulatory organisation of the country involved.³³⁸ EASA members agree to handle cross-border complaints under the same conditions as national complaints.³³⁹ In 2004, the Advertising Self-Regulatory Charter was agreed. The signatories have committed to implementing ten principles set by the Charter in the practical operation of self-regulatory mechanisms, creating a level playing field for all EU advertisers.³⁴⁰

2. Interim conclusion II.B

An extensive array of self-regulation on advertising exists. Several of the principles found there, can be translated and applied to the situation of integrated advertising by vloggers. Nevertheless, there is still much room for improvement. (*subquestion 2*)

³³⁵ ICC (2014) (n 333) p.5-6.; V. Verdoodt, I. Lambrecht and E. Lievens (2016). Mapping and analysis of the current self- and co- regulatory framework of commercial communication aimed at minors. A report in the framework of the AdLit research project, www.AdLit.be, p. 42.

³³⁶ Valerie Verdoodt and others (n 335), p. 33.

³³⁷ It is not a self-regulatory organisation itself.

³³⁸ M.A. Shaver and A. Soontae (eds), *The Global Advertising Regulation Handbook* (Sharpe 2014), p.241.

³³⁹ EASA, 'EASA Cross-Border Complaints System' <<http://www.easa-alliance.org/sites/default/files/EASA%20CBC%20system%20explained.pdf>> (accessed on 01/05/2018).

³⁴⁰ EASA (2004), 'Advertising Self-Regulation Charter', <http://www.easa-alliance.org/sites/default/files/SR_CHARTER_ENG_0.pdf> (accessed on 01/05/2018).

First, the identification principle is also paramount in self-regulation. The reasoning under the conclusion for legal instruments also applies here (*Supra* II.A.4). All the provisions mentioned above remain fairly abstract and none of them spoke of vloggers or social media in general, which is unfortunate.

Second, advertisers willing to comply with all self-regulatory codes will have to make a huge effort as the provisions are widespread into different instruments at international, European (and national)³⁴¹ level. Also, self-regulation is characterised by regional differences.³⁴² Hence, the ICC is not competent to require national self-regulatory organisations to adopt or implement the Code in a uniform way. This leads to uncertainty.³⁴³

As enforcement remains a national matter, the Part III will provide a comparative study of certain national initiatives and their enforcement. But first private regulation drafted by YouTube will be briefly discussed.

C. Private regulation

1. YouTube's terms of use

YouTube has also taken action by regulating its platform. For instance, it explicitly allows paid product placements and endorsements under the condition that the content creator notifies YouTube by checking the "video contains paid promotion" box in the monetisation settings. Since 2016, YouTube offers an additional feature providing creators with the possibility to opt-in to a visible disclosure for viewers: a text overlay for the first few seconds when watching the video. YouTube even makes content creators aware of the fact that using the paid promotion disclosure feature, sometimes is not enough: you always have to check the applicable laws as different jurisdictions may require creators and brands to do more.³⁴⁴ In its advertising policy, YouTube demands that all ads are appropriate for the general public of

³⁴¹ See Part III.

³⁴² Durovic and Micklitz (n 310) p.36.

³⁴³ Garde (n 2) p.162.

³⁴⁴ <<https://support.google.com/youtube/answer/154235?hl=en>> (accessed on 22/02/2018).

YouTube-users from the age of thirteen.³⁴⁵ This seems to rule out, for example, alcohol marketing.³⁴⁶

Moreover, there are features that serve as a safety net against inappropriate action on YouTube, e.g. community strikes, spam, and other abuse flags³⁴⁷ This will lead to a review of the content.

In case a YouTube partner violates Community Guidelines, monetisation basics & policies, terms of service or the AdSense program policies, YouTube foresees sanctions such as suspending their YouTube partnership agreement or even terminating their YouTube account.³⁴⁸

2. YouTube Kids³⁴⁹

In 2015, YouTube introduced the YouTube Kids application, which should protect children – under thirteen – from crossing paths with child-unfriendly content.³⁵⁰ When videos are uploaded to YouTube, algorithms determine whether they are appropriate for YouTube Kids. Subsequently, the videos are subject to quality control by an internal team.³⁵¹ A less laudable result, however, is that children are now directly advertised to.³⁵² During setup, parents are asked whether their child is in preschool or older to adapt the home page to this age. It also offers parental controls, such as timers or the possibility to turn off the search option.³⁵³

Ever since its birth, YouTube kids has found itself in the eye of the storm. Certain videos hosting disturbing content for children slip past its filters. This demonstrates the weakness of

³⁴⁵ In reality, a large part of the user base consists of children below the age of thirteen.

³⁴⁶ <https://www.youtube.com/t/advertising_policies> (accessed on 02/05/2018).

³⁴⁷ N. Mohan and R. Kyncl, 'Additional Changes to the YouTube Partner Program (YPP) to Better Protect Creators' <<https://youtube-creators.googleblog.com/2018/01/additional-changes-to-youtube-partner.html>> (accessed on 02/05/2018).

³⁴⁸ <https://support.google.com/youtube/answer/1311392?hl=en&ref_topic=1121317> (accessed on 02/05/2018).

³⁴⁹ Not (yet) available in Belgium.

³⁵⁰ B-Y. Shimrit, 'Introducing the Newest Member of Our Family, the YouTube Kids App--Available on Google Play and the App Store.' <<https://youtube.googleblog.com/2015/02/youtube-kids.html>> (accessed 02/05/2018).

³⁵¹ B. Burroughs, 'YouTube Kids: The App Economy and Mobile Parenting' (2017) 3 Social Media + Society 205630511770718, p.4.

³⁵² J. Debackere, 'YouTube Lanceert Kindvriendelijke Versie. Nieuwe App Opent Ook Een Reclamemarkt Voor Speelgoedfabrikanten' (24 February 2015) <<https://www.demorgen.be/technologie/youtube-lanceert-kindvriendelijke-versie-be2ab5b9/>>.

³⁵³ Burroughs (n 351) p.2.

digital media platforms that rely on computer algorithms, rather than human policing.³⁵⁴ As a response, YouTube Kids has introduced a new function: exclusively allows videos of which the content was actively monitored by humans, not solely by algorithms.³⁵⁵

3. Shortcomings

The fact that YouTube explicitly, and in various ways, pays attention to the vulnerabilities of children within the context of commercial communication is laudable. However, these rules and initiatives are all taken at the discretion of YouTube. Enforcement of these rules will therefore fully depend on the willingness of YouTube.

³⁵⁴ S. Maheshwari, 'On YouTube Kids, Startling Videos Slip Past Filters' *The New York Times* (4 November 2017) <<https://www.nytimes.com/2017/11/04/business/media/youtube-kids-paw-patrol.html>> (access 02/05/2018).

³⁵⁵ S. Marien, 'Nieuwe YouTube Kids-Functie Beoordeelt Content Niet Langer Met Algoritmes' *datanews.knack* (26 April 2018) <http://datanews.knack.be/ict/nieuws/nieuwe-youtube-kids-functie-beoordeelt-content-niet-langer-met-algoritmes/article-normal-1140443.html?utm_campaign=Echobox&utm_medium=social_datanl&utm_source=Facebook#link_time=1524745645>. (accessed on 02/05/2018).

PART III: COMPARATIVE STUDY

Alternative regulatory instruments (ARI's) are also omnipresent on a national level. They show significant differences across the EU, since they are shaped by cultural, commercial and legal traditions of the country in question.³⁵⁶ Under this section, specific initiatives and decisions taken in the Netherlands and the United Kingdom, concerning vlogging advertising, will be discussed below. Furthermore, applicable procedures and shortcomings will be uncovered. While Belgium is still catching up, children in these countries have been familiar with the 'vlogging phenomenon' for a longer time. Therefore, it will be assessed if they can serve as an inspiration for the Belgian system. First, a mapping of the current situation in Belgium will be presented.

1. Belgium

Under this heading, Belgian ARI's of potential relevance to remedying integrated vlogger advertising will be discussed.

1.1 Jury for Ethical Practices in Advertising (JEP)

1.1.1 General

The JEP was created by the Council for Advertising³⁵⁷ in 1973. It is the private, Belgian, self-regulatory organisation of the advertising industry, built upon – and financed by – the voluntary cooperation of advertisers, communication bureaus and advertising media. It is mainly concerned with supervising the correct and fair nature of commercial messages aimed at the public and serves as a 'court' for consumers against advertisers.³⁵⁸ Its decisions are based on both legislation and self-regulatory codes.³⁵⁹ It also drafts its own recommendations. Even though some of the latter recognise the vulnerability of children, they all concern the content of advertisements instead of the environment through which advertising is delivered, in particular vlogs or social media. The JEP researches content of commercial messages, spread via mass media, including digital media (e.g. social networks). However, competence

³⁵⁶ Durovic and Micklitz (n 310) p.26.

³⁵⁷ "Raad voor de Reclame" is an organisation consisting of advertisers, communication bureaus and advertising media, responsible for more than 80% of Belgian commercial communication. It aims to improve, valorise and defend commercial communication and the commercial freedom of expression.

³⁵⁸ Langerock (n 14) p.18.

³⁵⁹ *Ibid.*, p.19.; Particularly the ICC Code and a number of thematic convenants.

regarding sponsorship and product placement is lacking.³⁶⁰ This is an unfortunate lacuna in case of vlogger advertising.

1.1.2 Instruments relevant to vlogger advertising

As mentioned above, the JEP supervises legislation and self-regulatory instruments on advertising, even those not originating from them. In Belgium, a variety of self-regulatory codes exists in this regard, the majority of which are aimed at the content of the advertisement. Nevertheless, they can be relevant to integrated advertising by vloggers.

FOOD. Within the framework of combatting child obesity, several codes on food advertising were drafted nationally. For instance, the Belgian Federation for the Food Industry has drafted the FEVIA Code on food advertising.³⁶¹ With regard to children and youngsters, food advertisers are discouraged from relying upon characters known from the media – real or drawn – in such a manner that the line between editorial and commercial content blurs, in order to sell products or services.³⁶² This provision fits typical vlogger advertising like a glove as companies make use of popular vloggers to advertise their products (*supra* ‘Doritos Roulette Challenge’). Another example is the Belgian Pledge, which aims to limit food and beverage advertising – also online – to children under twelve years old.³⁶³

OTHER CODES. Furthermore, there are codes on the marketing of alcohol, cosmetics, gambling etc., holding some provisions regarding minors. For instance, the Covenant concerning Advertising for and Marketing of Alcoholic Beverages also entails a prohibition on the use of drawings or marketing techniques referring to characters that are particularly popular with minors, as well as images or statements appear that are mostly part of minors’ culture³⁶⁴ It also prohibits advertising for alcoholic beverages in digital media, primarily targeted at an audience that consists of minors.³⁶⁵ This constitutes an indirect warning for vloggers and

³⁶⁰ <<https://www.jep.be/nl/faq/welk-is-het-bevoegdheidsdomein-van-de-jep>> (accessed on 02/05/2018).

³⁶¹ FEVIA (2005), ‘Reclamecode Voor Voedingsmiddelen’ <https://www.jep.be/sites/default/files/rule_recommendation/fevia_nl.pdf> (accessed on 02/05/2018).

³⁶² Art. 5 Reclamecode Voor Voedingsmiddelen (n 361).

³⁶³ <<https://www.belgianpledge.be/nl/engagementen>> (accessed 02/05/2018).

³⁶⁴ Art. 4.5 ‘Convenant inzake Reclame Voor En Marketing van Alcoholhoudende Dranken’ <https://www.jep.be/sites/default/files/rule_recommendation/alcoholconvenant_nl_2013.pdf> (accessed on 01/05/2018).

³⁶⁵ *Ibid.*, art. 11.2.

companies: always check your audience/subscribers. As ‘beauty vloggers’ are plentiful on YouTube, the Code on Advertising for Cosmetic Products can be of relevance. An important principle is that this kind of advertising cannot contribute to early sexualisation of youngsters, nor to overuse of the products in question.³⁶⁶

PARENTAL AUTHORITY. Interesting within the scope of this research is that parental authority is defended by the JEP. They interpret it as ‘obligatory, reciprocal respect between parents and their children’.³⁶⁷ Failure to appreciate parental authority should not encourage socially irresponsible behaviour or crimes, e.g. stealing parents’ credit cards (*supra* II.A.3.1.2). However, this is not legally enforceable in Belgium. The JEP is the only option for aggrieved parents within the context of commercial messages harming parental authority. The JEP will assess if the humorous note is obvious and the behaviour towards parents remains fairly harmless. If so, it will not take measures. Decisions in this regard can be based on art. 18 ICC Code.³⁶⁸

1.1.3 Decisions

Up until today, the JEP has not had to deal with cases on vlogger advertising. Within the framework of the AdLit research project, JEP decisions were analysed. This showed that several cases involved new advertising formats, however, they concerned the content of the ad, regardless of the means of delivery.³⁶⁹ Hence, no guidelines could be deducted on the implementation of certain principles to new advertising formats. A fortiori, none concerned vlogger advertising.

To determine the JEP’s attitude towards vlogger advertising, I have submitted a testcase. In first instance, the JEP agreed that the practices at hand were inconsistent with unfair commercial practices regulation as well as with the ICC Code. So far, the takeaway here is the willingness shown by the JEP to tackle questionable vlogger advertising.³⁷⁰

³⁶⁶ Art. 3.3.2.2. JEP (2015), ‘Code on Advertising and Marketing Communication for Cosmetics’ <https://www.jep.be/sites/default/files/rule_recommendation/cosmeticacode_nl_september20151_0.pdf> (accessed on 02/05/2018).

³⁶⁷ Based on art. 371 of the Belgian Civil Code.

³⁶⁸ Langerock (n 14) p.107-108.

³⁶⁹ Valerie Verdoodt and others (n 335), p.81.

³⁷⁰ I will not elaborate on the details of the case as the decision is not final yet at the time of writing.

1.1.4 Procedure

Complaints filed with the JEP in first instance are free of charge.³⁷¹ The JEP is not solely complaint-based, the President of the Jury in first instance may submit an advertisement upon his own initiative or at the request of members.³⁷² Also upon request, it can even act proactively as an advisory body.

When an advertisement does not comply, the JEP instructs the advertiser to make adjustments or to stop using the ad (it can also directly contact the media). To ensure its independence vis-à-vis the government, the advertising sector etc., the advertising sector and civil society are equally represented.³⁷³ Finally, as a member of EASA, the JEP can even intervene in case of transboundary ads (*infra* II.B.1.3).³⁷⁴

1.1.5 Shortcomings

In Belgium, none of the self-regulatory initiatives specifically envisage vloggers or even social media. This makes them unsuitable to combat vlogger advertising. In this day and age, I definitely perceive this as a shortcoming. Vloggers motivated to comply with the regulation will have to navigate through this maze of codes and provisions and guess whether a rule is applicable to them or not.

The lack of decisions on integrated advertising within vlogs – and modern advertising techniques in general – might have to do with the dispersed nature of the provisions. Also, the fact that vlogging is a fairly young phenomenon in our country probably plays a role here. Children and parents might not be fully aware of the problem, nor of the competent enforcement authorities.

1.2 Guidelines for Online Influences

On 15 May 2018, the FPS Economy reacted to the problem of influencer advertising on social media, by providing a set of guidelines. Within these guidelines a specific section was

³⁷¹ <https://www.jep.be/nl/faq/is-er-klachtengeld-verschuldigd> (accessed 15/05/2018); in case of appeal, the complainant has to deposit €30, for advertisers this is €500.

³⁷² V. Verdoodt and others (n 335), p. 71.

³⁷³ <<https://www.jep.be/nl/faq/welk-is-het-bevoegdheidsdomein-van-de-jep>> (accessed on 02/05/2018).

³⁷⁴ <https://www.jep.be/nl/extra-info/europese-samenwerking-easa> (accessed on 14/05/2018).

dedicated to YouTube.³⁷⁵ This could have been an important first step to raising awareness of – and fighting against – integrated vlogger advertising, as well as a confirmation of what is held under II.A.3 concerning the UCPD.

However, on the same day the FPS backtracked, saying the guidelines were not yet validated and publication was premature. They first want to engage in dialogue with the sector of online influencers.³⁷⁶ Special about these guidelines is that they originated from a government body and were a translation of Book VI and XV of the Belgian Code of Economic Law³⁷⁷ to the particular situation of social media advertising. This means that these Guidelines would be legally enforceable and significant fines could be imposed. Now, all that can be done is to wait and see.

2. The Netherlands

2.1 The Advertising Code Foundation

2.1.1 General

In the Netherlands, the most important initiatives within the framework of this thesis have been taken by the Advertising Code Foundation³⁷⁸ (ACF).³⁷⁹ This is an independent and private organisation, financed by advertisers. By enabling cooperation and communication between advertisers, media-institutions, communication services and the Consumers Association, the ACF mainly aims to encourage responsible commercial communication.³⁸⁰ The system is based on the premise that advertisements should not mislead, nor violate statutory provisions, the truth, ‘good taste’ or decency.³⁸¹ The Advertising Code Commission³⁸² (ACC) handles complaints in this regard.

³⁷⁵ Vloggers should disclose a written mention “reclame” during their video at the moment commercial statements are taking place, at regular intervals of at least every fifteen seconds and visible for at least three seconds each time. “Reclame” cannot be hidden between several hashtags or at the end of the video. The company benefitting from the advertising, should also be shared

³⁷⁶ ‘Voorlopig Toch Geen Strengere Regels Voor Influencers’ *De Standaard* (15 May 2018) <http://www.standaard.be/cnt/dmf20180515_03513682>.

³⁷⁷ The implementation of the UCPD into Belgian law.

³⁷⁸ Stichting Reclame Code (SRC).

³⁷⁹ Verkade (n 207) p.95.

³⁸⁰ <https://www.reclamecode.nl/adverteerder/default.asp?paginaID=162&hID=124> (accessed on 04/05/2018).

³⁸¹ Art. 2 Dutch Advertising Code.

³⁸² Reclame Code Commissie (RCC).

The ACC's decisions are based on the Dutch Advertising Code.³⁸³ Besides a general part – providing rules that all commercial communication needs to comply with – this Code also entails advertising codes tailor-made for specific products, services or formats.³⁸⁴ Amongst the latter is the Code for advertising directed at Children and Young People.³⁸⁵ Thus, in case of commercial communication towards children, the advertiser will cumulatively have to comply with the general principles of the Dutch Advertising Code, the format-specific rules and the Code for Children.

2.1.2 Instruments relevant to vlogger advertising

(i) The Code for advertising directed at Children and Young People

The Dutch Advertising Commission recognises the need for special attention to advertising aimed at minors by establishing the Code for advertising directed at Children and Young People. No such horizontal code, specifically envisaging advertising towards children, exists in Belgium.

The preamble to this Code defines 'children' as minors of twelve years or younger, and 'young people' as minors below the age of eighteen.³⁸⁶ By this distinction, the evolving capacities of children regarding their perception of commercial messages is taken into account to a certain extent.³⁸⁷ The Code starts off by enlisting several general principles, e.g. advertisements aimed at children cannot mislead about the possibilities and characteristics of the advertised product, taking into account the comprehension and expectations of children³⁸⁸; moral and physical damage should be avoided³⁸⁹ and no physical or social benefit over peers should be promised.³⁹⁰ These principles are not revolutionary in se, but it is helpful that they are tailor-made for children and young people.

³⁸³ Nederlandse Reclame Code (NRC).

³⁸⁴ Verkade (n 207) p.95.; <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=0&deel=2> (accessed on 04/05/2018).

³⁸⁵ Kinder- en Jeugd reclamecode (KJC); Came into effect on 1 November 2013.

³⁸⁶ <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=279%20&deel=2> (accessed on 05/05/2018).

³⁸⁷ Art. 2 of the Code provides an exception in case commercial communication falls under the scope of the AVMSD. Then, 'children' will have to be read as 'minors'.

³⁸⁸ Art. 1 Children and Young People Code.

³⁸⁹ *Ibid.*, art. 2.

³⁹⁰ *Ibid.*, art.3.

Further, the provisions are categorised per format or sector. A category of provisions that is relevant to vloggers is ‘social media platforms’.³⁹¹ Article 5(3) stipulates that advertisements in social media used by children should be identifiable as such, e.g. by optical, virtual or acoustic means. Children’s perception and understanding need to be taken account of.

(ii) Social media code

Due to its specific nature and characteristics, the ACF also provides a separate code on social media advertising. An important provision for brands to keep in mind is that encouraging children under the age of thirteen to advertise products or services on a social media network is not allowed.

(iii) Food code

The Dutch food sector has engaged in drafting specific rules for food advertising aimed at children: the Code for Food Advertising.³⁹² This Code also dedicates a section to children, stipulating that advertising should not be aimed directly at children of twelve years or younger. This includes situations in which children constitute at least 25 percent of the audience reached by the advertisement.³⁹³ An exception is provided in case of cooperation with the government or other recognised authorities for the purpose of food, health or exercise campaigns.³⁹⁴ Moreover, children between seven and twelve can be commercially targeted if evidence of compliance with strict dietary conditions can be provided.³⁹⁵

Again, ads are not allowed to use idols – in the perception of children – to actively advertise certain foods.³⁹⁶ Advertisers often disregard this requirement. E.g. Fanta calls upon popular vloggers to advertise their soft drink.³⁹⁷

Finally, within the context of food advertising, no impression should be given that consuming the advertised product will increase children’s status or popularity among peers.³⁹⁸

³⁹¹ Ibid., art. 5(3).

³⁹² Food Advertising Code, <<https://www.reclamecode.nl/nrc/pagina.asp?paginaID=277%20&deel=2>> (accessed on 06/05/2018).

³⁹³ Ibid., art. 8(1).

³⁹⁴ Ibid., art. 8(2)(a).

³⁹⁵ Ibid., art. 8(2)(c); ‘Voedingskundige criteria reclame voor voedingsmiddelen gericht op kinderen’, <<https://www.reclamecode.nl/bijlagen/Voedingskundige%20criteria%20Reclame%20gericht%20op%20kindere n%207%20tot%20en%20met%2012%20jaa....pdf>> (accessed on 06/05/2018); <<https://www.youtube.com/watch?v=HgqZUTwsc4g>> (accessed on 07/05/2018).

³⁹⁶ Art. 9 Food Advertising Code (n 391).

³⁹⁷ <<https://www.youtube.com/watch?v=2tKrH-t2H8M>> (accessed on 06/05/2018).

(iv) Cosmetics code

With many ‘beauty vloggers’ residing on YouTube, the Advertising Code on Cosmetic Products also needs to be regarded.³⁹⁹ Article 7 states that advertising of cosmetics, specifically developed for minors, is allowed under the condition that this does not contribute to an untimely sexualising of minors. A contrario, advertising to minors of cosmetics that are not specifically developed for minors, should be banned.

Dutch vlogger ‘La Melanie’ has uploaded a video titled ‘Get READY with ME...’. In this vlog she shows her mostly teenage viewers how she prepares for a party. She starts off by washing her hair, prominently showing the shampoo, conditioner and hair mask she uses – not coincidentally all by the same brand. She stresses the characteristics of the products: hydrating, softening, untangling, glossy...⁴⁰⁰ This practice violates article 7 of the Advertising Code on Cosmetic Products.

Depending on the content of the advertisement, more codes can be relevant to vloggers. For instance, the code on games of chance, on medical goods, on alcohol and on tobacco, which all contain provisions concerning minors.

2.1.3 Decisions

Up until now, the Advertising Code Commission has not had to deliver many decisions on integrated advertising in vlogs. Some examples are enlisted below.

(i) Decision No. 2016/00079

A female vlogger recorded – and subsequently uploaded to YouTube – her visit to a ‘Swiss Sense’ store. More than half the video length consists of her looking at and commenting on mattresses and bedding she sees in the store. Three days later, she posts another video on the same YouTube channel, in which she is browsing the website of ‘Swiss Sense’ and she shares a reduction code of five percent. Furthermore, the ‘Swiss Sense’ website contains an article

³⁹⁸ Art. 11 Food Advertising Code (n 392).

³⁹⁹ <<https://www.reclamecode.nl/nrc/pagina.asp?paginalD=291%20&deel=2>> (accessed on 06/05/2018).

⁴⁰⁰ <<https://www.youtube.com/watch?v=4pFebq12yAE>> (accessed on 06/05/2018).

embedding the two mentioned vlogs, without disclosing the existence of a cooperation with the defendant.

Regarding the website of the defendant, the claim was rejected. As concerns the two vlogs, the Commission found both of them to breach the Advertising Code on Social Media. The defendant was ordered to avoid this manner of advertising in the future.⁴⁰¹

(ii) [Decision No. 2017/00208](#)

The complaint concerned a teenage YouTuber that made reference to the paying SMS service ‘AskBongo.com’ in one of her videos. She showed her smartphone while enthusiastically talking about the service. After reading a few text messages, she shares with her viewers that they too can receive such messages by texting a certain number. However, she does not mention at any point that it concerns a paying service. Considering that the viewers of this particular YouTube channel are generally between twelve and fourteen years old, this practice raised questions. The Commission deemed the practice to breach article 3(1) of the Advertising Code on SMS services which states that advertising on SMS services cannot mislead consumers as to the nature or characteristics, the price or the calculation thereof. Here, it is irrelevant that the ad targets children.

The advertiser has taken initiative to have the vlogger remove the promotional reference from the video, therefore the president of the Commission has decided not to make a recommendation.⁴⁰²

2.1.4 Procedure

When consumers⁴⁰³, companies or other organisations encounter problems with certain advertisements, they can file a complaint with the ACC. The Commission and its Appeals College consist of five representatives, one of each of the following stakeholders: advertisers, communications consultants, participating media organisations, consumers and a chairman

⁴⁰¹ The Advertising Code Commission 17 March 2016, No. 2016/00079, <<https://www.reclamecode.nl/webuitspraak.asp?ID=152627&acCode>> (accessed on 06/05/2018).

⁴⁰² The Advertising Code Commission 15 May 2017, no. 2017/00208, <<https://www.reclamecode.nl/webuitspraak.asp?ID=186966&acCode>> (accessed on 06/05/2018).

⁴⁰³ A complaint by a consumer is free.

with legal qualifications.⁴⁰⁴ In case of a decision of non-compliance, the advertiser will be advised to either adapt or to stop spreading the communication at issue. If this advice is disregarded, the advertiser will be publicly pilloried by being put on the online non-compliance list.⁴⁰⁵

The ACF also takes on an intermediary role. First of all, for the supervision of the general codes it has a cooperation agreement with the Consumer Authority. This allows the Consumer Authority to benefit from the expertise and swift procedures of the ACC. In return, when collective damage occurs, the ACC can call upon the legal competences of the Consumer Authority to take care of the enforcement part – as the ACC does not have the power to impose fines or damages.⁴⁰⁶ Secondly, the Dutch Media law obliges all media organisations providing commercial communications to subscribe with the ACF.⁴⁰⁷ The ACC could rely on the Media Commissariat and its enforcement competences regarding traditional media players.⁴⁰⁸ However, the Media Commissariat is not (yet) competent in the field of video-sharing platforms. Finally, the ACF is also a member of EASA.

2.1.5 Shortcomings

In practice, all advertisers – subscribed or not – are bound to the ACF system. Knowing that the ACC handles complaints against any advertiser, if organised media determine to refuse spreading commercial communication that is disapproved by the ACC, this can result in banning commercial communication of advertisers that are no party to the code.

Furthermore, the UCPD brings about maximum harmonisation. This appears to be at odds with forcing advertisers that are no party to the ACF (including foreign EU advertisers) to comply with more stringent rules. The ACF seems to be overstepping its underlying rationale:

⁴⁰⁴ <<https://www.reclamecode.nl/adverteerder/default.asp?paginaID=104&hID=2>> (accessed on 04/05/2018).

⁴⁰⁵ <<https://www.reclamecode.nl/adverteerder/default.asp?paginaID=1&hID=1>> (accessed on 04/05/2018).

⁴⁰⁶ Samenwerkingsprotocol Consumentenautoriteit – Stichting Reclame Code, <https://www.reclamecode.nl/bijlagen/11-7-2011_13_46_12.PDF> (accessed on 05/05/2018).

⁴⁰⁷ Art. 43b Wet van 21 april 1987, houdende regels betreffende de verzorging van radio- en televisieprogramma's, de omroepbijdrage en de steunverlening aan persorganen ('Mediawet').

⁴⁰⁸ Samenwerkingsprotocol tussen de Stichting Reclame Code en het Commissariaat voor de Media, <https://www.reclamecode.nl/bijlagen/20171123_Samenwerkingsprotocol_tussen_de_Stichting_Reclame_Code_en_het_Commissariaat_voor_de_Media_def.pdf> (accessed on 05/05/2018); V. Verdoodt and others (n 335), p.85.

voluntariness. Do note that the ICC is not a judicial court, so those advertisers can seek redress with the civil judge to demand an assessment based on the UCPD.⁴⁰⁹

Finally, it is not always clear what percentage of an audience is taken up by minors. Clear guidelines should provide a way to calculate this.

2.2 The Social Code

In 2017, several Dutch YouTubers have drawn up the self-regulatory ‘Social Code: YouTube’: an initiative by YouTubers, for YouTubers. For its realisation, they cooperated with the Media Commissariat, media agencies and interest organisations. Anyone professionally involved with creating content can join the Code by filling in an online form. The goal of these guidelines is transparency about advertising in videos, since this is actually obligatory in the Netherlands. The Code is a useful tool: compliance with the Social Code, automatically implies compliance with ACF’s code on social media.⁴¹⁰ It is to provide clarity for YouTubers, viewers, companies representing YouTubers and advertisers and to prepare them for the revised AVMSD.⁴¹¹ Moreover, the founders hope that these guidelines will contribute to professionalising the Dutch YouTube Community.⁴¹² Vloggers joining the code have to make this known to their viewers⁴¹³ and they agree to be monitored and – if necessary – contacted.⁴¹⁴ The guidelines are categorised under four headings.

<p>(1) The vlogger is paid to advertise a brand, product or service</p>	<p>The commercial nature needs to be clearly disclosed. E.g. by:</p> <ul style="list-style-type: none"> - showing a text before the start of the video for at least three seconds⁴¹⁵; - an oral disclosure by the vlogger <p>+ a predetermined, standard text in the</p>
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⁴⁰⁹ Verkade (n 207) p.72-74.

⁴¹⁰ C. Meindersma, ‘4 Nieuwe Regels Voor YouTubers – Social Code: YouTube’ (blog), <<https://www.charlotteslaw.nl/2017/11/4-nieuwe-regels-youtubers-social-code-youtube/>> (accessed on 07/05/2018).

⁴¹¹ NOS, ‘YouTubers Bedenken Eigen Regels Tegen Sluikreclame’ <<https://nos.nl/op3/artikel/2203297-youtubers-bedenken-eigen-regels-tegen-sluikreclame.html?>>.

⁴¹² <https://www.desocialcode.nl> (accessed 07/05/2018).

⁴¹³ By using ‘#desocialcode’.

⁴¹⁴ <https://www.desocialcode.nl> (accessed 07/05/2018).

⁴¹⁵ E.g. white letters on a black, screen-filling background.

	description box of the video. ⁴¹⁶
(2) The vlogger is paid to advertise a recognised charity	Idem (1). This disclosure only applies to recognised charities or non-commercial organisations.
(3) The vlogger received a product or service for free or with a reduction	When deliberate attention is paid to a product or service by explicit referral or showing, certain predetermined texts need to be copied into the description box below the video. ⁴¹⁷
(4) The vlogger bought a product or service upon own initiative	Even when vloggers have genuinely bought a product or service, the code advises them to disclose this in the description. ⁴¹⁸

Interesting with regard to merchandising, the Code does not require disclosure of the commercial nature when a vlogger promotes his or her own products.⁴¹⁹

In contrast with the ACF's codes, which are predominantly aimed at companies and advertisers, this code directly addresses vloggers.

However, in case of non-compliance there are no consequences – whatsoever – for the vlogger.⁴²⁰ Still, the fact that vloggers are taking initiative themselves is laudable. The industry is more likely to follow rules that were drafted by themselves.⁴²¹ Joining and following the Code benefits the vloggers, besides clarity it also increases their credibility and the chances for parental approval.

⁴¹⁶ “Deze video bevat een betaalde samenwerking met [NAAM MERK]. Deze vermelding is onderdeel van de Social Code: YouTube. Voor meer informatie, ga naar <https://desocialcode.nl>”.

⁴¹⁷ “Deze video bevat een gekocht(e) product/dienst met korting. Deze vermelding is onderdeel van de Social Code: YouTube. Voor meer informatie, ga naar <https://desocialcode.nl>” . / “Deze video bevat een gekregen product/dienst. Deze vermelding is onderdeel van de Social Code: YouTube. Voor meer informatie, ga naar <https://desocialcode.nl>”.

⁴¹⁸ “Deze video bevat geen betaalde samenwerking. Deze vermelding is onderdeel van de Social Code: YouTube. Voor meer informatie over deze richtlijnen, ga naar <https://desocialcode.nl>”.

⁴¹⁹ This does not refer to the situation in which the vlogger collaborates with a brand, this belongs under the first category.

⁴²⁰ Cf. ACF's advertising codes; Meindersma (n 410).

⁴²¹ E. Lievens, *Protecting Children in the Digital Era. The Use of Alternative Regulatory Instruments* (Martinus Nijhoff 2010) p.315-316.

3. The United Kingdom

The UK's advertising landscape is characterised by an extensive web of legislation, co-regulation and self-regulation.⁴²² Yet, only those codes and provisions relevant to this research will be discussed below.

3.1. The Committee of Advertising Practice

3.1.1 General

In the UK, a distinction is made between broadcast and non-broadcast advertising. Non-broadcast ads are regulated through a system of self-regulation.⁴²³ The Committee of Advertising Practice⁴²⁴ (CAP) – one of two industry committees⁴²⁵ – has drafted a self-regulatory Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing.⁴²⁶

Besides the CAP, the Advertising Standards Authority (ASA) is an important player in the UK advertising field. In fact, the industry committees were founded within the ASA. It is an independent regulator for advertising across almost all media.⁴²⁷ The Advertising Codes and ASA rulings universally cover the advertising industry: advertisers cannot opt out. Aside from proactively monitoring compliance of ads across the UK, the ASA handles complaints by consumers or businesses.⁴²⁸

3.1.2 Instruments relevant to vlogger advertising

(i) Code of Non-Broadcast Advertising and Direct & Promotional Marketing (CAP Code)⁴²⁹

⁴²² Prof Dr LAJ Senden and others, “Mapping Self- and Co-Regulation Approaches in the EU Context” Explorative Study for the European Commission, DG Connect’ (Utrecht University Repository 2015) p.21-24.; V. Verdoodt and others (n 335), p.94.

⁴²³ <<https://www.gov.uk/marketing-advertising-law/advertising-codes-of-practice>> (accessed on 08/05/2018).

⁴²⁴ Its members are trade associations representing advertisers, agencies and media.

⁴²⁵ The second industry committee is the Broadcast Committee of Advertising Practice (BCAP) developing the Code of Broadcast Advertising. This remains outside the scope of this thesis.

⁴²⁶ Such as online. Since 2011, social media spaces are included.

⁴²⁷ <<https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/what-we-cover.html>> (accessed on 08/05/2018).

⁴²⁸ <<https://www.asa.org.uk/about-asa-and-cap/about-regulation/about-the-asa-and-cap.html>> (accessed on 08/05/2018).

⁴²⁹ CAP Code, <<https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>> (accessed on 08/05/2018).

The CAP Code's scope is delineated in a peculiar manner. First, the marketing communications to which the Code applies are enlisted.⁴³⁰ The category 'advertisements in non-broadcast electronic media'⁴³¹ includes online video advertisements, which is what will be focused on here. Subsequently, the scope takes on a residual approach by extensively stating to what the code does not apply.⁴³²

It is held that advertisers cannot condone or encourage any unsafe practices, especially when their marketing communications are addressed to or depict a child.⁴³³ Note that rule III.i of the Code defines a child as anyone under sixteen.⁴³⁴

In Section 5 of the CAP Code, the need for specific protection is recognised in case of marketing communications addressed to, targeted directly at or featuring children. The first principle stipulates that advertisements must not cause physical, mental or moral harm.⁴³⁵ This general principle is filled in by five examples of potentially harmful situations.⁴³⁶

In addition, marketing communications must not exploit children's credulity, loyalty, vulnerability or lack of experience by making them feel inferior or unpopular for not buying the advertised product or as if they are lacking in courage, duty or loyalty if they do not buy or encourage others to buy the product.⁴³⁷ (*Supra* II.A.1.2) Moreover, it must be easy for children to judge the size, characteristics and performance of advertised products and to distinguish between real-life situations and fantasy.⁴³⁸ Neither should marketing communications exaggerate what is attainable by an ordinary child using the product being marketed, nor should it exploit children's susceptibility to charitable appeals.⁴³⁹

⁴³⁰ I jo. rule III.f Cap Code (n 429).

⁴³¹ *Ibid.*, III.d.

⁴³² *Ibid.*, II.

⁴³³ *Ibid.*, 4.5.

⁴³⁴ Cf. the Netherlands: ACF Codes.

⁴³⁵ 5.1 CAP Code (n 429).

⁴³⁶ (1) children must not be encouraged to enter strange places or talk to strangers; (2) children must not be shown in hazardous situations or behaving dangerously (except to promote safety); (3) children must not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision; (4) children must not be encouraged to copy practices that might be unsafe for a child; (5) distance selling marketers must take care when using youth media not to promote products that are unsuitable for children.

⁴³⁷ 5.2.1 jo. 5.2.2 CAP Code (n 429).

⁴³⁸ *Ibid.*, 5.2.3.

⁴³⁹ *Ibid.*, 5.3.

Advertisements should not actively encourage children to make a nuisance of themselves to parents or others and must not undermine parental authority.⁴⁴⁰

Regarding promotions addressed to children, it must be clear that adult permission is required if a prize or an incentive might cause conflict between a child's desire and a parent's, or other adult's, authority. If applicable, it must contain a prominent closing date and it must not exaggerate the value of a prize or the chances of winning.⁴⁴¹ Promotions that require a purchase to participate and include a direct exhortation to make a purchase must not be addressed to or targeted at children.⁴⁴² The 'Oreo lick race' (*infra* III.3.1.3) is at odds with these provisions. For a chance to win a year's worth of Oreos, children need to buy the biscuits and take part in the challenge. Another practice that would be forbidden in the UK, under this provision:

A vlogger cooperates with a cereal brand. His picture has been placed on the back of the cereal boxes for the purpose of a contest. By buying the cereal, fans could win a breakfast date with the vlogger in question. He has made a vlog of him visiting the factory, praising the product and explaining the promotion.⁴⁴³ Again, there is no disclosure of the commercial nature, nor any mention of nutrition. Furthermore, this promotion is targeted at children, even though a purchase is necessary to participate in the contest.

Advertisers envisaging children, additionally need to take account of sector-specific rules

(ii) Food

Advertising which promotes food and soft drink products to children must be responsible and in line with the CAP Code. A poor diet or lifestyle should not be condoned or encouraged.⁴⁴⁴ Advertisements holding a promotional offer require a due sense of responsibility.⁴⁴⁵ Some significant examples will be provided:

⁴⁴⁰ 5.4 CAP Code (n 429).

⁴⁴¹ *Ibid.*, 5.6.

⁴⁴² *Ibid.*, 5.7.

⁴⁴³ <https://www.youtube.com/watch?v=KXcO5wD_t5M> (accessed on 09/05/2018).

⁴⁴⁴ 15.11 jo. 15.12 CAP Code (n 429).

⁴⁴⁵ *Ibid.*, 15.13.

Advertisements relating to food high in saturated fats, trans-fatty acids, free sugars or salt (HFSS food) that are – through their content – directly targeting pre-school or primary school children must not include a promotional offer. For children under sixteen, marketing communications should not encourage children to eat or drink a product solely to benefit from a promotional offer (except for fresh fruit or vegetables).⁴⁴⁶ Neither should children be encouraged to eat more than they otherwise would or for marketing of collection-based promotions, must not urge children or their parents to buy excessive quantities of food.⁴⁴⁷ The ‘Oreo lick race’ advertising could, again, serve as an example (*infra* III.3.1.3).

Then, again, certain rules on the use of licensed characters and celebrities popular with children have been set. According to rule 15.15 CAP Code, HFSS product advertisements targeted directly at pre-school or primary school children are banned from using these characters or celebrities.⁴⁴⁸ E.g. *supra* III.3.1.2(i).

The CAP Code also prohibits direct advice or direct exhortations to children to buy or to ask their parents or other adults to do so.⁴⁴⁹ Only if authorised by the European Commission, claims referring to children’s development and health are acceptable.

And finally, a significant provision for the aim of this research: HFSS product advertisements must not be directed at people under sixteen through the selection of media or the context in which they appear. In fact, if more than 25 per cent of its audience is under sixteen years of age, the medium should not be used for these types of ads. Hence, vloggers should keep in

⁴⁴⁶ 15.14.1 CAP Code (n 429).

⁴⁴⁷ *Ibid.*, 15.14.3 jo. 15.14.4.

⁴⁴⁸ This prohibition does not apply to advertiser-created equity brand characters, which may be used by advertisers to sell the products they were designed to sell. Further, licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar.

⁴⁴⁹ In rule 15.16, 3 examples are given: (1) do not try to sell to children by directly appealing to emotions (e.g. pity, fear, self-confidence) nor suggest that having the advertised product confers superiority (e.g. making a child more confident, clever, popular, successful); (2) do not urge children to buy or persuade others to buy and avoid high-reassurance or hard-sell techniques. No suggestion should be made that children could be bullied, cajoled or otherwise put under pressure to acquire the advertised item; (3) products or prices should not be presented as ‘easily affordable’.

mind that adverts for HFSS products are not allowed if they are likely to appeal to children under the age of sixteen.⁴⁵⁰ This threshold is met by plenty of vloggers.

(iii) Medical Goods, weight control and slimming products

Rule 12.16 stipulates that marketing communications for a medicine must not be addressed to children.

Marketing communications for weight-reduction regimes or establishments must not be directed or appeal particularly to people under eighteen.⁴⁵¹ Marketing for very low-calorie diets or other diets below 800 kcal a day can only be done for short-term use and must encourage preliminary medical advice.⁴⁵²

An eighteen-year-old vlogger has made a video of her undergoing a juice detox. For three days, she will not eat any solid food. She mentions the company providing her with the juices, yet no explicit mention is made of her receiving it for free or getting paid for it. She says she is sharing it so that her viewers can decide whether they would like to do it too.⁴⁵³ No information on the amount of calories was disclosed.

(iv) Gambling⁴⁵⁴

Section 16 of the CAP Code is dedicated to gambling. It is the sole section protecting not only children but also ‘young persons’⁴⁵⁵. It prohibits the exploitation of susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children or young persons.⁴⁵⁶ Gambling should never be associated with youth culture.⁴⁵⁷ Finally, rule 16.3.13 states that gambling advertisements should never be directed at people below eighteen⁴⁵⁸, through selection of media or context in which they appear. This, again, makes vlogs an unsuitable

⁴⁵⁰ S. Boseley, ‘Junk Food Ads Targeting Children Banned in Non-Broadcast Media’ *The Guardian* (8 December 2016) <<https://www.theguardian.com/society/2016/dec/08/junk-food-ads-targeting-children-banned-in-non-broadcast-media>>.

⁴⁵¹ Cf. the Netherlands: no code for weight loss products.

⁴⁵² 13.7 CAP Code (n 429).

⁴⁵³ <<https://www.youtube.com/watch?v=lhlhpqY2Cn0>> (accessed on 10/05/2018).

⁴⁵⁴ i.e. gaming and betting.

⁴⁵⁵ Minors between the age of sixteen and eighteen.

⁴⁵⁶ 16.3.2 CAP Code (n 429).

⁴⁵⁷ *Ibid.*, 16.3.12.

⁴⁵⁸ For football pools, equal-chance gaming, prize gaming or Category D gaming machines the age threshold is sixteen.

medium. Even more so, taking into account the fact that the advertisements cannot include anyone who seems to be under twenty-five years old.⁴⁵⁹ This rules out many vloggers as well.

(v) Tobacco and e-cigarettes

There is a complete ban on tobacco advertising.⁴⁶⁰ Regarding electronic cigarettes, marketing communication may not particularly appeal to people under eighteen and no association with youth culture shall be made.⁴⁶¹ No medium should be used to advertise e-cigarettes if more than 25 percent of its audience is under 18.⁴⁶² People in the advertisement using e-cigarettes must be and look over twenty-five.⁴⁶³

3.1.3 Decisions

The ASA has delivered a landmark ruling in the ‘Oreo Lick Race’⁴⁶⁴ decision. The ruling constituted a turning point: from then on, vloggers are forced to be upfront with their followers regarding paid promotion of products in their videos.⁴⁶⁵

Mondelēz⁴⁶⁶ relied upon certain YouTube stars for the promotion of Oreos biscuits by showing an ‘Oreo Lick Race’ in their videos. The issue was that the vloggers in question did not clearly label the videos as being paid for. They did say they were working with Oreo and the description boxes below their videos stated that they were teaming up with the brand for these videos. A complaint from a BBC journalist in this regard landed the case before the ASA.

Based on the UK advertising code stating that ads must be “obviously identifiable marketing communications”, the ASA deemed the YouTubers’ ads to be in a very similar style to their

⁴⁵⁹ 16.3.14 CAP Code (n 429); An exception applies to situations where a person (seemingly) under 25 is the subject of the bet or where it concerns family events.

⁴⁶⁰ 21.1 CAP Code (n 429).

⁴⁶¹ *Ibid.*, 22.9.

⁴⁶² *Ibid.*, 22.11.

⁴⁶³ *Ibid.*, 22.10.

⁴⁶⁴ ASA 26 November 2014, no. A14-275018, <<https://www.asa.org.uk/rulings/mondelez-uk-ltd-a14-275018.html>> (accessed on 09/05/2018).

⁴⁶⁵ N. Harley, ‘Hidden Advertising by Vloggers under the Spotlight’ *The Telegraph* (26 November 2014) <<https://www.telegraph.co.uk/news/uknews/law-and-order/11255077/Hidden-advertising-by-vloggers-under-the-spotlight.html>>.

⁴⁶⁶ The parent company that owns the Oreos brand.

regular content posts and therefore it would not be immediately clear that the videos were marketing communications.

Also, disclosure statements such as “Thanks to Oreo for making this video possible”, in the video or in the text descriptions, do not suffice to clarify the marketing nature of the video.

The ASA told Mondelēz UK to make sure that their future ads through this medium will make their commercial intent clear, prior to consumer engagement, by indicating it in the vlog’s title. From here on, the ASA has engaged to monitor this type of content more closely.

Remarkable is that after this ruling Mondelēz continued using this advertising practice, without properly disclosing the commercial intent, in other countries (e.g. Belgium and the Netherlands).⁴⁶⁷

3.1.4 Procedure

Complaints can be filed with the ASA. If the advertisement at issue qualifies as ‘non-broadcasted’, the ASA will direct the complainant to the CAP investigative cell.⁴⁶⁸ The latter will assess the complaint in light of the CAP Code, while taking into account other relevant self-regulatory provisions.

For enactment and enforcement of the final decision, the ASA is readdressed. It can order to amend or withdraw ads that mislead, harm, offend or that are irresponsible. In case of disagreement with the ASA’s decision, consumers can turn to the Independent Reviewer of the Rulings of the ASA Council.⁴⁶⁹ Advertisers that still do not comply with the rules can become subject to sanctions, e.g. bad publicity. However, as a non-statutory body the ASA does not have powers to impose fines or bring advertisers before court. Hence, in case of persistent breaches a legal backstop is put in place: the ASA can refer the issue to Trading Standards⁴⁷⁰ - who do possess certain statutory powers.⁴⁷¹

⁴⁶⁷ <<https://www.youtube.com/watch?v=4exmzCzLGGQ> and <https://www.youtube.com/watch?v=kEmXCdUSclw>> (accessed on 09/05/2018).

⁴⁶⁸ If it concerns a broadcasted advertisement, it is referred to the BCAP investigative cell.

⁴⁶⁹ <<https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/how-we-handle-complaints.html>> (accessed on 08/05/2018).

⁴⁷⁰ Examples of the sanctions available to them: <<https://www.asa.org.uk/asset/447A954A-A36D-4FEE-A9DCCC72DB35E66F/>> (accessed on 08/05/2018).

3.1.5 Shortcomings

The annual report of 2017 indicates that there is still a lack of awareness by citizens of the existing complaint procedures.⁴⁷² This is reflected in the number of complaints before the ASA. Only four cases correspond to the term ‘vlog’, of which only one concerns advertising towards children. This is not in proportion to the number of infringing videos to be found on YouTube.

3.2 ASA Vlogging Guidance⁴⁷³

The Advertising Codes do not prohibit vlogger advertising, as long as brands and influencers are upfront about the commercial nature. Compliance in this area needs to improve.⁴⁷⁴ The CAP has issued its first guidance following the ASA’s landmark ruling. This is supposed to increase vloggers’ confidence that they are in compliance with the rules, which in turn will help maintain the relationship and trust with their followers.

The guidance takes the form of a non-exhaustive list of scenarios, each with practical advice on how to apply the rules:

(1) Advertorial vlogs	<p>The whole video is in the usual style of the vlogger, yet the content is controlled by the brand and the vlogger has been paid.</p> <p>They need to be labelled upfront as commercial (rule 2.4 CAP Code). However, there is no ASA ruling on an appropriate label for vlogs but ‘ad’, ‘ad feature’, ‘advertorial’ etc. are likely to be acceptable.⁴⁷⁵ As to the location of the label, solely relying on the description box does</p>
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⁴⁷¹ <<https://www.asa.org.uk/codes-and-rulings/sanctions.html>> (accessed on 08/05/2018).

⁴⁷² ASA (2017), ‘Showing More Impact. Annual Report 2017’ p.9
<<https://www.asa.org.uk/uploads/assets/uploaded/90bb829c-4d22-49a9-b4f29d605d752950.pdf>>.

⁴⁷³ ASA, ‘Guidance for Vloggers’ <<https://www.asa.org.uk/advice-online/video-blogs-scenarios.html>>.

⁴⁷⁴ ASA (2017) (n 472) p.15.

⁴⁷⁵ The label “sponsored” is not ideal in this context because it could cause confusion for consumers who could understand it to refer to vlogs and videos where a brand has sponsored it but had no control of the content. The same counts for “supported by”, “Funded by” and “Thanks to X for making this possible” in this context.

	<p>not suffice as they are not immediately visible when visiting the site via tablet, mobile browser or app, nor are they available when selecting a video from a playlist or related videos. Effective ways of disclosure are early in the title of the vlog or in the thumbnail.</p> <p>UK vlogger ‘Zoella’ nearly got it right by titling her vlog: “Gingerbread Christmas Light Cupcakes Zoella AD”.⁴⁷⁶ ‘AD’ should have been mentioned early in the title.</p>
(2) Commercial breaks within vlogs	<p>This refers to a specific section dedicated to the promotion of a product, where most of the vlog is editorial content containing independent, non-paid for opinion.</p> <p>Here, the CAP does not advise to label the entire vlog as an ad, as long as it is clear to the viewer when the advertisement starts. A possible way to do this is an onscreen text stating “ad”, holding up a sign, incorporating the brand’s logo or orally by the vlogger.</p>
(3) Product placement	<p>This is the scenario in which a product is used as a ‘prop’ along with messages controlled by the advertiser within a vlog that is largely editorial.⁴⁷⁷</p> <p>In this case, a disclosure in the video title is not required, an onscreen text stating “ad” or “product placement”, holding up a sign, or oral disclosure by the vlogger can be used to clarify the commercial intent.⁴⁷⁸</p>
(4) Vlogs about own products	<p>Many vloggers promote their own merchandise. The CAP still considers this a marketing communication which the viewer should be made aware of before selecting</p>

⁴⁷⁶ <<https://www.youtube.com/watch?v=EacCdANafyQ>> (accessed on 10/05/2018).

⁴⁷⁷ E.g. a make-up tutorial where the vlogger features a specific set of brushes.

⁴⁷⁸ E.g. a beauty vlogger could say “In this tutorial I’m using brushes from brand X, who paid for me to feature them and want you to know about...”.

	<p>the video, by an indication in the title.</p> <p>Still, this is significantly different from third-party endorsement, hence the disclosure will have to meet a lower threshold.⁴⁷⁹</p> <p>Where the promotion of own products is not the sole purpose of the video, labelling will most likely not be required by the CAP. The commercial nature will be self-evident.⁴⁸⁰</p>
(5) Sponsorship	<p>When a brand sponsors a vlogger to create a video without having control of the content, this can be qualified as sponsorship.</p> <p>This is not covered by the CAP Code. The lack of control by the brand makes that the vlog does not need to be labelled as an ad.</p>
(vi) Free items	<p>It is common for vloggers to receive certain products for free in order to be reviewed. The brand in question has no control on the content. The vlogger is free to decide whether or not to include the item in a vlog.</p> <p>This also remains outside of the CAP's scope. The lack of control justifies the absence of an advertorial.⁴⁸¹</p>

4. Interim conclusion Part III

First and foremost, it has been shown that both in the UK and the Netherlands the industry has been granting specific attention to advertising on social media. Interestingly, the ACF and ASA systems are both equipped with a set of teeth – by cooperating with bodies possessing statutory powers – as a last resort in case of obdurate advertisers.

⁴⁷⁹ A title such as “Let me show you how to use my new make-up line” suffices.

⁴⁸⁰ E.g. a gaming vlogger may state during an editorial video: “I’m currently using the new headphones I’ve just released; you can purchase them through the link below”.

⁴⁸¹ Nevertheless, the Consumer and Market Authority would expect brands and vloggers to tell consumers if an item was given on the condition that it is talked about. According to the CMA viewers need to know whether a vlogger has an incentive to talk about a product.

There have even been initiatives specifically envisaging vloggers: the Social Code and the ASA's guidelines. Even though they are not enforceable, they still are welcome initiatives. Not only do they draw attention to the issue of vlogger advertising, they also provide vloggers with clear guidelines that have been missing so far. The difference between these initiatives is that the Social Code is drafted upon the initiative of vloggers themselves. Very recently, it looked like the FPS Economy modestly followed in their footsteps, however it withdrew its guidelines as it deemed the time was not quite ripe. This leaves Belgium still without any specific initiatives. On the bright side, now it is clear that the government is aware of the issue of vlogger advertising. (*subquestion 4*)

In general, one needs to be mindful of the limitations inherent to ARI's, especially the enforcement element. Compliance cannot be enforced when compulsory key provisions are lacking.⁴⁸² Therefore, ARI's should be perceived as a supplement instead of a substitute to legislation. A final unpractical aspect of self-regulation is that they are widespread, all over different codes. This places a burden on advertisers wanting to comply with all the regulation. Another point is that there are disproportionately few decisions on vlogger advertising. Moreover, in Belgium there are none. This indicates that there are certain problems, most-likely to be situated with awareness. (*subquestion 3*)

⁴⁸² E. Lievens, *Protecting Children in the Digital Era. The Use of Alternative Regulatory Instruments* (Martinus Nijhoff 2010) p.315–316.

PART IV: RECOMMENDATIONS

Based on the shortcomings identified in this thesis, a set of recommendations will be formulated to the Belgian legislators, policymakers and advertising industry. The implementation of these recommendations should make Belgium better equipped to tackle integrated advertising by vloggers in the future. This section will formulate an answer to *subquestion 5*.

FRAMEWORK. The protection of children is too important to be left entirely up to the industry. I recommend the establishment of a strong legal base regulating advertising (towards children) in general. These legal provisions are allowed to be abstract so that they do not have to undergo time-consuming legal reform with every development in the digital world. Still, an important role should be attributed to self-regulation: this should translate the abstract provisions to the case of vlogger advertising and provide guidance ensuring protection. In case of technological development this framework can more easily be adapted, meanwhile the existence of a legal provisions provides a deterrent effect as it makes enforcement possible.

THE IDENTIFICATION PRINCIPLE. As mentioned under Part II, current legal framework does not properly arm children against vlogger advertising. Research has shown that the identification principle is not watertight in case of integrated advertising towards children through new formats (*supra* II.A.4). Therefore, deploying it as the foundation of the entire regulatory framework is not desirable. It places too much responsibility on children themselves instead of the advertiser. In its current shape, advertisers can easily hide behind the principle and interpret it as they please since there are no implementation guidelines. A balance between empowerment and protection of children against advertising is necessary. With the balance currently tilting too much to the empowerment side, more emphasis should be put on protection. An example can be found with the new AVMSD placing certain responsibilities with video-sharing platforms. Another way to strengthen the protection element is by improving enforcement (see below). Under the new AVMSD, national regulatory authorities will soon have explicit power to take action against hidden vlogger advertising. This might have a deterrent effect. Finally, further research should be conducted to establish a more suitable central principle.

SELF-REGULATION. Self-regulation is very important to vlogger advertising in order to provide practical guidance. However, it should be formulated in a less abstract way. Belgium should – like most countries – have self-regulation in place specifically for integrated social media advertising, including a section on video-sharing platforms. Currently, self-regulation on advertising is widespread over different codes. Only having to consult one code in case of vlogger advertising, should be realised. Furthermore, because of the absence of legal provisions on vlogger advertising, I believe there should be a legal backstop in place as a last resort. This could be modelled on the UK or Dutch system. Both the code and enforcement could be taken care of by the JEP⁴⁸³, with the possibility to direct persistent non-compliant vloggers to a regulatory body, possibly the VRM.⁴⁸⁴

CHILDREN’S PROGRAMME. Both legal and self-regulatory codes base certain rules on ‘children’s programmes’. To provide a future-proof regulatory environment on vlogger advertising, rules on how to determine a vlogger’s audience are indispensable. Several rules refer to ‘if the audience consists for X% of children...’, yet there is no practical guidance. One could think of a monitoring and reporting duty on professional vloggers. This would also make them more conscious about it. A pitfall that needs to be considered is that only viewers that are logged in can be monitored.

EVOLVING CAPACITIES. Different advertisements are inappropriate to different ages. This should be taken into account by legislators, policymakers and the industry.

LACK OF CASES. There have not yet been any rulings on integrated advertising by vloggers in Belgium. Even in the Netherlands and the UK the number of cases is scarce. The dispersed nature of competences amongst various bodies likely causes practical difficulties to enforcement, which can discourage consumers to take action. A more coordinated approach between the different regulatory bodies is therefore desirable. They should regularly consult each other and perhaps draw up practical guidelines or recommendations on how to apply the abstract regulatory framework to integrated vlogger advertising.

⁴⁸³ Cf. ASA and ACF.

⁴⁸⁴ So, actually a form of co-regulation.

AWARENESS-RAISING. I believe the main reason for the absence of cases is a lack of awareness of both the problem and the law by citizens. Legislators, policy makers and regulatory bodies should raise awareness amongst citizens in order to make them comfortable to file complaints against integrated advertising. To avoid legal uncertainty, judges should also be made aware that they could perfectly apply the AVMSD, UCPD and the e-Commerce Directive to cases of integrated advertising in vlogs.

CPC NETWORK. Vlogs are often watched across borders. Flemish children, for instance, like to watch Dutch or English vloggers. Within this context, a role should be dealt to the CPC. This might be a good inset for the authorities to exchange experiences on the young phenomenon of vlogger advertising and eventually come up with guidelines on how to deal with certain common practices. It could also carry out a joint enforcement action on integrated vlogger advertising, likely to influence or harm children.⁴⁸⁵ This could be a statement towards the advertising industry, companies, vloggers and consumers.

EASA. Parallel to the CPC-network, the EASA can play a role in cross-border complaints on self-regulatory level. It could likewise be a place of coordination and discussion for national self-regulatory authorities. It could also serve as a place to take harmonising initiatives. For instance, in the Netherlands and the UK certain disclosure cues are proposed to inform children of the commercial nature of vlogs. It would be beneficial if throughout the EU the same cues would be used to avoid confusion amongst both consumers and advertisers. This could be a task on the to do-list of the EASA. It could also draw up a list of the most essential obligations for vloggers and require its signatories to implement this in their codes.⁴⁸⁶ This seems an obvious route to take as the organisation already exists. To achieve this, again, awareness should be raised regarding EASA's existence.

⁴⁸⁵ In 2013 and 2014 the Consumer Protection Cooperation (CPC) Network carried out such an action on online games and in-app purchases.

⁴⁸⁶ Cf. Advertising Self-Regulatory Charter (2004).

PART V: CONCLUSION

Knowing that certain vloggers in Belgium are able to attract more viewers than traditional television programmes, it is time to take them seriously.

The main research question throughout this thesis was: “*Which (legal) remedies can currently be found in the toolbox of children and their parents, in case of an encounter with integrated advertising in vlogs?*”.

By mapping the **legal and self-regulatory framework** applicable in Belgium, it has been confirmed that a web of obligations exists on which child and parent can rely against vlogger advertising. Remarkably, provisions are often similar across the different instruments or in other words, overlaps exist. By relying on advertisers and vloggers themselves to make that puzzle for each situation, some of the effectiveness gets lost and uncertainty is raised. This could negatively affect the motivation of advertisers to comply. The fragmented nature of the regulatory framework also results in gaps: no specific provisions on vlogger advertising, or even social media advertising in general, are available to the Belgian consumer.

Today’s **legal ruleset** does provide certain core advertising provisions, such as the identification principle and prohibitions on misleading and aggressive advertising. These legal provisions are necessary to provide a strong legal basis. However, the identification principle does not seem to work as hoped, therefore the legal framework does need some adaptations to be better equipped to protect children against vlogger advertising. The legislator should take a step back from putting (almost) all eggs in the basket of empowerment and advertising literacy of children and reallocate responsibility to advertisers and platforms. For important steps already taken in this regard see Part IV.

The legal framework, in se, does not suffice due to its abstract nature. I do believe this role should be kept by the regulatory framework: setting the major principles underlying the general regulatory framework on advertising. Additionally, **self-regulation** is necessary to fill in these abstract provisions by providing practical guidance. The more flexible approach typical of self-regulation, is necessary in light of quickly-evolving technology. Within the context of this thesis, the self-regulatory framework in Belgium is neither on point yet, as often self-regulatory provisions remain abstract as well. A desirable next step, therefore, is the drafting of tailor-made self-regulatory provisions on integrated advertising by vloggers. In

Belgium, we are possibly awaiting our own ‘oreo judgement’ as a signal to trigger regulatory initiatives and a change of attitude in the minds of the advertising industry, vloggers and consumers.

Considering the omnipresence of questionable advertising practices on YouTube, it is remarkable that **cases or decisions** on vlogger advertising are still non-existent in Belgium. One reason could be a shortage of resources for regulators to instigate their own investigations. Another reason could be the dispersed nature of provisions and competences amongst various bodies. The confusion that results from the foregoing could discourage consumers to take action. **Awareness raising** could positively affect the lack of cases. By pointing out current issues in vlogger advertising, as well as the existence and functioning of the competent enforcement authorities, to citizens, they will likely be more comfortable to file complaints if necessary. This in turn puts pressure on vloggers and advertisers. By increasing awareness on the legislative and self-regulatory rulesets as well as by clarifying their respective scopes of applicability, they will gain in effectiveness.

Children watching foreign vloggers could lead to situations of **cross-border infringements**. With enforcement being a national responsibility, this brings about practical issues. The existence of platforms for cooperation, coordination and discussion on both legal and self-regulatory level is promising. The potential of these platforms should be taken full advantage of in the future.

Conclusively, the existing regulatory framework does not suffice to arm children against vlogger advertising. However, to end on a positive note, change seems to be on the horizon as the FPS Economy is working on guidelines for social media advertising, including specific attention to vloggers. The practical consequences of these guidelines remain to be seen.

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