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# Digital Market, Bloggers, and Trendsetters: The New World of Advertising Law

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Received: 23 July 2019; Accepted: 25 August 2019; Published: 3 September 2019



**Abstract:** The importance of digital marketing is continuously growing, at least in the present economic phase. Within this sector, fashion bloggers play a crucial role, which reflects the relevance of fashion on an economic and a social level, as already highlighted in Georg Simmel’s pioneering study. New communication opportunities made available by the development of digital technologies shed more light on this phenomenon. One of the main concerns is the need to guarantee the transparency and the correctness of commercial communications shared through social media in order to ensure the consumers’ full freedom of choice. However, can traditional rules on advertising be considered sufficient, or is there a need for ad hoc rules? Can consumers’ protection be reconciled with other values such as the creative freedom of advertisers and, more generally, the freedom of expression? Thus far, interventions by self-regulatory bodies and independent authorities, both at national and international levels, have proven to be effective, even if more “classic” regulatory interventions may occur in the future. After a short reference to the literature concerning fashion as a social phenomenon, the contribution focuses on the main solutions adopted in Italy and in Europe.

**Keywords:** fashion; influencer marketing; online advertising; self-regulation

## 1. Introduction

The development of digital technologies has not only opened new opportunities on an economic level but has also determined the appearance of new rights and the consequent need to protect them.

As regards marketing techniques, the advent of the Internet has introduced a veritable revolution, prompting companies to rethink their methods of interaction with suppliers and customers and build more solid and lasting relationships with them<sup>1</sup>. One of the main features of the so-called digital marketing consists precisely of exploiting Internet infrastructures and technologies in order to create an interactive relationship with consumers, understand their needs and desires, and succeed in promoting products or services to satisfy them.

This worldwide phenomenon has also imposed a “new dimension” in the process of implementation of the single market within the European Union. In 2015, the European Commission launched a strategy for the Digital Single Market, identifying a series of political priorities to allow people, consumers, and businesses to benefit fully from the opportunities offered by the Internet and digital technologies and to bring down regulatory and administrative barriers that could prevent the achievement of these purposes<sup>2</sup>.

In this new context where innovation and changes follow each other rapidly, traditional regulatory tools often prove to be ineffective or even insufficient to guarantee adequate protection of the different

<sup>1</sup> See the definition of digital marketing in [www.glossariomarketing.it](http://www.glossariomarketing.it).

<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final.

interests at stake. An example is represented by the influencer marketing, a phenomenon that has spread from the fashion market to other economic sectors, acquiring a *latu sensu* social relief, and has represented a testing ground for the effectiveness of the rules governing commercial communication and advertising in general. It is therefore interesting to describe its main features and analyze the solutions adopted in some countries and at a supranational level—mainly in terms of self-regulation—with the purpose to balance consumers' protection and the legitimate interests of advertisers as well as creative and expressive freedoms of the various actors involved in this particular communication technique.

## 2. The Social Relevance of the Fashion World Meeting New Technologies: A Brief Overview

The fashion industry in particular has proven able to exploit the emerging opportunities introduced by digital marketing, increasing online sales services, and transforming its communication strategies (Foglio 2017; Dara 2017). Its versatility may be seen as one of the reasons behind its importance as a social phenomenon. After all, fashion has often represented a privileged field of interdisciplinary analysis and has been investigated under philosophical, aesthetic, cultural, and economic perspectives by studies that have also explored its different languages as well as its multiple meanings on the social level (Barthes; Baldini 2008). Within the wide literature devoted to it, an almost obligatory reference point is the essay written by Georg Simmel at the beginning of the twentieth century<sup>3</sup>.

According to the German sociologist and philosopher, fashion reflects two typical impulses of human nature: the tendency to imitate a given model and the need for differentiation. On the one hand, imposing a fashion makes it possible to affirm an individual's personality or charm, to distinguish her/him from the mass, and even to bring about societal change once that fashion proves to be successful. On the other hand, following or being seduced by a fashion can be considered as the expression of human beings' natural tendency to feel as part of a group (be this the group of belonging or of reference). In both cases, fashion would satisfy the need for social support; being "fashionable" means, in most cases, receiving approval from people placed at the same social level or doing the same things, as well as attracting the envy from those who would like to be part of that group so as to improve or advance their social status.

Simmel also conceived of fashion an expression of "class distinction", spreading and reproducing itself through the society as a top-down flow. Upper classes impose new fashions and styles and abandon or change them when these begin to be widely followed or "absorbed" by the less privileged classes. The author described this process as a sort of social pursuit game that governs the continuous fashion changes, which in turn are influenced, and even encouraged, by the advance of monetary economy. As soon as an object becomes trendy, the demand for cheaper products of the same type expands. However, when it becomes cheap and more accessible, it immediately loses its distinctive force. Consequently, upper classes look for a new trend to impose, and producers create new "objects of desire" to the purpose of increasing consumption, and the process starts again.

There is no doubt that the main value of Simmel's analysis—and the reason for its permanent interest—consists in having highlighted the ambivalent nature of fashion, which is simultaneously a "thing of imitation" and an instrument of differentiation at the social level (Godart and Aspers 2013; Maldini and Manz 2017). Alongside with the transformations of the social structure, fashion has gradually evolved from a class phenomenon to a mass phenomenon that interacts with the most diverse sectors of modern societies. It interprets and often anticipates their changes and interconnects with other "mass-media systems" that have promoted its spreading, not only in such "classic" tools as magazines, photography, or cinema, but also in marketing and advertising (Cafelato 2007). Equally acknowledged is the impact of fashion on modern national (and international) economies, another theme anticipated

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<sup>3</sup> References come from the translation edited by Anna Maria Curcio for the Italian publishing house Mimesis in 2015 (referred as Simmel 2015).

by Simmel and constantly confirmed by a plethora of studies devoted to the expansion of this sector as well as to the growth of its turnover, not only with reference to the clothing sector<sup>4</sup>.

### 2.1. Fashion and Social Media: The Influencer Marketing Phenomenon

Simmel's essay also emphasized two fundamental prerequisites for the very existence of fashion—it must be followed and, for this to happen, it must be communicated. Undeniably, the appearance of the World Wide Web together with the expansion of digital technologies and the flowering of social media had a decisive impact on these aspects. As already noted, companies, and fashion firms in particular, have redefined their way of interacting with suppliers and found new strategies and tools to obtain customers' loyalty, actually clearing any distance with them. For this purpose, the so-called "dynamic" or "interactive" web together with social media proved to be very effective. They have increased the possibility of communicating and sharing opinions, not only through the "classic" personal computers, but also through a variety of devices (tablets and smartphones, first of all) that can be used in each moment of daily life and even in the absence of a material Internet connection. Moreover, individuals are no longer simply "passive" users; now, they can directly create stories and contents, channel them into the Web, and share them through videos, blogs, and posts. Of course, these new kinds of interaction need to be part-and-parcel of a group or a community. They gradually lead to the come-up of new communication's players, identified with some current use terms such as "bloggers", "vloggers", etc., referring to individuals who are very active on social channels and enjoy a broad (and in some cases, extremely wide) consensus.

These can be sportsmen, show business celebrities, or even ordinary people who prove to have a particular aptitude to capture, on certain topics such as travels, food, or fashion, the attention of groups of people for whom they become points of reference or even real sources of information.

The chance for anyone—boosted by digital technologies and tools—to be in direct and potentially permanent interaction with a favorite artist or celebrity has amplified the success of these communication media. It has also given rise to a new kind of profession—that of influencers or trendsetters, i.e., people who show a specific skill to establish a trustful relationship with their followers and present their opinions in a sound or even weighty way. By virtue of their position or their skills, they succeed in imposing themselves as "authorities" in a certain field or in being perceived as credible enough to affect consumers' decisions and purchasing behaviors<sup>5</sup>.

Given the high profitability of digital advertising<sup>6</sup>, it is easy to understand how such actors quickly attracted the attention of companies and brand owners, either already famous or emerging, which have gradually begun to engage them for their commercial strategies. Their messages, posts, or other kinds of content circulate on social media profiles, third-party sites, platforms, or even on independent sites.

These two elements feed on each other. Once it has appraised a celebrity's connection with the business area involved, a company engages her/him and asks them to review a product through its own social channels. Considering how quickly messages and opinions spread out and circulate through the new media, that company is able to increase the visibility of its products exponentially and to rely on the popularity enjoyed by the personality, reaching the target audience in a faster and more effective way. At the same time, the influencer takes advantage of the companies or the brand's reputation and reliability, which in turn allows her/him to enhance her/his contacts and level of fame.

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<sup>4</sup> For a recent review concerning the vitality of the fashion sector, its importance for the economy, and the changes deriving from the emergence of the so-called "fast fashion", see, for example, the report by Ellen MacArthur Foundation, *A new textiles economy: Redesigning fashion's future*, (2017, <http://www.ellenmacarthurfoundation.org/publications>).

<sup>5</sup> <http://www.businessdictionary.com/definition/influencers.html>.

<sup>6</sup> According to the market research agency EMarketer, during 2019, investments for digital advertising will grow worldwide by over 17%, which means that, for the first time, the digital market will account for almost half of the advertising market (<https://www.emarketer.com/content/global-digital-ad-spending-2019>).

In any case, as is well known, influencer marketing has become a “powerful tool for advertising”<sup>7</sup>, with a greater impact force if compared to other forms of promotional communication. It does not come as a surprise that it seems to be an ever-expanding sector, whose importance is also confirmed by a growing number of studies, observations, and reports concerning the state of this phenomenon<sup>8</sup>. To give an example, according to a survey conducted by Talkwalker (one of the main platforms for analysis and evaluation of the social media world), from a sample of over 800 professionals operating in this sector at a global level, the great majority (69%) stated that influencer marketing is one of their main strategic priorities for 2019<sup>9</sup>.

## 2.2. Influencer Marketing, Product Placement, and Advertising: Need for New Rules?

The clear economic relevance of influencer marketing has posed the question of regulating this kind of activity in order to avoid possible distortive effects deriving from the mixture between promotional messages and editorial contents without the user being able to distinguish between one and the other.

This issue, which falls within the broader category of hidden and misleading advertising, has already been raised with reference to “editorial” advertising, in which messages for promotional purposes take the same graphic form and appearance as journalistic information. This practice then spread to radio, television, and audio-visual works, taking the form of “product placement”, an advertising technique used by companies that pay for their products to be featured within non-typical promoting spaces (such as movies or television programs) without this exposure being revealed patently as a commercial communication. The Internet has amplified this phenomenon to the utmost. Its benefits in terms of ease of access and speed of information’s flow have allowed companies to experiment with a new technique (the so-called “native advertising”) which, by exploiting the channels of social networks, makes it possible to creep in the interest of consumers, circumventing their possible distrust towards advertising (Ciani and Tavella 2017, pp. 487–88). Promotional messages take on the same aspect of the site that hosts them, which often makes it difficult or even impossible for the user/consumer to avoid them.

In this new context, influencers’ communication shows further features due to it taking place in online “environments”—mainly blogs—which do not belong specifically to the world of advertising. Blogs can be defined as a sort of online record of personal thoughts and opinions expressed by the authors and often contain different kinds of contents (video, photographs, or links to other websites) provided by the writers for other people to read and comment. Through this channel, bloggers build a real trust relationship with their followers, which can also take place on a daily basis with a very high degree of emotional involvement. The interplay of these two aspects can produce a lowering of users’ attention, preventing them from distinguishing between advertising content and free comments that, in fact, coexist within the same message and the same narrative structure.

The techniques are well known; the blogger is portrayed in a moment of her/his everyday life while, in a way that appears casual, a product appears in the image or the shot with the brand in plain view. Or, in the context of a “normal” conversation via social media, the blogger declares her/his approval for a product, a brand, or a service, generating an advertising effect that is not explicitly declared. In other words, she/he seems to act spontaneously or to express an objective and disinterested opinion, while in

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<sup>7</sup> As defined also by the Italian Antitrust Authority in a press release of December 2017 concerning transparent advertising on social media (<https://www.agcm.it/media/comunicati-stampa/2017/12>). The point will be examined later in more detail.

<sup>8</sup> To give an Italian example, in April 2019, the National Observatory on influencer marketing (ONIM) was established, a non-profit association aimed at informing and improving the use of influencer marketing by involving all the stakeholders interested: influencers, agencies, brands, software houses, etc. (<https://www.onim.it>).

<sup>9</sup> Talkwalker, *The Global State of influencer marketing in 2019*, <https://www.talkwalker.com/it>. The report also shows that the main objectives pursued through the influencer marketing are the brand visibility (65.8%) and the creation of lists of possible customers—the so-called leads (16.9%).

fact, she/he is paid (in cash or other kind of benefits) for her/his comments. Moreover, the impact of the message is particularly effective—often viral—given the already mentioned web features.

However, all this posits an evident problem of transparency. The user should be able to understand whether or not the communication he is assisting or participating in has a commercial purpose in order to consciously decide whether or not to follow the “suggestion” coming from the blogger without being passively exposed to the advertising conditioning. In the mentioned examples, the behavior of the blogger or the influencer is likely to fall into the category of hidden advertising.

“Audio-visual commercial communications shall be readily recognizable as such”<sup>10</sup>; this is the cardinal principle underlying the rules that govern advertising at both supranational and national levels<sup>11</sup>. However, even if nobody seems to question that online advertising must be subject to the same standards regulating traditional commercial communications<sup>12</sup>, the “new frontiers” opened by technological developments have raised interesting legal questions.

Firstly, it has been necessary to dispel the doubts raised about whether the existing rules governing advertising could fit the characteristics of digital advertising or whether it was necessary to develop specific rules in the field. In any case, rapid changes and developments make the digital world a phenomenon that is often hard for law to regulate or manage timely and effectively. The question seems to be linked to the doubts and the objections put forward by advertising operators against the idea of adding “new” rules. Many of them have expressed the fear that introducing new kinds of constraint could limit creativity and lower its innovative potential, subsequently jeopardizing the impact of the messages (Cramer 2016). Specifically regarding the influencer marketing, some also stated that followers would have no interest at all in knowing whether or not the celebrity is paid for comments. These doubts seem instrumentally connected to the false myth considering the Internet as a law-less area<sup>13</sup>.

Secondly, as already mentioned above, separating promotional contents and personal opinions within digital commercial communications can be quite a difficult exercise (Ruffolo 1996). Any limits placed on this type of communication should therefore be reconciled with the safeguards that guarantee the freedom of expression (in Italy, Article 21 of the Constitution).

Thirdly, it should be borne in mind that the interests at stake are different and have many nuances to consider. On the one hand, there is the “classic” goal of consumers’ protection. Even though they could be portrayed as completely naïve, they have the right to be informed about the advertising purpose of the message shared by the celebrities followed. This is not only in order to guarantee their freedom of choice but also to protect their privacy, taking into consideration the possibilities that the “likes” expressed are subject to profiling. The issue assumes an even greater relevance if

<sup>10</sup> See Article 9, 1 (a), of Directive 2010/13/EU, 10 March 2010, of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive); ELI: <http://data.europa.eu/eli/dir/2010/13/oj>. The article also specifies that “[s]urreptitious audio-visual commercial communication shall be prohibited”.

<sup>11</sup> As regards the Italian legal system, the principle of advertising transparency is laid down in Article 5 of the Legislative Decree 2 August 2007, n. 147, implementing Article 14 of the European Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (ELI: <http://data.europa.eu/eli/dir/2005/29/oj>), as well as in Article 22, 2, of the Consumer Code (Ciani and Tavella 2017, p. 497; D’Antonio and Tarantino 2011, p. 1).

<sup>12</sup> Within the EU legal order, this principle can be traced back to the abovementioned EU directive 2005/29/EC, which extended the concept of commercial advertising to the more general concept of commercial communication. During the annual meeting organized by the Italian Institute of Advertising Self-Regulation (IAP), focusing on rules, guidelines, and balances on the Web (Milan, 15 May 2017), Antonio Martusciello, Commissioner at the Italian Autorità per le Garanzie nelle comunicazioni (AGCOM), underlined that “even online (...) advertising must be clearly recognizable as such, in compliance with regulatory provisions” (<https://medium.com/@AGCOMunica/lintervento-del-commissario-agcom-martusciello-su-regole-orientamenti-ed-equilibri-in-internet-acec132448e1>).

<sup>13</sup> In Italy, the change of attitude on this subject can be traced back to the judgement made by the Tribunale di Milano (24 February–2 April 2010 n. 1972, IV Sez. Penale), which found guilty of privacy violation three Google managers with reference to a video uploaded on the famous search engine that portrayed a disabled child insulted and beaten by his schoolmates. See also the speech by AGCOM Commissioner Francesco Posteraro during a meeting on the responsible use of the network and the protection of rights, held in Rome, 19 October 2018 (<https://www.agcom.it/19-ottobre-2018-uso-responsabile-della-rete-e-tutela-dei-diritti>).

referring to young people and minors, who now spend most of their time on social media. Moreover, it appears that there are few users who claim to succeed in distinguishing a commercial message from the so-called “organic content”, i.e., the part of online communication that is not supported by paid ads<sup>14</sup>. On the other hand, the need to protect the brand or the company from the potential risks resulting from a possible association with a controversial testimonial or even with inappropriate content expressed by the celebrity engaged should also be a matter of concern<sup>15</sup>.

### 3. A Viable Solution: Soft Law and Self-Regulation Tools

In light of the abovementioned factors, which are apparently hindering regulatory actions perceived as too rigid, a solution may come from soft law tools, an expression that refers to a variety of instruments such as guidelines, codes of conduct, private standards, etc. These are informal regulation means explored and used in an increasing number of sectors to harmonize regulatory approaches both at national and supranational levels (Senden 2004) in order to ultimately manage problems and challenges posed by emerging technologies (Marchant and Allenby 2017). Soft law procedures look less time-and-resource-consuming as well as more effective in guaranteeing legitimacy and transparency vis-à-vis traditional regulatory processes. Besides, because of their more proactive than reactive nature (Muela-Molina and Perelló-Oliver 2014), they appear to be particularly suited to the communicative dimension of advertising.

For this reason, it is very interesting to examine some of the actions taken by independent administrative authorities or by self-regulatory agencies and bodies, both in Europe and overseas, to counter hidden advertising on social media.

#### 3.1. Some Examples in the UK and USA

Between April and August 2016, the UK Competition and Markets Authority (CMA) carried out a series of investigations aimed at discovering and sanctioning unrevealed advertising in articles and online blogs. As an outcome of one of these initiatives, CMA sent warning letters to 43 celebrities—and to 15 businesses whose names were not revealed—involved in a commercial campaign organized by the marketing company Social Chain promoting films, games, and apps without revealing to users that they had been paid for the content published by them. The Authority reminded the addressees that forms of advertising not declared as such were contrary to consumer protection laws and asked that they include a clearly visible label for consumers, for example, “#ad” or “#sponsored”, in social media communications. Social Chain then agreed not to use its social media accounts to organize new unlabeled advertising campaigns in the future<sup>16</sup>.

The US Federal Trade Commission (FTC) moved along the same lines. In March 2016, Lord & Taylor, a US chain of luxury department stores, after having been investigated by the FTC, acknowledged that it had paid 50 influencers to post photo shoots on Instagram while wearing garments from its Design Lab clothing line<sup>17</sup>. In July of the same year, the FTC reached an agreement with Warner Bros. Home Entertainment after ascertaining that it had engaged some famous YouTubers to get positive reviews on a video game<sup>18</sup>.

<sup>14</sup> As it emerges from the research “Italians and social media” (ed. 2018) carried out by the Italian platform Blogmeter, one third of Facebook and Instagram users stated that they are not able to understand when they are looking at an advertising message (<https://www.blogmeter.it/it/reports/italiani-e-social-media-seconda-edizione>).

<sup>15</sup> For some examples of “transparent” advertising campaigns in which the choice of the hired testimonial turned out to be a double-edged sword, reference can be made to [www.socialacademy.com/academies/upa-academy/posts/a-ciascuno-il-suo-il-testimonial-in-pubblicita](http://www.socialacademy.com/academies/upa-academy/posts/a-ciascuno-il-suo-il-testimonial-in-pubblicita).

<sup>16</sup> <https://www.decisionmarketing.co.uk/news/cma-fingers-social-media-agency-over-hidden-ads>.

<sup>17</sup> FTC Press release, 15 March 2016, <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

<sup>18</sup> FTC Press release, 11 July 2016, <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

In both the cases mentioned, the FTC acted on the ground of “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (hereafter the “Endorsement Guidelines”), adopted since the 1970s. This is a typical soft law tool that is not legally binding but is compelling enough to prompt its addressees to adopt “virtuous” behaviors and comply with advertising laws. Their effectiveness relies on the enforcement power conferred to the FTC (Ciani and Tavella 2017, pp. 503–6). Under the Endorsement Guidelines, the existence of a “material connection” between endorser and advertiser must be disclosed unless it emerges unequivocally from the context of the advertising communication. The advertiser is free to decide how to proceed with such disclosure, which be in any case clearly visible and understandable by users. Following some complaints brought about by consumers and their associations, the FTC monitored the activities of several celebrities on social media. In April 2017, it sent moral suasion letters to over 90 influencers and advertisers with the purpose of reminding them of their duty to reveal the existence of a commercial link with the brands endorsed<sup>19</sup> and inviting them to adapt their disclosures tools to the characteristics of the media used so as to allow consumers to get their meaning unequivocally.

In September 2017, the FTC updated its Endorsement Guides, adding some practical suggestions about the use of endorsement in social media, emphasizing some points that companies should respect. In particular, they should:

- (a) Clearly reveal whether they have a financial or family relationship with a brand; in particular, they cannot assume that followers know all about their business connections;
- (b) Not assume that using disclosure tools provided by social media platforms is adequate enough that they could not be missed or misunderstood by users;
- (c) Avoid using ambiguous labels such as “#thanks”, “#collab”, “#sp”, “#spon”, or “#ambassador”;
- (d) Not rely on disclosure placed in easy-to-miss locations or where people would see it only after a “click more” link.

### 3.2. Advertising Self-Regulation at European Level: The Coordination Carried out by EASA

In Europe, a point of reference is the “Best Practice Recommendation on influencer marketing”<sup>20</sup>, adopted in December 2008 by the European Advertising Standard Alliance (EASA), the association that brings together the self-regulatory organizations (SRO) of various European countries. Even though, in 2008, EASA had already adopted some guidelines concerning digital marketing in general<sup>21</sup>, different reasons prompted it to give a special consideration to this advertising practice and to add further guidance. In particular, whilst recognizing the growing importance of this marketing technique, EASA also acknowledged the peculiar role played by the influencers themselves, seen as independent third parties that cannot be considered as “part of the self-regulatory system in its present form” (page 9). It also stressed that the content this creates is viewed, followed, and shared by an ever-increasing number of young people and minors, for whom the time spent on social media is often a wide part of their everyday life (page 10).

This document seeks to check and coordinate the practices adopted by the different self-regulatory bodies as well as to evaluate the most effective methods to face the challenges posed by this spreading phenomenon. The coordination strategy consists of pointing to some key elements considered as crucial in order to improve the correctness of advertising and to develop uniform and coherent behavior guidelines related to influencer marketing.

EASA leaves to national SROs the possibility to interpret its recommendations in a flexible way, following a more elastic or more stringent approach according to the differences and the peculiarities

<sup>19</sup> FTC Press release, 19 April 2017, <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

<sup>20</sup> <https://www.easa-alliance.org>.

<sup>21</sup> <https://www.easa-alliance.org/issues/digital-marketing>.

of their own national systems (page 6). In order to determine if the activities performed by influencers can be considered as commercial communications, it stressed that two main elements must be taken into consideration:

- (a) Firstly, the level of “editorial control” by the advertiser on the message posted by the influencer (page 10)—this concept should be broadly understood to include a wide range of conducts, from bland forms of interference such as simple suggestions concerning the message structure or the tones used by the influencer to more straightforward interventions relating, for example, to scripts or dialogues.
- (b) Secondly, the compensation granted to the influencer—this may take different forms, ranging from a cash remuneration based on contractual agreements to other kinds of advantages such as gifts, discounts or samples of the products, or benefits committed to the celebrity.

The principles inspiring EASA Best Practices on the influencer marketing correspond to the “classic” standards governing the commercial communication in general and are consistent with the guidelines defined by the International Chamber of Commerce Code<sup>22</sup>.

Recognizability is the fundamental rule considered the cornerstone for honest and responsible advertising. There is full congruity here with the already mentioned general standards applied to traditional media, according to which commercial communications must be recognizable as such, whatever the means used. Therefore, an influencer’s communication combining a promotional message with informative or editorial content should be planned and presented in such a way that the widespread audience can immediately identify it as sponsored content.

Disclosure can take place in different ways, provided it is easily visible and understandable. National SROs are invited to provide practical examples of acceptable formats and, to that purpose, EASA recommends taking into account some features, for example: the label should be placed in an easy-to-read position within the post or the screen; it should last long enough to draw the attention of the users; special consideration should be devoted to the wording used, avoiding expressions that are likely to confuse the consumers or that in any case may not allow them to correctly identify the nature of the relationship between influencers and advertisers<sup>23</sup>.

Once again, SROs are free to choose whether or not to set out a list of general criteria with the purpose of adapting to the rapid changes distinguishing the digital world as well as new tools and techniques made available by the web platforms.

EASA also stresses that the rules concerning correct advertising should be deemed as applicable to all kinds of commercial communication and consequently to all those who participate in “the “digital marketing eco-system”. Therefore, advertising businesses and operators as well as influencers are attracted to the orbit of stakeholders required “to adhere to responsible marketing practices” and to comply with the self-regulation codes (page 13).

Interestingly, EASA Best Practices are consistent with the wishes expressed by the institutions of the European Union—a point already mentioned and which is discussed more extensively in the last paragraph—which, within their policy aimed at implementing the Digital Single Market, encourage the Member States to acknowledge the role that can be played by effective self-regulation mechanisms “as a complement to the legislative, judicial and administrative mechanisms in place”<sup>24</sup>.

Given the consequences resulting from the impact of new digital technologies on national economies as well as on citizens’ and consumers’ rights, self-regulation mechanisms show a number

<sup>22</sup> Advertising and Marketing Communication Practice—Consolidated ICC Code (2011), <https://iccwbo.org>.

<sup>23</sup> These directives are analogous to those defined by the FTC Endorsement Guides (Ciani and Tavella 2017, pp. 504–6).

<sup>24</sup> See, for example, the remarks expressed in the 14th recital of the new European Directive on audio-visual media services, which are also examined later on; Directive (EU) 2018/1808 of the European Parliament and of the Council, of 14 November 2018, 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 audio-visual media services (Audio-visual Media Services Directive) in view of changing market realities (ELI: <http://data.europa.eu/eli/dir/2018/1808/oj>).



of advantages if compared to traditional legal instruments. What matters is the higher degree of involvement of the interested parties, the greater tendency to adhere to shared rules immediately, as well as their flexibility and speed of adaptation to changes. According to some scholars, this is the reason why, while facing the need to regulate online behavioral advertising, the European Commission did not focus on self-regulation promoted by the Information and Technology industry but preferred to encourage the mediation work realized by the EASA and then implemented by national self-regulatory bodies and industry actors (Senden 2004). It should be emphasized that self-regulation and co-regulation practices are currently mainstreamed in the European Commission strategy for the implementation of the Digital Single Market<sup>25</sup>.

### 3.3. The Italian Experience between Self-Regulation and National Regulatory Authorities

Many countries have already adopted specific guidelines regarding influencer marketing<sup>26</sup>. Among them, the initiatives taken by the Italian Istituto dell'Autodisciplina Pubblicitaria (IAP) deserve special interest. IAP is a private association that involves companies, publishers, media, and industry associations in monitoring the most diverse forms of advertising and commits them to comply with both the rules of a "Codice di Autodisciplina della Comunicazione Commerciale" (Code of Marketing Communication Self-Regulation; hereafter the "Code") and with the decisions of the Institute's decision-making bodies, i.e., the Jury and the Review Board<sup>27</sup>. The Code, adopted in 1966, has been updated several times over the years, which has enabled its adaptation to the continuous changes in the advertising world, especially those resulting from the developments of digital technologies.

In 2016, IAP adopted a "Digital Chart", a tool aimed at providing a first answer to the needs of transparency in online advertising. This document identifies the most common forms of digital commercial communications, from endorsement to native advertising, from social networks to content sharing sites, and advertisements included in apps or interactive electronic games. For each type, the main characteristics are summarized, and practical examples are provided concerning the criteria that operators should follow to make them consistent with Article 7 of the Code ("Identification"), according to which "[m]arketing communication must be clearly distinguishable as such".

In particular regard to the forms of endorsement of a product or a brand expressed by influencers within the messages shared through their social media profiles, the Digital Chart states that the underlying marketing relationship with the advertiser and the commercial purpose of the contents must be made evident to the users with appropriate means. Alternative solutions are provided depending on the medium (post or video) used.

Concerning messages posted online, some identification marks or labels are suggested, such as "Pubblicità/Advertising", "Promosso da ... /Promoted by", "Sponsorizzato da ... /Sponsored by ... ", or "in collaborazione con ... /In partnership with ... ", together with the indication of the brand. These labels should appear in the initial part of the post or within the first three hashtags (#). In the case of vlogs, appropriate written or verbal disclosures, such as "brand presents ... " or "in partnership with ... brand", should be inserted in the opening or the closing scenes or shots containing the promotional content. Where there is no marketing agreement between influencer and advertiser but only an occasional relationship consisting of the simple sending by the latter of products for free or for a modest value, the abovementioned disclosures may be replaced by a clearly visible or clearly expressed statement (such as "product sent by ... ").

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<sup>25</sup> <https://ec.europa.eu/digital-single-market/en/policies>.

<sup>26</sup> As indicated in Annex I to the EASA BPs, Belgium, France, Germany, Ireland, Sweden, the Netherlands, and the United Kingdom have already adopted specific guidelines, while in Austria, Romania, and Spain, the process is currently underway.

<sup>27</sup> The IAP Code is binding for agencies, consultants, media, sales houses, and all of those who accept it by entering into an agreement or by signing a contract for advertising. The adherents include an acceptance clause in their contracts or those of their associates asking users to follow the Code and self-regulatory policies (<https://www.iap.it/about/mission/?lang=en>).

Although formally presented as a list of suggested practices, in the early stages of its life, the Digital Chart has drawn its prescriptive force indirectly from Article 7 of the Code, which is immediately binding for all parties adhering to the advertising self-regulatory system<sup>28</sup>. From the beginning, therefore, it could be qualified as something more than a “simple” ethic code; indeed, it is a true instrument of soft law.

During the first two years after its adoption, the Digital Chart was applied with reference to 97 advertising messages examined by the Jury or the Review Board. Only 30 were considered consistent with the Code’s rules, while the others were blocked because they were found to be in conflict with the principle of recognizability or were modified upon request by the Review Board. Almost all of the cases (92%) fell into the influencer marketing category, while the product sector most “involved” was that of clothing and accessories (24.7%)<sup>29</sup>.

The IAP’s Jury clarified some important aspects regarding online commercial communications and the responsibility of advertisers in the first case in which it applied the Digital Chart<sup>30</sup>.

In May 2018, the Review Board ordered Peugeot Automobili Italia SpA to stop the distribution of commercial messages relating to the brand “Peugeot” shared by a celebrity on his Instagram account through the “Instagram Stories” tool. These “stories” consisted of some shoots and short videos portraying the artist while visiting the car manufacturer’s stand during the international tennis tournament held in Rome (and officially sponsored by Peugeot).

While appearing as the simple report of a private moment of the celebrity’s life, the messages actually had a patent commercial purpose, considering their actual contents as well as some of their formal features; for example, the brand was always clearly visible and framed, and the product’s qualities were described and emphasized by the artist himself. However, according to the Review Board, the advertising intent was not immediately recognizable by the users, because none of the appropriate measures suggested by the Digital Chart had been adopted.

Peugeot declared that the production and the publication of the “Stories” were due to an occasional and autonomous initiative assumed by the artist in breach of the sponsorship agreement concluded with him under which, *inter alia*, he should abide by the self-regulatory rules when publishing commercial contents.

The Jury stated that the disputed messages fell precisely into the scope of the Self-Regulation Code. It stated that, in such cases, the advertising nature of a communication can be ascertained not only by referring to a sponsorship agreement between the artist and the company concerned (which, in fact, was undisputed in the case in question) but also by evaluating the content of the communication, irrespective of the subjective position and the intentions of its author.

The Jury then added that the existence of an upstream sponsor relationship did not allow the artist’s behavior to be considered as simply “occasional” and, at the same time, it was enough to realize the material connection necessary to ascribe to the advertiser the communications realized by the artist<sup>31</sup>. It also underlined that Peugeot had not provided for sanctions or other deterrent mechanisms in its contract to prevent the breach of self-regulatory rules, a behavior defined “unwise” by the Jury, particularly when adopted by advertisers who, in order to promote their brand, have recourse to personal accounts of celebrities, bloggers, vloggers, and influencers acting on social media. With this respect, it pointed out that communication diffused through these new media is more “opaque” because it is horizontal peer-to-peer, which may cause a higher risk of confusion between advertising,

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<sup>28</sup> Proceeding n. 45/2018, 26 June 2018, *Comitato di Controllo v. Peugeot Automobili Italia S.p.a. and Newtopia S.r.l.*; <https://archivio.iap.it/>. The Jury added that the Article 7 is also directly applicable to those “who have agreed to observe the Code in relation to single commercial communications”.

<sup>29</sup> See the IAP Annual Report 2018 IAP, [https://www.iap.it/incontro\\_annuale\\_iap19/](https://www.iap.it/incontro_annuale_iap19/). Data provided by courtesy of IAP Secretariat.

<sup>30</sup> Proceeding n. 45/2018, see note n. 28 above.

<sup>31</sup> The Jury also referred to the definitions contained in the ICC Code on advertising and marketing communication and in the EASA Best Practice Recommendation on digital marketing communications, as well as to its consolidated case law.

information, and non-commercial content compared to traditional vertical media or mass media. Regarding the case examined, the very structure of the “Stories” made it highly probable that the average consumer could really believe that he was looking “only” at a private tale of a celebrity.

It must be remarked that a rapidly evolving commercial sector such as influencer marketing has proven to fully understand the relevance of the self-regulatory system and to seize the opportunities offered by it in order to ensure the transparency of communication and to better protect the brands’ and the companies’ reputations. Indeed, between the end of 2018 and the beginning of 2019, some of the main agencies and influencers joined the IAP<sup>32</sup> (among the first was famous fashion blogger Chiara Ferragni through her company, TBS Crew). This provides further evidence of how it is important for all operators and users involved to dispose of precise and structured rules and to find an interlocutor that helps to abide by the rules governing, in particular, the influencer marketing’s world.

Recently, the Digital Chart underwent an important legal development, which was supported by the companies. As of 29 April 2019, it includes a specific Regulation on the Recognizability of Marketing Communication Distributed over the Internet<sup>33</sup>, which explicitly refers to Article 7 of the IAP Code, suitably rephrased<sup>34</sup>. As IAP itself underlined in presenting the initiative, this step fully realizes the proactive role that self-regulation systems should be able to play, as was hoped for in the numerous interventions of the European institutions dealing with this issue. In this way, the Digital Chart has become an integral part of the Code and has acquired a direct, binding force for the members of the self-regulatory system and from a formal point of view.

In Italy, the Digital Chart played a “forerunner” role to further initiatives aimed at managing the influencer marketing phenomenon. In July 2017, the Italian Authority for Competition and the Market (AGCM)<sup>35</sup>, at the end of an investigation concerning a series of posts and content shared via Instagram, sent moral suasion letters to seven influencers and 11 well-known brands’ owners, warning them for having realized non-transparent promotional messages. After recalling the general principle according to which advertising must be clearly recognizable and perceivable as such by consumers, the Authority invited the addressees to comply with the requirements of the Italian Consumer Code, adopted since 2005 and containing the rules relating to consumer protection. It emphasized that the prohibition of hidden advertising has a general scope, and it is therefore applicable to communications shared by influencers via social channels. It therefore asked the recipients to make the promotional purpose of their messages and contents clearly recognizable, by inserting specific warnings or labels such as “#advertising ...”, “#sponsored by ...”, “#paid advertisement ...”, or “#product provided by ...” together with the indication of the brand.

In other words, AGCM actually referred to the same behavior’s guidelines already expressed by the Digital Chart, indirectly validating IAP’s initiative. The Italian Antitrust Authority has subsequently continued to monitor influencers’ activities and, in August 2018, it took a second moral suasion initiative, this time extended also to the so-called “micro-influencers” who have a more limited number of followers (between 1000 and 100,000) but nonetheless have significant promotional importance. Significantly, in this new intervention, AGCM highlighted that the simple positioning of a tag or a label referring to the site of the brand’s owner or to the celebrity’s social profile may not be sufficient to make evident the promotional aim of the communication to all consumers when further elements are missing to make this character clearly recognizable.

Both these initiatives were judged “largely satisfactory” by AGCM itself, which required influencers and companies to not only commit publicly but also to effectively adopt more transparent behaviors

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<sup>32</sup> <https://www.iap.it/conoscere-iap/associati>.

<sup>33</sup> <https://www.iap.it/codice-e-altre-fonti/regolamenti-autodisciplinari/digital-chart>.

<sup>34</sup> Article 7 of the IAP Code was integrated with a new paragraph, which states: “As regards certain forms of commercial communication disseminated through the Internet, the main suitable measures are indicated in the Digital Chart Regulations”.

<sup>35</sup> As is known, the AGCM is an independent administrative authority established by law of 10 October 1990, n. 287. It is aimed, inter alia, at protecting consumers against all unfair commercial practices put in place by companies, including misleading advertising spread out by any means (<https://www.agcm.it/competenze>).

towards consumers by revealing the brand with which they have established contractual or even occasional relationships. The Authority also emphasized that social network platforms have to provide specific tools in order to increase the disclosures of sponsored content. For example, in June 2017, Instagram, which is considered the platform preferred by influencers for their marketing operations<sup>36</sup>, announced that it had included in its posts and stories the label “Paid Partnership with” to highlight the commercial relationships existing between celebrities and companies and acknowledge that “a healthy community should be open and consistent about paid partnerships”<sup>37</sup>.

The positive reaction by the influencer marketing world to the guidelines edited by self-regulatory bodies has been confirmed by several investigations and surveys.

For example, Buzzoole, an Italian technological services provider, recently published a white paper on *Transparency in Influencer marketing*<sup>38</sup>. This research, focused on the Italian market, analyzed the number of transparency hashtags used during 2018. Data show that posts containing labels such as those suggested in the Digital Chart have increased by 235% compared to the previous year. Moreover, the market sector that made the most use of transparent posts was the fashion sector (clothing and footwear), which recorded the greatest number of interactions in terms of comments, likes, and shares.

On 18 June 2018, IAP and AGCM signed a cooperation agreement aimed at ensuring better consumer protection through more effective control on commercial communication<sup>39</sup>. This agreement falls clearly among the policies aimed at encouraging the forms of self-regulation, consistent with the EU recommendations, and provides for coordination between the two Authorities within their respective competences on regulatory, technical, and economic levels. IAP and AGCM will therefore carry out research and guidance activities aimed at identifying the different forms of commercial communications as well as the related obligations in order to guarantee the fairness and the transparency of advertising.

This cooperation agreement seems to be a first step towards the creation of a real “system” of integrated initiatives aimed at managing and regulating a slippery phenomenon such as that of hidden advertising, falling in line with the hopes expressed by the current IAP President, Mario Barbuto<sup>40</sup>. This could also allow for a deeper coordination between preventive protection measures (such as the interruption of harmful advertising practices or the removal of offending message) and the imposition of fines on the subjects found guilty.

#### 4. Conclusions: Can Self-Regulation Alone Be Enough? The Impact of the New European Directive on Audiovisual Services

Despite its positive effects, as shown by the Italian experience, one cannot think that self-regulation alone may suffice to regulate a phenomenon as elusive as online advertising. The main problem coincides with the doubts raised about the actual capacity of the self-regulatory tools to boost virtuous attitudes among companies over time and convince them to conform to the commitments undertaken on a “voluntary” basis.

This is perhaps one of the main reasons why, despite the limits already highlighted, “stronger” statutory interventions are invoked to avoid leaving the implementation of these commitments solely to the good will of the interested parties. Preventive measures are recommendable, for example, by requiring companies to communicate to national authorities the commitments existing with the celebrities engaged or to include specific clauses in their contracts with the testimonials binding them to respect the rules of transparency. Downstream, the most mentioned approach concerns the accountability of online platform managers and their involvement in the adoption of effective tools to guarantee the transparency of commercial communications (Ciani and Tavella 2017, p. 517).

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<sup>36</sup> As confirmed, for example, by [www.brand-news.it](http://www.brand-news.it).

<sup>37</sup> <https://instagram-press.com/blog/2017/06/14/bringing-more-transparency-to-commercial-relationships-on-instagram>.

<sup>38</sup> <https://buzzoole.com/resources/transparency-influencer-marketing>.

<sup>39</sup> [https://www.iap.it/2018/06/accordo\\_quadroagcom\\_iap](https://www.iap.it/2018/06/accordo_quadroagcom_iap).

<sup>40</sup> <https://www.engage.it/media/web-marketing-digital-chart-iap>.

With this respect, a possible first answer seems to be provided by new Audiovisual Media Services Directive (AVMSD), which was adopted in late 2018<sup>41</sup>.

As is known, a few decades ago, the European Union developed a prescriptive regime for the audio-visual media services. After the first directive concerning the exercise of television activities (the so-called “Television without Frontiers Directive”, 89/552/EEC of 3 October 1989), the regulatory framework had to be adapted to the developments deriving from technological innovations and the consequent changes in consumers’ and users’ habits. The Television without Frontiers Directive was then repealed in 2010<sup>42</sup>. With the 2018 revision, the AVMSD Directive pays special attention to commercial communication, trying to preserve the competitiveness of European industries and to guarantee consumer protection while simultaneously improving guarantees for vulnerable subjects such as minors. Its purpose consists also of increasing transparency, legal certainty, and the possibility to settle disputes more easily.

One of the fundamental principles introduced is that all authors of audio-visual content must be treated according to the same rules. The Directive thus provides uniform rules for all the subjects involved in audio-visual communications at any level and develops principles applicable to relationships between online platforms and companies. Those principles should therefore be considered applicable to other players of commercial communication, such as influencers or bloggers, when they promote brands or products on the basis of sponsorship agreements.

This seems to be further confirmed by the fact that the new AVMSD Directive explicitly acknowledges and supports the role of self-regulation systems. As provided for under Article 4 *bis*, “Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated” by the Directive itself. Moreover, some of the fundamental guidelines identified through co- and self-regulation experiences and directly involving the media service providers are, in fact, codified. For example, pursuant to Article 9 of the new AVMSD Directive, Member States shall ensure that audio-visual contents provided by those subjects under their jurisdiction comply with requirements such as the immediate recognizability of commercial communications as such, the prohibition of surreptitious advertising and of subliminal techniques, the respect for human dignity, and the ban of discriminatory messages as well as contents encouraging behaviors prejudicial to health or safety.

Finally, under Article 28 *ter* of the AVMSD Directive, Member States should ensure that media service providers subjected to their jurisdiction adopt and apply proportionate and appropriate measures in order to guarantee the consumers’ protection in several respects. These measures should be envisaged by considering the nature of shared contents, of the harm that may be caused, as well as “the characteristics of the category of persons to be protected” and “the rights and legitimate interests at stake”. Under paragraph 3, (c) of the same article, media service providers should adopt “a functionality for users who upload user-generated videos to declare whether such videos contain audio-visual commercial communications as far as they know or can be reasonably expected to know”.

As is known, Member States have a certain degree of leeway regarding the legal tools and the procedures to implement European directives within the time limit laid down by the Institutions. Therefore, it will take time to verify whether or not they will be able to coordinate their actions effectively, avoiding the risk of elaborating fragmented disciplines and the recourse to a sort of forum shopping by companies.

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<sup>41</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 audio-visual media services (Audio-visual Media Services Directive) in view of changing market realities (PE/33/2018/REV/1); OJ L 303, 28.11.2018, pp. 69–92. ELI: <http://data.europa.eu/eli/dir/2018/1808/oj>.

<sup>42</sup> Renamed Audiovisual Media Services Directive: 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 95, 15.4.2010, pp. 1–24; ELI: <http://data.europa.eu/eli/dir/2010/13/oj>).

**Funding:** This research received no external funding.

**Conflicts of Interest:** The author declares no conflict of interest.

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