

**VIRTUAL REALITY, REAL RESPONSIBILITY:**  
**THE REGULATORY LANDSCAPE FOR**  
**VIRTUAL INFLUENCERS**  
**WP 2024-02**

Floris Mertens and Julie Goetghebuer

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Virtual Reality, Real Responsibility:  
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## Abstract

*Virtual influencers are a new type of social media influencers, deployed by commercial entities to endorse their goods and services across several social media platforms. Distinguished by their entirely fictitious nature, virtual influencers exhibit remarkably human-like attributes encompassing physical characteristics and personalities. The visual representation of existing virtual influencers is claimed to be facilitated by artificial intelligence, although it is uncertain if this technology is really used to generate their images. Virtual influencers promote products in a way that human influencers do, albeit lacking the essential authenticity required to provide a faithful recommendation. They are fake personalities; hence they cannot try the products they recommend, a characteristic inherent to their human counterparts. In addition, virtual influencer profiles are under complete control of commercial entities such as brands. The average consumer developed the legitimate expectation that influencers endorse products based on their personal experience and opinion, rather than just following instructions from brands. However, in case of virtual influencers, experience-based endorsements are replaced by the financial incentives of the entities behind them. The lack of a personal element makes virtual influencer advertisements inauthentic and incommensurable with consumer expectations. Problematically, the average consumer remains oblivious to the fictitious nature of virtual influencers, or worse, their orchestration by commercial brands. The glaring absence of transparency pertaining to these elements leads to a general deception of the consumer.*

*The protection of consumers against such practices is harmonised in the European Union through the Directive on Unfair Commercial Practices. This paper explores the application of the standards set by EU law on virtual influencers, which are fictional characters without a form of natural or legal personhood. It ascertains that the deployer of virtual influencers, in addition to the third-party seller of the endorsed product, is in some cases bound by the provisions of EU law in this respect. We establish that the deception of the consumer by highly anthropomorphised virtual influencer posts that do not disclose the ad, the virtual nature of the influencer, and the control of the trader, is per se an unfair market practice that is forbidden under EU law. In this paper, we also take a closer look at the liability distribution between the parties involved in the creation process of these influencers, alongside the respective sanctioning that may be imposed. By doing so, we uncover several hardships when it comes to the enforcement of EU law provisions against misleading content created by virtual influencers. In addition, the paper uncovers the obligations of social media platforms to assess the systemic risks arising from such profiles, while suggesting a couple of specific policy measures these platforms could take to strengthen the existing enforcement mechanisms of EU and national law.*

The authors welcome your comments at [floris.mertens@ugent.be](mailto:floris.mertens@ugent.be)  
and [julie.goetghebuer@ugent.be](mailto:julie.goetghebuer@ugent.be)

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## Introduction

1. THE RISE OF VIRTUAL INFLUENCERS – In recent years, a new kind of social media influencers has emerged, so-called virtual influencers.<sup>1</sup> In general, social media influencers play a large role in the online community of modern times, and can be defined as “*independent third party endorsers who shape audience attitudes through blogs, posts, tweets, and the use of other social media*”.<sup>2</sup> A social media influencer engages in influencer marketing, which has the goal of persuading other people to take a specific action<sup>3</sup> – mostly to buy goods or services (hereinafter: products).

Whereas commercial entities have so far predominantly trusted their online endorsement to humans (*i.e.*, natural persons) an increasing number of courageous enterprises started using computer-generated influencers to endorse their products on social media.<sup>4</sup> These virtual influencers are driven by the power of computer-generated imagery (CGI) and to some extent by artificial intelligence (AI). While AI-enabled bots and spokes-characters have been ubiquitous in the arena of social media advertising for a few years now,<sup>5</sup> CGI-influencers have managed to captivate a much larger amount of online attention in the form of likes and followers.<sup>6</sup> The most prominent virtual influencer is *Lil Miquela*,<sup>7</sup> a self-proclaimed musician and arts student that has gained almost 3 million followers and makes a considerable amount of profit for her creators by “modelling” clothing for brands such as *Prada* and *Calvin Klein*,<sup>8</sup> showing off

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<sup>1</sup> Virtual influencers are alternatively known as ‘digital influencers’, ‘artificial influencers’, ‘AI-influencers’, ‘AI-generated influencers’, ‘computer-generated influencers’, ‘CGI-influencers’ or ‘avatars’. For reasons set out in no. 4 *ff.*, we opine that the terms ‘artificial influencer’, ‘AI-influencer’ and ‘AI-generated influencer’ are misplaced in respect of existing virtual influencers.

<sup>2</sup> K. FREBERG, K. GRAHAM, K. MCGAUGHEY and L.A. FREBERG, “Who are the social media influencers? A study of public perceptions of personality”, *Public Relations Review* 2011, vol. 37, 90-92; EUROPEAN ADVERTISING STANDARDS ALLIANCE (EASA), *Best Practice Recommendation on Influencer Marketing – Guidance*, 2023, [www.easa-alliance.org/publications/best-practice-recommendation-on-influencer-marketing-guidance\\_v2023](http://www.easa-alliance.org/publications/best-practice-recommendation-on-influencer-marketing-guidance_v2023), 8.

<sup>3</sup> X, “What is Influencer Marketing?”, *The Shelf* 2022, [www.theshelf.com/the-blog/what-is-influencer-marketing](http://www.theshelf.com/the-blog/what-is-influencer-marketing).

<sup>4</sup> F. MIAO, I. KOZLENKOVA, H. WANG, T. XIE and R. PALMATIER, “An emerging theory of avatar marketing”, *Journal of Marketing* 2021, vol. 86, 67-68; M. MRAD, Z. RAMADAN and L.I. NASR, “Computer-generated influencers: the rise of digital personalities”, *Marketing Intelligence & Planning* 2022, vol. 40, 589.

<sup>5</sup> For instance, a 2019 analysis of Twitter posts revealed that approximately 30% of content generated by users was already produced by AI-powered bots impersonating human interactions. See X. LIU, “A big data approach to examining social bots on Twitter”, *Journal of Services Marketing* 2019, vol. 33, 369-379.

<sup>6</sup> V.L. THOMAS and K. FOWLER, “Close Encounters of the AI Kind: Use of AI Influencers as Brand Endorsers”, *Journal of Advertising* 2020, vol. 50, 11-12; K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 368-369; L. EL BAKKALI, “Lijn tussen echt en virtueel vervaagt steeds meer: nemen virtuele influencers binnenkort de markt over?”, *VRT NWS* 2023, [www.vrt.be/vrtnws/nl/2023/08/02/virtuele-influencers-artificiele-intelligentie](http://www.vrt.be/vrtnws/nl/2023/08/02/virtuele-influencers-artificiele-intelligentie).

<sup>7</sup> See [www.instagram.com/lilmiquela](http://www.instagram.com/lilmiquela).

<sup>8</sup> See [www.instagram.com/p/Bxhji4UHnmr/](http://www.instagram.com/p/Bxhji4UHnmr/). See also B. ROBINSON, “Towards an Ontology and Ethics of Virtual Influencers”, *Australasian Journal of Information Systems* 2020, vol. 24, 2.



*Isamaya Beauty makeup*<sup>9</sup> and enjoying *Haribo candy*.<sup>10</sup> In 2018, TIME named her one of the 25 most influential “people” on the internet.<sup>11</sup> She joins an army of upcoming virtual influencers, including the Swedish *Esther Olofsson*,<sup>12</sup> all with ranging levels of success and spread over several social media platforms.<sup>13</sup> A recent study indicated that a large portion of US consumers, especially Gen Z, is following a virtual influencer on social media.<sup>14</sup> It is also claimed that virtual influencers generate three times more engagement to brands than their human counterparts.<sup>15</sup> Additionally, 55% of those who engage with a CGI-influencer have made a purchase as a result of their following, according to a study by *FullScreen*.<sup>16</sup>

Some have claimed that virtual influencers are the future of ads, fashion and commerce.<sup>17</sup> Consumers are placing their trust in CGI-influencers and making important decisions based on what the CGI-influencers they follow encourage them to do, in spite of their (non-)apparent virtual nature. Thus, CGI-influencers, such as *Lil Miquela*, are the ideal ambassadors for brands to partner with, because their product endorsements foster the same, if not more, engagement with consumers compared to human influencers.<sup>18</sup>

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<sup>9</sup> See [www.instagram.com/p/ChfRdn9pJQG/](https://www.instagram.com/p/ChfRdn9pJQG/).

<sup>10</sup> See [www.instagram.com/p/CpS81tcvzkR/](https://www.instagram.com/p/CpS81tcvzkR/) and [www.instagram.com/p/Cq8ZdFsLg75/](https://www.instagram.com/p/Cq8ZdFsLg75/).

<sup>11</sup> TIME, “The 25 Most Influential People on the Internet”, 2018, [time.com/5324130/most-influential-internet](https://time.com/5324130/most-influential-internet).

<sup>12</sup> See [www.instagram.com/esther.olofsson](https://www.instagram.com/esther.olofsson).

<sup>13</sup> A few of the first prominent virtual influencers, besides *Lil Miquela*, were *Bermuda* and *Blawko*, all three created by the Los Angeles start-up Brud. See for instance S. BARKER, “CGI Influencers: Just Another Fad or the Next Big Thing on Social Media?”, *The Startup* 2019, [medium.com/swlh/cgi-influencers-just-another-fad-or-the-next-big-thing-on-social-media-118704400954](https://medium.com/swlh/cgi-influencers-just-another-fad-or-the-next-big-thing-on-social-media-118704400954); C. TREPANY, “The Robot Invasion Has Begun: Meet Computer-Generated Influencers Taking Over Instagram”, *USA Today* 2019, [eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002](https://eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002). Also included in the Instagram list of immensely popular CGI-influencers are *CB*, *Imma*, *Kyra*, *Lu Do Magalu*, *Noonoouri*, *Shudu Gram* and *Thalasya Pov*. On TikTok, CGI-influencers are equally pervasive, boasting superstars with multi-million followings, such as *Qai Qai*, *Lechat* and *Kizuna AI*. See [www.virtualhumans.org](http://www.virtualhumans.org) for a documentation of the industry of virtual influencers.

<sup>14</sup> 75% of respondents aged between 18 and 24 years old expressed that they followed at least one virtual influencer at the time. The percentage dropped to 67% for the respondent cohorts between 25 to 34 years old and 35 to 44 years old. Cf. V. DENCHEVA, “Share of consumers who follow at least one virtual influencer in the United States as of March 2022, by age group”, [www.statista.com/statistics/1304080/consumers-follow-virtual-influencers-age-us](https://www.statista.com/statistics/1304080/consumers-follow-virtual-influencers-age-us) (retrieved on 18 May 2023).

<sup>15</sup> N. BAKLANOV, “The Top Virtual Instagram Influencers in 2021”, *HypeAuditor Blog* 2021, [hypeauditor.com/blog/the-top-instagram-virtual-influencers-in-2021](https://hypeauditor.com/blog/the-top-instagram-virtual-influencers-in-2021).

<sup>16</sup> E. BROWN, “Betrayal by CGI: Almost half of Gen Y and Z don't know they're following a bot”, *ZDNET* 2019, [www.zdnet.com/article/betrayal-by-cgi-study-reveals-almost-half-of-gen-y-and-z-dont-know-they-are-following-a-bot/](https://www.zdnet.com/article/betrayal-by-cgi-study-reveals-almost-half-of-gen-y-and-z-dont-know-they-are-following-a-bot/). See also C. TREPANY, “The Robot Invasion Has Begun: Meet Computer-Generated Influencers Taking Over Instagram”, *USA Today* 2019, [eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002](https://eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002); K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 369.

<sup>17</sup> B. ROBINSON, “Towards an Ontology and Ethics of Virtual Influencers”, *Australasian Journal of Information Systems* 2020, vol. 24, 3.

<sup>18</sup> K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 369.



2. ETHICAL AND LEGAL IMPLICATIONS OF VIRTUAL INFLUENCERS – Virtual influencers portray a fictional character, hence at face value, they do not fundamentally differ from human influencers regarding their appearance.<sup>19</sup> However, the endorsements they make are by definition ingenuine and fabricated, as virtual influencers cannot exercise an independent judgement like humans can.<sup>20</sup> Brands have complete control over their messages and content.<sup>21</sup> Therefore, alarming concerns are raised about the poor or absent disclosure of the nature of virtual influencers, as well as the brands and the other organisations behind them.<sup>22</sup> Such non-disclosure creates a blurring line between reality and science fiction, which enables the use of virtual influencers as a tool to manipulate consumers. Legal scholars in the United States have warned the United States Federal Trade Commission (FTC) on numerous occasions in this regard,<sup>23</sup> which prompted the FTC to adapt its Endorsement Guidelines to the practices of virtual influencers as of July 2023.<sup>24</sup>

In the European Union, consumer law rules on unfair commercial practices, which have been harmonised through the transposition of the Unfair Commercial Practices Directive

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<sup>19</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, “The impact of influencers on advertising and consumer protection in the Single Market”, 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 33. See also B. ROBINSON, “Towards an Ontology and Ethics of Virtual Influencers”, *Australasian Journal of Information Systems* 2020, vol. 24, 4-5.

<sup>20</sup> K. POWERS, “Virtual Influencers Are Becoming More Real – Here’s Why Brands Should Be Cautious”, *American Marketing Association* 2019, [www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious](http://www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious).

<sup>21</sup> A. HAMILTON, “Can CGI Influencers Displace Their Human Counterparts?”, *JD Supra* 2019, [www.jdsupra.com/legalnews/can-cgi-influencers-displace-their-22527](http://www.jdsupra.com/legalnews/can-cgi-influencers-displace-their-22527).

<sup>22</sup> *Inter alia* H.A. MELTON, “Does the FTC’s Recent Influencer Guidance Address Robots?”, *The Journal of Robotics, Artificial Intelligence & Law* 2020, vol. 3, 329-331; S.M. OKOLIE, “Virtual Influencers – Stretching the Boundaries of Intellectual Property Governing Digital Creations”, *Landslide* 2020, vol. 12, 53-54; S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 348-349; K. HEALY, “CGI Social Media Influencers & Deceptive Marketing”, *Revue Canadienne du Droit de la Concurrence* 2021, vol. 33, 182-186; J. MASTERALEXIS, S. MCKELVEY and K. STATZ, “#IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?”, *Harvard Journal of Sports & Entertainment Law* 2021, vol. 12, 366-368.

<sup>23</sup> *Inter alia* H.A. MELTON, “Does the FTC’s Recent Influencer Guidance Address Robots?”, *The Journal of Robotics, Artificial Intelligence & Law* 2020, vol. 3, 329-331; K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC’s Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 361-386; S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 325-354; J. MASTERALEXIS, S. MCKELVEY and K. STATZ, “#IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?”, *Harvard Journal of Sports & Entertainment Law* 2021, vol. 12, 353-392.

<sup>24</sup> By changing the definition of an ‘endorser’ to anyone who “could be or appear to be an individual, group or institution”, the FTC made clear that its Endorsement Guidelines also apply to virtual influencers; cf. S. 255.0 Guides Concerning the Use of Endorsements and Testimonials in Advertising, [www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255](http://www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255). See also the publication of the revised Guidelines at [www.federalregister.gov/documents/2023/07/26/2023-14795/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising](http://www.federalregister.gov/documents/2023/07/26/2023-14795/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising). The reference to the FTC-Guidelines in this chapter is made to emphasize the lack of regulatory or policy action by the European Union.





(hereinafter: UCPD)<sup>25</sup>, protect consumers against misleading and aggressive marketing practices originating from ‘traders’. It is not unimaginable that virtual influencers could engage in such misleading or aggressive commercial behaviour, given the large amount of money they have proven to make.<sup>26</sup> Moreover, as we argue in this paper, it is our opinion that today’s virtual influencer marketing is *per se* misleading in absence of far-reaching disclosure. However, in contrast with the United States, there is no definitive clarity about the application of the UCPD and its national transposition laws to virtual influencers, in absence of a regulatory response from the European Commission. The silence of the Commission on the unfair market practices of virtual influencers has inspired this paper’s EU-focused legal analysis of virtual influencers’ product endorsements.

The legal concerns pertain to both the applicability and enforceability of the UCPD to virtual influencers. A first obvious observation is that virtual influencer personas are neither natural nor legal persons, which raises the question if their online behaviour is captured by consumer law standards, as they might not fall under the scope of the Directive. Furthermore, it is often not readily apparent who the actual entity or individual behind the digital persona is. Unlike traditional influencers, who are identifiable public figures, virtual influencers operate as computer-generated characters, whilst their controllers or creators might not be disclosed properly. The latter may be deemed problematic, since these are the entities that might bear responsibility for the profile’s online behaviour. Furthermore, existing UCPD enforcement mechanisms provided by the Member States, such as ‘naming and shaming’, seem inefficient for rule-disobeying virtual influencers that can simply be deleted and relaunched under a different name or as an updated version.<sup>27</sup> The foregoing ‘delete and repeat’ method allows brands to escape from consumer law obligations by hiding behind a dispensable virtual character. These are just a few handpicked examples of the underlying legal issues of virtual influencers, which call for a thorough legal analysis of the matter.

3. STRUCTURE – This paper aims to provide an introduction to the emerging phenomenon of virtual influencers, encompassing both their commercial advantages and their inherent dangers towards consumers (part I). Subsequently, in part II, the paper argues that virtual influencers cannot escape the mandatory provisions of the Unfair Commercial Practices Directive and the Belgian transposition law, as their scope of application extends itself to the entities responsible for their creation and operation. In light of these legal instruments, an examination

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<sup>25</sup> Directive 2005/29/EC 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, *O.J.* 11 June 2005, iss. 149, 22, [data.europa.eu/eli/dir/2005/29/oj](http://data.europa.eu/eli/dir/2005/29/oj).

<sup>26</sup> For instance, *Lil Miquela* was estimated to make over 10 million US dollars in 2020; cf. T. ONG, “Virtual Influencers Make Real Money While Covid Locks Down Human Stars – The pandemic isn’t a problem when you’re computer-generated”, *Bloomberg* 2020, [www.bloomberg.com/news/features/2020-10-29/lil-miquela-lol-s-seraphine-virtual-influencers-make-more-real-money-than-ever](http://www.bloomberg.com/news/features/2020-10-29/lil-miquela-lol-s-seraphine-virtual-influencers-make-more-real-money-than-ever).

<sup>27</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, “The impact of influencers on advertising and consumer protection in the Single Market”, 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 33.



is made of the unfair commercial practices that may be committed using virtual influencers. This part also examines the (civil law and public law) enforcement against virtual influencers, as well as the potential hurdles associated with it. Lastly, it assesses the additional measures that are required to ensure an effective level of consumer protection, by exploring potential strategies to enhance the overall protection of consumers in this rapidly evolving landscape.

## I. The phenomenon of virtual influencers

### A. The hybrid nature of virtual influencers: AI use and brand control

4. ARTIFICIAL NATURE OF VIRTUAL INFLUENCERS? – There is no one-size-fits-all approach for a virtual influencer profile, as the methods and techniques behind them are developed on a tailored basis for the brand(s) behind them.<sup>28</sup> Aligned with this dispersion of methods, it is ambiguous to what extent the personality and content of most virtual influencers are actually created or driven by applications of AI, as opposed to being handcrafted by humans. The uncertainty about the artificial, human or mixed nature of virtual influencers' online presence is primarily caused by a lack of disclosure (*infra*, no. 10). Considering this ambiguity, we contend that the use of terms such as 'artificial influencer' and 'AI-generated influencer' (as synonyms to virtual influencers), is misplaced in most cases. The potential involvement of AI differs for every aspect of the influencer profile, as there is a fundamental difference between its visual aspects such as content images and its non-visual aspects such as its identity and background story. The next paragraphs elaborate further on this dichotomy, of which the recognition is pivotal for determining the consumer law implications.

5. VISUAL ASPECTS OF THE VIRTUAL INFLUENCER – One cannot dispute that the imageries of a virtual influencer, *i.e.*, the pictures and videos posted on its profile, are fabricated.<sup>29</sup> Some authors perceive these images as fully generated by computers,<sup>30</sup> while others argue that the images are partially digitally deformed.<sup>31</sup> Computer generated imagery (CGI) refers to “the

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<sup>28</sup> See no. 6 for an account on the commercial advantages of deploying virtual influencers on social media.

<sup>29</sup> M. MRAD, Z. RAMADAN and L.I. NASR, “Computer-generated influencers: the rise of digital personalities”, *Marketing Intelligence & Planning* 2022, vol. 40, 589.

<sup>30</sup> *Inter alia* V.L. THOMAS and K. FOWLER, “Close Encounters of the AI Kind: Use of AI Influencers as Brand Endorsers”, *Journal of Advertising* 2020, vol. 50, 3-4; K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 368-369; S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 331-333; K. HEALY, “CGI Social Media Influencers & Deceptive Marketing”, *Revue Canadienne du Droit de la Concurrence* 2021, vol. 33, 172-174; J. MASTERALEXIS, S. MCKELVEY and K. STATZ, “#IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?”, *Harvard Journal of Sports & Entertainment Law* 2021, vol. 12, 363; R.J. AHN, S.Y. CHO and W.S. TSAI, “Demystifying Computer-Generated Imagery (CGI) Influencers: The Effect of Perceived Anthropomorphism and Social Presence on Brand Outcomes”, *Journal of Interactive Advertising* 2022, vol. 22, 327.

<sup>31</sup> B. ROBINSON, “Towards an Ontology and Ethics of Virtual Influencers”, *Australasian Journal of Information Systems* 2020, vol. 24, 3.





creation of still or animated visual content with imaging software”.<sup>32</sup> Such technology, an umbrella term for a variety of methods,<sup>33</sup> allows companies to generate content without having to use real live people, places or objects.<sup>34</sup>

Frankly, there is no way of knowing that any AI method is used to generate the CGI-images posted on virtual influencer pages, as they could also be the product of traditional computer graphics techniques such as 3D-modelling, rendering and compositing. The shared CGI-images could be the product of human compositions aided by graphics design programs (not reliant on AI technology). In fact, a human designer succeeded in mimicking *Lil Miquela* by using motion design programs that are not AI-driven.<sup>35</sup> Of course, one should recognize the potential for AI in this area. It is plausible that a machine learning model is implemented for some influencer profiles, to render synthetic or AI-generated media.<sup>36</sup> For example, text-to-image (deep learning) models could serve as an efficient tool for CGI-creators. Typically, these models combine<sup>37</sup> a sizable language model which converts natural language into a latent representation, and a generative image model that produces an image derived from that depiction.<sup>38</sup> These are neural networks trained on a large dataset of images labelled with text captions, usually scraped from the internet.<sup>39</sup> The creators of a virtual influencer could deploy such text-to-image models to input a natural language description, such as “*Lil Miquela* drinking through a straw from a soda bottle of *Coca-Cola* on a sunny beach in Barcelona”. Then, a striking and artistic image of the fashionista is expected as output. Famous examples of publicly available text-to-image models are OpenAI’s *DALL-E 2*, Google Brain’s *Imagen* and

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<sup>32</sup> M. ROUSE, “CGI (Computer-Generated Imagery)”, *TechTarget* 2016, [www.techtarget.com/whatis/definition/CGI-computer-generated-imagery](http://www.techtarget.com/whatis/definition/CGI-computer-generated-imagery). See also in the context of science fiction movies: S. ABBOTT, “Final Frontiers: Computer-Generated Imagery and the Science Fiction Film”, *Science Fiction Studies* 2006, vol. 33, 89-108.

<sup>33</sup> R. ABREU, “What is CGI? How CGI Works in Movies and Animation”, *StudioBinder* 2021, [www.studiobinder.com/blog/what-is-cgi-meaning-definition](http://www.studiobinder.com/blog/what-is-cgi-meaning-definition).

<sup>34</sup> K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 362.

<sup>35</sup> See the experiment by *The Cut*: K. WASSUS and E. PETRARCA, “How We Made Our Own CGI Influencer in 48 Hours”, *The Cut* 2018, [www.thecut.com/2018/05/how-we-made-our-own-cgi-influencer-in-48-hours.html](http://www.thecut.com/2018/05/how-we-made-our-own-cgi-influencer-in-48-hours.html).

<sup>36</sup> *Inter alia* S. ROSENBAUM, “What Is Synthetic Media?”, *MediaInsider* 2019, [www.mediapost.com/publications/article/341074/what-is-synthetic-media.html](http://www.mediapost.com/publications/article/341074/what-is-synthetic-media.html); A. VALES, “An introduction to synthetic media and journalism”, *Medium - Wall Street Journal* 2019, [medium.com/the-wall-street-journal/an-introduction-to-synthetic-media-and-journalism-cbbd70d915cd](https://medium.com/the-wall-street-journal/an-introduction-to-synthetic-media-and-journalism-cbbd70d915cd); K. WADDELL, “Welcome to our new synthetic realities”, *Axios* 2019, [www.axios.com/2019/09/14/synthetic-realities-fiction-stories-fact-misinformation](http://www.axios.com/2019/09/14/synthetic-realities-fiction-stories-fact-misinformation).

<sup>37</sup> As the learning process of text-to-image applications combines two separate neural networks or models, this process is often referred to as multimodal learning.

<sup>38</sup> *Inter alia* S. FROLOV, T. HINZ, F. RAUE, J. HEES and A. DENGEL, “Adversarial text-to-image synthesis: A review”, *Neural Networks* 2021, vol. 144, 188-189; A. RAMESH, M. PAVLOV, G. GOH, S. GRAY, C. VOSS, A. RADFORD, M. CHEN and I. SUTSKEVER, “Zero-Shot Text-to-Image Generation”, 2021, [doi.org/10.48550/arXiv.2102.12092](https://doi.org/10.48550/arXiv.2102.12092), 1; K. CROWSON, S. BIDERMAN, D. KORNIS, D. STANDER, E. HALLAHAN, L. CASTRICATO and E. RAFF, “VQGAN-CLIP: Open Domain Image Generation and Editing with Natural Language Guidance”, 2022, [doi.org/10.48550/arXiv.2204.08583](https://doi.org/10.48550/arXiv.2204.08583), 1-2.

<sup>39</sup> J. VINCENT, “All these images were generated by Google’s latest text-to-image AI”, *The Verge* 2022, [www.theverge.com/2022/5/24/23139297/google-imagen-text-to-image-ai-system-examples-paper](http://www.theverge.com/2022/5/24/23139297/google-imagen-text-to-image-ai-system-examples-paper).



StabilityAI's *Stable Diffusion*.<sup>40</sup> We should emphasize that *deepfakes*, *i.e.*, a harmful type of synthetic media generated by artificial neural networks,<sup>41</sup> have not yet popped up on virtual influencer profiles, to the best of our knowledge. At most, a CGI-character is pasted on top of a real picture of a human celebrity or influencer.<sup>42</sup>

6. NON-VISUAL ASPECTS OF THE VIRTUAL INFLUENCER – While the pictures and videos that we see on the profile of virtual influencers *may* be generated by AI, the concept idea and caption for each post is presumably the work of humans. The same applies to the distinct identity and personality of these influencers.<sup>43</sup> Virtual influencers have an entire persona built around them, often with a rich history and storyline portrayed throughout their profile. *Lil Miquela* is the most striking example, who was created as a 'relatable' American-Brazilian 19-year-old girl-next-door that has grown from an arts student and musician to a social justice activist<sup>44</sup>, model and popstar. Its Indian counterpart, *Kyra*, has a similar background.<sup>45</sup> It would be technologically feasible that machine learning is used to render these fundamental stories behind each profile to make them as appealing as possible to the relevant audience,<sup>46</sup> yet there is no evidence that this is actually the case (despite the myth building around many CGI-influencers).<sup>47</sup> Therefore, concerns about the risks of AI are misplaced in respect of the non-visual

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<sup>40</sup> In respect of OpenAI's DALL-E 2, see A. RAMESH, M. PAVLOV, G. GOH and S. GRAY, "DALL-E: Creating images from text", 2021, [openai.com/research/dall-e](https://openai.com/research/dall-e) (retrieved on July 7th, 2023). In respect of Google Brain's Imagen, see C. SAHARIA, W. CHAN, S. SAXENA, L. LI, J. WHANG, E. DENTON, S. KAMYAR, S. GHASEMIPOUR, B.K. AYAN, S.S. MAHDAVI, R.G. LOPES, T. SALIMANS, J. HO, D.J. FLEET and M. NOROUZI, "Photorealistic Text-to-Image Diffusion Models with Deep Language Understanding", 2022, [doi.org/10.48550/arXiv.2205.11487](https://doi.org/10.48550/arXiv.2205.11487). In respect of StabilityAI's Stable Diffusion, see STABILITY AI, "Stable Diffusion XL", [stability.ai/stablediffusion](https://stability.ai/stablediffusion) (retrieved on July 7th, 2023).

<sup>41</sup> Deepfakes refer to an "AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful"; see art. 52 (3), par. 1 Proposal for an AI Act. See also D.K. CITRON and R. CHESNEY, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security", *California Law Review* 2019, vol. 107, 1758-1768; M. WESTERLUND, "The Emergence of Deepfake Technology: A Review", *Technology Innovation Management Review* 2019, vol. 9, 40-41.

<sup>42</sup> See for instance [www.instagram.com/p/CbX5wLAuq5i/](https://www.instagram.com/p/CbX5wLAuq5i/) and [www.instagram.com/p/CfzMSNVJc0H/](https://www.instagram.com/p/CfzMSNVJc0H/); where the digital persona of *Lil Miquela* is clearly added as extra layer to a real picture of a human celebrity or other influencer. See also [www.instagram.com/p/B2fIHpUB-GmQ/](https://www.instagram.com/p/B2fIHpUB-GmQ/) of *Bermuda*; [www.instagram.com/p/Cs8qNHEKpf9/](https://www.instagram.com/p/Cs8qNHEKpf9/) of *Kyra*; and [www.instagram.com/p/CwpPmQQyUho/](https://www.instagram.com/p/CwpPmQQyUho/) of *Imma*.

<sup>43</sup> M. MRAD, Z. RAMADAN and L.I. NASR, "Computer-generated influencers: the rise of digital personalities", *Marketing Intelligence & Planning* 2022, vol. 40, 589.

<sup>44</sup> The fact that *Lil Miquela* purports herself as a social justice activist is considered problematic when seen in conjunction with her use as marketing tool; E. CLEIN, "Branding Fake Justice for Generation Z", *The Nation* 2019, [www.thenation.com/article/archive/social-justice-cgi-advertising-brud](https://www.thenation.com/article/archive/social-justice-cgi-advertising-brud).

<sup>45</sup> *E.g.*, S. RAY, "Everything you need to know about Kyra, India's first virtual influencer", *GQ India* 2022, [www.gqindia.com/get-smart/content/everything-you-need-to-know-about-kyra-india-first-virtual-influencer](https://www.gqindia.com/get-smart/content/everything-you-need-to-know-about-kyra-india-first-virtual-influencer); T. SAXENA, "Meet Kyra, India's first meta or virtual influencer", *The New Indian Express* 2022, [www.newindianexpress.com/lifestyle/fashion/2022/jul/24/meet-kyra-indias-first-meta-or-virtual-influencer-2479169.html](https://www.newindianexpress.com/lifestyle/fashion/2022/jul/24/meet-kyra-indias-first-meta-or-virtual-influencer-2479169.html).

<sup>46</sup> M. MRAD, Z. RAMADAN and L.I. NASR, "Computer-generated influencers: the rise of digital personalities", *Marketing Intelligence & Planning* 2022, vol. 40, 589.

<sup>47</sup> B. ROBINSON, "Towards an Ontology and Ethics of Virtual Influencers", *Australasian Journal of Information Systems* 2020, vol. 24, 3.



aspects of virtual influencers.<sup>48</sup> Brands and other commercial entities have a strong incentive to keep the non-visual aspects of the virtual influencer in their own hands. We are convinced that the storyline of CGI-influencers is tailored to the products that they would usually endorse, because of significant human interference in the creation of their background. Hence, *Lil Miquela*, who often promotes clothing brands such as *Calvin Klein*, is a fashionista and model. We presume that this form of personality-tailoring also extends to other user interactions than just curating and sharing content, such as replying to direct messages and comments from followers, which all serve the purpose of promoting a brand and its products.<sup>49</sup>

Brands can exercise their control over the message, content and storyline of virtual influencers<sup>50</sup> by dominating the content creation process, or by delegating this task to the entity that operates the profile.<sup>51</sup> This can be arranged in a contract with the entity behind the virtual influencer to make sure that the image of the influencer will remain a certain way and also serve the brand's best interest.<sup>52</sup> It is possible that the entity behind the virtual influencer collaborates with several brands or third-party sellers, all of whom will give instructions on how they want their product promoted. In other words, a commercial entity decides what, when and how a CGI influencer promotes its products,<sup>53</sup> a luxury that is not readily available when using real human influencers.<sup>54</sup> The unpredictability of working with human influencers is

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<sup>48</sup> Moreover, if AI methods are used at all in existing virtual influencers, the significant technical risks that are typically associated with AI systems, such as unpredictability, conceptual inexplicability (due to a potential black box) and occasionally erroneous results, are counterbalanced by presumably far-reaching human supervision of the implemented AI methods. See e.g., V.L. THOMAS and K. FOWLER, "Close Encounters of the AI Kind: Use of AI Influencers as Brand Endorsers", *Journal of Advertising* 2020, vol. 50, 3-4; M. MRAD, Z. RAMADAN and L.I. NASR, "Computer-generated influencers: the rise of digital personalities", *Marketing Intelligence & Planning* 2022, vol. 40, 590-591.

<sup>49</sup> Contra R. BYERS, "What are AI influencers? And should your brand care?", [goatagency.com/blog/influencer-marketing/ai-influencers/](https://goatagency.com/blog/influencer-marketing/ai-influencers/) (retrieved on 2 August 2023).

<sup>50</sup> J. SPILLANE, "The Upsides of Using CGI in Commercial Marketing", *Business 2 Community* 2017, [www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380](http://www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380); A. HAMILTON, "Can CGI Influencers Displace Their Human Counterparts?", *Pillsbury Insights* 2019, [www.internetandtechnologylaw.com/cgi-influencers](http://www.internetandtechnologylaw.com/cgi-influencers); K. CALLAHAN, "CGI Social Media Influencers: Are They Above the FTC's Influence?", *Journal of Business & Technology Law* 2021, vol. 16, 362; S. FAVELA, "Uncovering the "Realness" of CGI Influencers", *SMU Science and Technology Law Review* 2021, vol. 24, 333.

<sup>51</sup> For an account on the different actors that may be involved in the process of running a virtual influencer profile, see no. 14.

<sup>52</sup> B. ROBINSON, "Towards an Ontology and Ethics of Virtual Influencers", *Australasian Journal of Information Systems* 2020, vol. 24, 2.

<sup>53</sup> S. BARKER, "CGI Influencers: Just Another Fad or the Next Big Thing on Social Media?", *The Startup* 2019, [medium.com/swlh/cgi-influencers-just-another-fad-or-the-next-big-thing-on-social-media-118704400954](https://medium.com/swlh/cgi-influencers-just-another-fad-or-the-next-big-thing-on-social-media-118704400954); K. CALLAHAN, "CGI Social Media Influencers: Are They Above the FTC's Influence?", *Journal of Business & Technology Law* 2021, vol. 16, 369.

<sup>54</sup> See also J. FASTENAU, "Under the Influence: The Power of Social Media Influencers", *Medium* 2018, [medium.com/@jelle\\_27973/under-the-influence-the-power-of-social-media-influencers-5192571083c3](https://medium.com/@jelle_27973/under-the-influence-the-power-of-social-media-influencers-5192571083c3); S.M. OKOLIE, "Virtual Influencers – Stretching the Boundaries of Intellectual Property Governing Digital Creations", *Landslide* 2020, vol. 12, 54.



also negated,<sup>55</sup> while virtual influencers turn out to be cheaper and faster to work with.<sup>56</sup> In other words, virtual influencer marketing brings some benefits and opportunities to businesses in the promotion and sale of their products, that may be hard to find with human influencers.<sup>57</sup>

## B. Dangers for consumers

7. IMPACT ON CONSUMER TRANSACTIONAL DECISION-MAKING AND GENERAL CONSEQUENCES – In general, influencer marketing has a significant impact on the transactional decision-making of their followers.<sup>58</sup> In Belgium for example, this is supported by a large study conducted on influencer engagement.<sup>59</sup> Of the participants between 16 to 39 years old who follow influencers, 28,2% indicated that they have bought a product or service, 33,1% indicated that they started following a brand and 41,4% indicated they looked up more information about a brand, due to an influencer endorsement in the past three months.<sup>60</sup> Their impact is even higher among youth. With regard to virtual influencers specifically, it appears that the

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<sup>55</sup> Since all posts of (non-autonomous) virtual influencers are undoubtedly reflected upon by a group of humans, there is a low risk of the influencer saying something politically incorrect or misaligned with the interests of the instructing brand. See J. SPILLANE, “The Upsides of Using CGI in Commercial Marketing”, *Business 2 Community* 2017, [www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380](http://www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380); K. TIFFANY, “Lil Miquela and the virtual influencer hype, explained”, *Vox* 2019, [www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups](http://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups); S.M. OKOLIE, “Virtual Influencers – Stretching the Boundaries of Intellectual Property Governing Digital Creations”, *Landslide* 2020, vol. 12, 54; B. ROBINSON, “Towards an Ontology and Ethics of Virtual Influencers”, *Australasian Journal of Information Systems* 2020, vol. 24, 2; K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 362.

<sup>56</sup> For instance, there is no need to fly an influencer to a location for a photoshoot, spend money on makeup artists or hairstylists, send free products (PR packages) or pay a high fee. Moreover, virtual influencers can appear in many places at once, and, most importantly, they never age or die. See J. SPILLANE, “The Upsides of Using CGI in Commercial Marketing”, *Business 2 Community* 2017, [www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380](http://www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380); L. DODGSON, “Fake, computer-generated Instagram influencers are modeling designer clothes, wearing Spanx, and attending red carpet premieres”, *Insider* 2019, [www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8](http://www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8); K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 362; S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 333.

<sup>57</sup> L. DODGSON, “Fake, computer-generated Instagram influencers are modeling designer clothes, wearing Spanx, and attending red carpet premieres”, *Insider* 2019, [www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8](http://www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8); S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 333.

<sup>58</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, “The impact of influencers on advertising and consumer protection in the Single Market”, 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 15-26; J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 2.

<sup>59</sup> COMEOS and ARTEVELDEHOGESCHOOL, “SMI Barometer 2023 – Insights into how Belgians experience branding through social media and influencer marketing”, 2023, 46-48.

<sup>60</sup> *Ibid.*





use of CGI comes across to consumers as exciting and unique,<sup>61</sup> in spite of its mystifying effect.<sup>62</sup> A (worldwide) study indicated that more than 55% of participating consumers who engage with one or more virtual influencers, *purchased* something as a result of an endorsement of a virtual influencer.<sup>63</sup> This finding is clear evidence that consumers are also placing their trust in CGI-influencers and making important decisions based on what the CGI-influencers they follow encourage them to do.<sup>64</sup>

Considering the meaningful commercial advantage and the increasingly persuasive power of virtual influencers, it is important to acknowledge the major downsides in relation to the consumers that follow them. Virtual influencers negatively affect the transactional behaviour of consumers through a lack of *transparency*, and their content is intrinsically incompatible with the reasonable consumer expectation of *authenticity* from influencers. We contend that both major pitfalls of virtual influencers result in a ubiquitous deception of the average consumer.

## 1. Lack of authenticity of virtual influencers

8. REASONABLE CONSUMER EXPECTATION OF EXPERIENCE-BASED INFLUENCER ENDORSEMENTS – The popularity of human influencers is partly due to the consumer appreciation of their honest reviews, personal opinions and individual experiences about a certain commercial product.<sup>65</sup> It is true that in reality, human influencers do not always convey an objective, non-biased opinion on a given product, especially when they are bound by a sponsorship deal. In spite of this reality, it is the conception of the consumer that matters here, in conjunction with

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<sup>61</sup> K. NEUBECK, “This Is How CGI Actually Works”, *Complex* 2015, [www.complex.com/pop-culture/a/kyle/this-is-how-cgi-actually-works](http://www.complex.com/pop-culture/a/kyle/this-is-how-cgi-actually-works).

<sup>62</sup> Of course, this only affects consumers who are aware that the influencer has a digital nature, which is not always the case (*supra*, no. 10). See L. DODGSON, “Fake, computer-generated Instagram influencers are modeling designer clothes, wearing Spanx, and attending red carpet premieres”, *Insider* 2019, [www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8](http://www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8); S. FAVELA, “Uncovering the “Realness” of CGI Influencers”, *SMU Science and Technology Law Review* 2021, vol. 24, 333.

<sup>63</sup> E. BROWN, “Betrayal by CGI: Almost half of Gen Y and Z don't know they're following a bot”, *ZDNET* 2019, [www.zdnet.com/article/betrayal-by-cgi-study-reveals-almost-half-of-gen-y-and-z-do-not-know-they-are-following-a-bot](http://www.zdnet.com/article/betrayal-by-cgi-study-reveals-almost-half-of-gen-y-and-z-do-not-know-they-are-following-a-bot). See also C. TREPANY, “The Robot Invasion Has Begun: Meet Computer-Generated Influencers Taking Over Instagram”, *USA Today* 2019, [eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/](http://eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/); K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 369.

<sup>64</sup> K. CALLAHAN, “CGI Social Media Influencers: Are They Above the FTC's Influence?”, *Journal of Business & Technology Law* 2021, vol. 16, 369.

<sup>65</sup> See *inter alia* J.G. MOULARD, D.H. RICE, C.P. GARRITY and S.M. MANGUS, “Artist authenticity: How artists’ passion and commitment shape consumers’ perceptions and behavioral intentions across genders”, *Psychology & Marketing* 2014, vol. 31, 576-590; W. KUCHARSKA, I. CONFENTE and F. BRUNETTI, “The power of personal brand authenticity and identification: Top celebrity players’ contribution to loyalty toward football”, *Journal of Product & Brand Management* 2020, vol. 29, 815-830; L. VAN DRIEL and D. DUMITRICA, “Selling brands while staying “Authentic”: The professionalization of Instagram influencers”, *Convergence* 2021, vol. 27, 67; L. CHEN, Y. YAN and A.N. SMITH, “What drives digital engagement with sponsored videos? An investigation of video influencers’ authenticity management strategies”, *Journal of the Academy of Marketing Science* 2023, vol. 51, 201.



the reasonable expectation that he derives thereof. We dare to argue that the average consumer developed a legitimate and reasonable expectation from influencers to deliver an honest, personal, experience-based and trustworthy endorsement of a product to their audience. In fact, in the US, it is explicitly stated in the FTC's Endorsement Guidelines that "*endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser*".<sup>66</sup> In other words, consumers have the right to expect a level of *authenticity* from influencers. Indeed, one can ascertain that the persuasive power of influencers is actually based on what they share from their personal lives, instead of commercial sponsorships.<sup>67</sup>

When influencers do collaborate with brands, they succeed in maintaining that authenticity by being true to their audience (*'accuracy'*) and being true to themselves (*'integrity'*) in the advertisement post.<sup>68</sup> In respect of accuracy, recent outcry over the '*LashGate*' scandal of TikTok personality *Mikayla Nogueira*, in which she allegedly advertised a voluminous mascara without disclosing she was wearing false lashes,<sup>69</sup> proves that consumers care deeply about the validity and accuracy of influencer statements. Integrity, on the other hand, requires not acting out of one's own financial interest, while behaving autonomously and consistently.<sup>70</sup> Influencers project a form of personal passion and love about a product to achieve (an appearance of) sincerity and integrity.<sup>71</sup> Autonomous decision-making of the influencer itself is key in this process, as one cannot be sincere when someone else dictates or dominates the message.<sup>72</sup> Relatedly, trustworthiness is one of the key drivers of influencers' effectiveness, which is – for

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<sup>66</sup> S. 255.1 (a) Guides Concerning the Use of Endorsements and Testimonials in Advertising, [www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255](http://www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255).

<sup>67</sup> T. SENFT, *Camgirls: Celebrity and Community in the Age of Social Networks*, New York, Peter Lang, 2008, 15-31; L. VAN DRIEL and D. DUMITRICA, "Selling brands while staying "Authentic": The professionalization of Instagram influencers", *Convergence* 2021, vol. 27, 66-84.

<sup>68</sup> J.C. NUNES, A. ORDANINI, and G. GIAMBASTIANI, "The concept of authenticity: What it means to consumers", *Journal of Marketing* 2021, vol. 85, iss. 4, 2-3. See also in respect of video influencers (*i.e.*, vloggers): L. CHEN, Y. YAN and A.N. SMITH, "What drives digital engagement with sponsored videos? An investigation of video influencers' authenticity management strategies", *Journal of the Academy of Marketing Science* 2023, vol. 51, 201-202.

<sup>69</sup> A.M. WARE, "Everything We Know About the Lash Drama on TikTok", *The Cut* 2023, [www.thecut.com/2023/01/everything-we-know-about-the-lash-drama-on-tiktok.html](http://www.thecut.com/2023/01/everything-we-know-about-the-lash-drama-on-tiktok.html); G. WEISS, "A TikTokker is facing backlash for arguing that it's OK to lie about sponsored products amid the 'Mascara-Gate' scandal", *Business Insider* 2023, [www.businessinsider.com/influencer-mads-lewis-backlash-defending-false-advertising-mascara-tiktok-2023-1](http://www.businessinsider.com/influencer-mads-lewis-backlash-defending-false-advertising-mascara-tiktok-2023-1).

<sup>70</sup> J.C. NUNES, A. ORDANINI, and G. GIAMBASTIANI, "The concept of authenticity: What it means to consumers", *Journal of Marketing* 2021, vol. 85, iss. 4, 2-3.

<sup>71</sup> A. AUDREZET, G. DE KERVILER and J. G. MOULARD, "Authenticity under threat: When social media influencers need to go beyond self-presentation", *Journal of Business Research* 2020, vol. 117, 562-563.

<sup>72</sup> J.C. NUNES, A. ORDANINI, and G. GIAMBASTIANI, "The concept of authenticity: What it means to consumers", *Journal of Marketing* 2021, vol. 85, iss. 4, 3.





human influencers – proven to be shaped by the influencer’s expertise<sup>73</sup>, relatability<sup>74</sup>, disclosure<sup>75</sup>, message positivity<sup>76</sup>, influencer-brand fit<sup>77</sup> and follower count<sup>78</sup>. It is exactly through sharing these personal experiences and building intimate relationships with their viewers, that influencers connect better with their audience than traditional celebrities and effectively create trust.<sup>79</sup> The more a consumer has the feeling that he can trust a source for being sincere and motivated to provide accurate information, the more likely this consumer is to follow its recommendation.<sup>80</sup>

9. ANTHROPOMORPHISM APPLIED BY VIRTUAL INFLUENCERS – Authenticity and the associated trust are where virtual influencers fall short, as they cannot have tried the product or service that they are recommending since they are simply not real. Providers of virtual influencer profiles (*i.e.*, their creators) try to make these digital persona seem more human, authentic and eerily realistic, which increases trust in them.<sup>81</sup> The extent to which an image looks human is denoted in the literature as “anthropomorphism”.<sup>82</sup> A more human-like appearance can be achieved by simulating human characteristics, intentions, emotions, beliefs, and mind,<sup>83</sup>

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<sup>73</sup> S.-A.A. JIN and J. PHUA, “Following Celebrities’ Tweets About Brands: The Impact of Twitter-Based Electronic Word-of-Mouth on Consumers’ Source Credibility Perception, Buying Intention, and Social Identification With Celebrities”, *Journal of advertising* 2014, vol. 43, 181-195; C. HUGHES, V. SWAMINATHAN and G. BROOKS, “Driving Brand Engagement Through Online Social Influencers: An empirical Investigation of Sponsored Blogging Campaigns”, *Journal of Marketing* 2019, vol. 83, 78-96.

<sup>74</sup> M. ATIQ, G. ABID, A. ANWAR and M.F. IJAZ, “Influencer Marketing on Instagram: A Sequential Mediation Model of Storytelling Content and Audience Engagement via Relatability and Trust”, *Information* 2022, vol. 13, 348-351.

<sup>75</sup> M.H.E.E. GERRATH and B. USREY, “The Impact of Influencer Motives and Commonness Perceptions on Follower Reactions Toward Incentivized Reviews”, *International Journal of Research in Marketing* 2021, vol. 38, 531-532; L. CHEN, Y. YAN and A.N. SMITH, “What drives digital engagement with sponsored videos? An investigation of video influencers’ authenticity management strategies”, *Journal of the Academy of Marketing Science* 2023, vol. 51, 200-203; Z. KARAGÜR, J.-M. BECKER, K. KLEIN and A. EDELING, “How, why, and when disclosure type matters for influencer marketing”, *International Journal of Research in Marketing* 2022, vol. 39, 313-335.

<sup>76</sup> F.F. LEUNG, F.F. GU, Y. LI, J.Z. ZHANG and R.W. PALMATIER, “Influencer Marketing Effectiveness”, *Journal of Marketing* 2022, vol. 87, 383-405.

<sup>77</sup> *Ibid*; L. CHEN, Y. YAN and A.N. SMITH, “What drives digital engagement with sponsored videos? An investigation of video influencers’ authenticity management strategies”, *Journal of the Academy of Marketing Science* 2023, vol. 51, 206.

<sup>78</sup> S. WIES, A. BLEIER and A. EDELING, “Finding Goldilocks Influencers: How Follower Count Drives Social Media Engagement”, *Journal of Marketing* 2022, vol. 87, 383-405.

<sup>79</sup> *E.g.*, A. ARNOLD, “4 Ways Social Media Influences Millennials’ Purchasing Decisions”, *Forbes* 2017, [www.forbes.com/sites/andrewarnold/2017/12/22/4-ways-social-media-influences-millennials-purchasing-decisions/](http://www.forbes.com/sites/andrewarnold/2017/12/22/4-ways-social-media-influences-millennials-purchasing-decisions/).

<sup>80</sup> Conversely, influencers may be publicly shamed (*‘cancelled’*) when they appear to be dishonest. See also C. PORNPITAKPAN, “The Persuasiveness of Source Credibility: A Critical Review of Five Decades’ Evidence”, *Journal of Applied Social Psychology* 2004, vol. 34, 243-281.

<sup>81</sup> M. TOURÉ-TILLERY and A.L. MCGILL, “Who or What to Believe: Trust and the Differential Persuasiveness of Human and Anthropomorphized Messengers,” *Journal of Marketing* 2015, vol. 79, 94-110.

<sup>82</sup> K. NOWAK and C. RAUH, “The influence of the avatar on online perceptions of anthropomorphism, androgyny, credibility, homophily, and attraction”, *Journal of Computer-Mediated Communication* 2005, vol. 11, 153-178.

<sup>83</sup> P. AGGARWAL and A.L. MCGILL, “Is That Car Smiling at Me? Schema Congruity as a Basis for Evaluating Anthropomorphized Products”, *Journal of Consumer Research* 2007, vol. 34, 468-479.



and having realistic traits.<sup>84</sup> Appearing with others (companions) in posts also seems to have a positive effect in trust-creation.<sup>85</sup> A study examining the similarities between *Lil Miquela* and a comparable human influencer (Emma Chamberlain) found that *Lil Miquela* succeeds in appearing human-like by posting highly-relatable content with which her followers can empathize.<sup>86</sup> A deep dive into the comment sections under posts of virtual influencers prove the finding that consumers are deceived by the realism of the influencer's page, as millions of followers engage with their content as if they are human beings (yet some top comments do appear to recognize and appraise the virtual nature of their persona<sup>87</sup>).

The ubiquitous anthropomorphism of virtual influencers has been the subject of ontology research, which indicates that CGI-influencers contribute to increasingly blurry lines between real life and online existence.<sup>88</sup> Long-standing psychological research, on the other hand, has contended that the persuasiveness of anthropomorphised agents (*i.e.*, non-human objects with human features<sup>89</sup>) is similar to that of human agents from the perspective of consumers.<sup>90</sup> However, studies have revealed that when the anthropomorphism used in virtual influencers is too high, social media users can induce negative reactions, resulting in more anger, anxiety and doubts in user comments, as compared to less anthropomorphic influencers.<sup>91</sup> This is the

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<sup>84</sup> F. MIAO, I. KOZLENKOVA, H. WANG, T. XIE and R. PALMATIER, "An emerging theory of avatar marketing", *Journal of Marketing* 2021, vol. 86, 67-90.

<sup>85</sup> *E.g.*, G.L.C. RIZZO, J. BERGER and F.V. ORDENES, "What Drives Virtual Influencer's Impact?", 2023, [dx.doi.org/10.2139/ssrn.4329150](https://dx.doi.org/10.2139/ssrn.4329150).

<sup>86</sup> D.A. KUHLNE, "A comparative analysis of CGI Instagram influencer, @lilmiquela, and human Instagram influencer, @emmachamberlain. The careful balance between being "insta-famous" and being relatable: discussions on media representation and media production of influencers on Instagram", unpublished Masters' thesis in media and communication studies, Malmö University, 2019, [hdl.handle.net/2043/30077](https://hdl.handle.net/2043/30077).

<sup>87</sup> E. BLOCK and R. LOVEGROVE, "Discordant Storytelling, 'Honest Fakery', Identity Peddling: How Uncanny CGI Characters Are Jamming Public Relations and Influencer Practices", *Public Relations Inquiry* 2021, vol. 10, 267-269. See also R.J. AHN, S.Y. CHO and W.S. TSAI, "Demystifying Computer-Generated Imagery (CGI) Influencers: The Effect of Perceived Anthropomorphism and Social Presence on Brand Outcomes", *Journal of Interactive Advertising* 2022, vol. 22, 328.

<sup>88</sup> B. ROBINSON, "Towards an Ontology and Ethics of Virtual Influencers", *Australasian Journal of Information Systems* 2020, vol. 24, 6. See also KALPOKAS, who contends that "the distinction between truth and falsehood has become irrelevant" in the digital world; cf. I. KALPOKAS, *A Political Theory of Post-Truth*, London, Palgrave Macmillan, 2019, 9-49.

<sup>89</sup> See for an elaborate description of the psychological process of anthropomorphism: N. EPLEY, A. WAYTZ and J.T. CACIOPPO, "On Seeing Human: A Three-Factor Theory of Anthropomorphism", *Psychological Review* 2007, vol. 114, 864-886.

<sup>90</sup> *Inter alia* P. AGGARWAL and A.L. MCGILL, "Is That Car Smiling at Me? Schema Congruity as a Basis for Evaluating Anthropomorphized Products", *Journal of Consumer Research* 2007, vol. 34, 468-479; S. KIM and A.L. MCGILL, "Gaming with Mr. Slot or Gaming the Slot Machine? Power, Anthropomorphism, and Risk Perception," *Journal of Consumer Research* 2011, vol. 38, 94-107; J. LANDWEHR, A.L. MCGILL, and A. HERRMANN, "It's Got the Look: The Effect of Friendly and Aggressive 'Facial' Expressions on Product Liking and Sales", *Journal of Marketing* 2011, vol. 76, 132-146; M. TOURÉ-TILLERY and A.L. MCGILL, "Who or What to Believe: Trust and the Differential Persuasiveness of Human and Anthropomorphized Messengers," *Journal of Marketing* 2015, vol. 79, 94-110.

<sup>91</sup> J. ARSENYAN and A. MIROWSKA, "Almost Human? A Comparative Case Study on the Social Media Presence of Virtual Influencers", *International Journal of Human - Computer Studies* 2021, vol. 155, 102694. See also in general about highly anthropomorphic objects: J.I. SEYAMA and R. S. NAGAYAMA, "The



reason why virtual influencers, while definitely aiming to exhibit human features, are still somewhat distinguishable from humans – even though this is not apparent to every consumer.

## 2. Lack of transparency of virtual influencers

10. LACK OF TRANSPARENCY – The lack of authenticity of virtual influencers is exacerbated by their equally pervasive absence of transparency. The social media profiles of virtual influencers do generally not properly disclose their potential artificial nature and their non-autonomous nature. These two transparency-deficiencies are an addition to the traditional disclosure issues of human influencers, such as the non-disclosure of advertisements,<sup>92</sup> which also occur on the social media profiles of their virtual counterparts.

The average consumer may be unaware that the virtual influencer does not represent a real person, irrespective of the implemented level of AI.<sup>93</sup> The root cause of this misconception is the fact that virtual influencers are deliberately designed to resemble humans (the explained anthropomorphism) and to come across as relatable.<sup>94</sup> In fact, 42 percent of Gen Z and millennials have followed an influencer of which they did not realise they were not human.<sup>95</sup> In case of *Lil Miquela* for example, it took two years before she admitted she is a virtual influencer.<sup>96</sup> A two-year disclosure period seems exuberant in respect of a business-to-consumer relation. To make matters worse, *Lil Miquela* only shared her artificial nature after she was purportedly ‘hacked’ by her ‘frenemy’ *Bermuda*, a CGI-influencer developed by the same company *Brud*.<sup>97</sup> It turns out that their feud was a complete fabrication and a marketing stunt, which again, is not obvious to most consumers. *Shudu* is another virtual model whose CGI-nature was initially kept a secret by her creator.<sup>98</sup> The sole knowledge that the endorser is a fake character could reasonably deter a consumer from purchasing a product in pursuit of that endorsement, given

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Uncanny Valley: Effect of Realism on the Impression of Artificial Human Faces”, *Presence* 2007, vol. 16, 337-351.

<sup>92</sup> See J. KERCKAERT, “Influencer Marketing Meets Consumer Protection: The Role of the Rules on Unfair Commercial Practices in Regulating Social Media Influencers” in J. KERCKAERT and S. GEIREGAT (eds.), *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, forthcoming.

<sup>93</sup> With regard to AI use, even a consumer with professional knowledge may not be able to identify the parts of a virtual influencer profile that are not the product of humans.

<sup>94</sup> See no. 9.

<sup>95</sup> C. TREPANY, “The Robot Invasion Has Begun: Meet Computer-Generated Influencers Taking Over Instagram”, *USA Today* 2019, eu.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/.

<sup>96</sup> T. HSU, “These Influencers Aren’t Flesh and Blood, Yet Millions Follow Them”, *The New York Times* 2019, www.nytimes.com/2019/06/17/business/media/miquela-virtual-influencer.html.

<sup>97</sup> E. PETRARCA, “Everything We Know About the Feud Between These Two Computer-Generated Instagram Influencers”, *The Cut* 2018, www.thecut.com/2018/04/lil-miquela-hack-instagram.html.

<sup>98</sup> GQ STAFF, “Instagram-famous Shudu is a supermodel with a secret”, *CQ India* 2018, www.gqindia.com/content/shudu-model-worlds-first-digital-supermodel-on-instagram/.



the proper disclosure. Only a handful of virtual influencers discloses its virtual nature prominently in the bio of their social media profile.<sup>99</sup>

Even when social media users are aware of the fakeness of the influencer, average consumers are also uninformed about the full control of entities with strong commercial incentives over the narrative conveyed by CGI-influencers (*supra*, no. 6). It is not mentioned on the profile of any virtual influencer, as far as we know, that they are the creation of a certain company and thus under complete control of that entity. In case of human influencers, it is already proven that undisclosed advertisements jeopardize the ability of consumers to make informed decisions as they may consider the disseminated information to be impartial, and rely on it to make a choice they would otherwise not have made.<sup>100</sup> Virtual influencers take this effect to another level, since their entire profile is a billboard with the sole purpose of displaying hidden brand advertisements.

### 3. Consumer deception by virtual influencers

**11.** CONSUMER DECEPTION ABOUT THE HYBRID NATURE OF VIRTUAL INFLUENCERS – As a result of the explained lack of proper disclosure, there is a double layer of consumer-misconception over the authenticity of existing virtual influencers; (i) they are *not completely human, i.e.*, their images are CGI and potentially produced by AI, which makes their content images unrealistic, and (ii) they are *not completely artificial, i.e.*, they lack autonomy (or independence) as their posts and endorsements are dictated by brands, other commercial entities and their human employees. The current virtual influencers are a misleading hybrid of those two natures. The fact that the influencer uses CGI-images may deceive the consumer into thinking that no human is involved at all and that there is no manipulation, *quod non*. Conversely, their level of anthropomorphism creates the feeling that endorsements are personal and experience-based, *quod non*. Whilst the impression that the influencer is completely human may be easy to pierce and less problematic from a consumer law point of view, the misconception that the influencer is completely artificial can lead to a manipulation of consumers into buying products based on false opinions and advertisements.

The fact that the ‘experiences’, ‘opinions’ and ‘endorsements’ of virtual influencers are dishonest by definition, is undoubtedly most detrimental in terms of consumer protection. Virtual influencers face serious limitations in their ability to genuinely experience the products they promote, while their product endorsements are portrayed as based on own experience. They

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<sup>99</sup> See for example [www.instagram.com/magazineluiza/](https://www.instagram.com/magazineluiza/); [www.instagram.com/kyraonig/](https://www.instagram.com/kyraonig/); [www.instagram.com/shudu.gram/](https://www.instagram.com/shudu.gram/). In some cases, the disclosure of the digital nature is hidden or ambiguous. For instance, *Lil Miquela* refers to herself in her bio as a “19-year-old Robot living in LA”.

<sup>100</sup> E.g., S.C. BOERMAN, L.M. WILLEMSSEN and E.P. VAN DER AA, “This Post is Sponsored’ Effects of Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook”, *Journal of Interactive Marketing* 2022, vol. 38, 82-92; Z. KARAGÜRA, J.-M. BECKERB, K. KLEINC and A. EDELING, “How, why, and when disclosure type matters for influencer marketing”, *International Journal of Research in Marketing* 2022, vol. 39, 313-335.



lack the physical senses that are necessary to try on clothing, feel the texture of makeup on their skin, or perceive the fragrance of a scent. For instance, a virtual influencer showcasing clothing may not accurately depict how the garments would appear on a real person due to the influencer's fake and idealized body. In the same vein, *Lil Miquela* cannot taste the Haribo candy that she promotes. Their endorsements are framed as personal and experience-based, but in reality, they are fake and designed to mislead consumers.

Considering the implemented level of anthropomorphism of virtual influencers, one cannot reasonably argue that consumers uphold a different standard of expectations for them as opposed to human influencers, since a large portion of social media users is unable to distinguish real from unreal online personalities in absence of proper disclosure in this respect.<sup>101</sup> Therefore, virtual influencer endorsements are principally incompatible with the average consumer's legitimate expectations that we have established, *i.e.*, the expectation to receive a genuine and personal opinion on a certain product. As a result, we argue that product advertisements from highly anthropomorphised virtual influencers are by definition deceptive towards consumers, in absence of proper disclosure about the hybrid nature of the virtual influencer. EU consumer law may qualify this deception as a forbidden unfair market practice, which is covered further on in this paper (*infra*, no. 19 ff).

#### 4. Other ethical problems arising from virtual influencers

**12.** MISREPRESENTATION, DIVERSITY AND UNREALISTIC BODY IMAGES – Broader concerns than only the consumer-related problems exist about the image portrayed by prominent virtual influencers. These issues go beyond the scope of this paper but are worth mentioning. For example, a CGI-influencer may appear to represent a particular ethnic group, gender or (dis)ability, while it is actually coded and operated by a white and/or all male team.<sup>102</sup> Recently, fashion brand Levi's decided to introduce AI models to create “*a more diverse and inclusive customer experience*”, which brought the brand into hot waters as this was purportedly just an attempt to improve the company's optics at a low cost, without making substantial changes to its hiring policies.<sup>103</sup> Some argue that virtual influencers promote unattainable beauty

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<sup>101</sup> See no. 10.

<sup>102</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, “The impact of influencers on advertising and consumer protection in the Single Market”, 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 33. See also C. MALACHIAS, “Diversity and inclusion in the metaverse: What effect will virtual influencers have?”, *The Drum* 2022, [www.thedrum.com/profile/itb-worldwide/news/diversity-and-inclusion-in-the-metaverse-what-effect-will-virtual-influencers-have](http://www.thedrum.com/profile/itb-worldwide/news/diversity-and-inclusion-in-the-metaverse-what-effect-will-virtual-influencers-have).

<sup>103</sup> E. ORMESHER, “Why Levi's decision to use AI models misses the mark on DE&I”, *The Drum* 2023, [www.thedrum.com/news/2023/03/28/why-levi-s-using-ai-models-misses-the-mark-dei](http://www.thedrum.com/news/2023/03/28/why-levi-s-using-ai-models-misses-the-mark-dei); S. RUTBERG, “Backlash against AI supermodels triggers wider fears in fashion workforce”, *NBC News* 2023, [www.nbcnews.com/business/business-news/ai-models-levis-controversy-backlash-rcna77280](http://www.nbcnews.com/business/business-news/ai-models-levis-controversy-backlash-rcna77280).





standards and body images for young women and men, leading to a risk of low self-esteem and anxiety for the youthful audience.<sup>104</sup>

## II. The treatment of virtual influencers under the EU Unfair Commercial Practices Directive and the Belgian Code of Economic Law

### A. Virtual influencers: traders or not? The scope of the EU Unfair Commercial Practices Directive and the Belgian Code of Economic Law

13. INFLUENCERS AS TRADERS?<sup>105</sup> – The EU addresses misleading and aggressive marketing practices through the UCPD and its national transposition laws, which are essentially only applicable to ‘traders’. Therefore, a crucial question emerges regarding the identification of virtual influencers as ‘traders’ under the purview of EU law. We presume that virtual influencers may only be considered as such insofar their human counterparts are captured by the concept.

Under the UCPD, the term ‘trader’<sup>106</sup> refers to any natural or legal person who, in commercial practices covered by the Directive<sup>107</sup>, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.<sup>108</sup> The UCPD defines

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<sup>104</sup> M. ALLUM, “How Do Virtual Models Influence Body Image?”, *fashionispsychology.com/how-do-virtual-models-influence-body-image/* (retrieved on 3 August 2023); Q. JI, L. LINGHU and F. QIAO, “The Beauty Myth of Virtual Influencers: A Reflection of Real-World Female Body Image Stereotypes”, *Advances in Social Science, Education and Humanities Research* 2022, vol. 670, 784-787. The criticism of virtual influencers for unrealistic representations is similar to the criticism of toy dolls such as Mattel’s *Barbie* in the 1990s and 2000s. See e.g., K.D. BROWNELL and M.A. NAPOLITANO, “Distorting reality for children: Body size proportions of Barbie and Ken dolls”, *International Journal of Eating Disorders* 1995, vol. 18, 295-298; H. DITTMAR, E. HALLIWELL and S. IVE, “Does Barbie make girls want to be thin? The effect of experimental exposure to images of dolls on the body image of 5- to 8-year-old girls”, *Developmental Psychology* 2006, vol. 42, 283-292.

<sup>105</sup> For a more comprehensive analysis pertaining to the potential trader status of influencers in general under EU Law, we refer to J. KERCKAERT, “Influencer Marketing Meets Consumer Protection: The Role of the Rules on Unfair Commercial Practices in Regulating Social Media Influencers” in J. KERCKAERT and S. GEIREGAT (eds.), *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, forthcoming.

<sup>106</sup> While the Directive occasionally mentions the term ‘business’, it is essential to clarify that the terms ‘trader’ and ‘business’ carry identical meaning and legal significance within the context of this Directive. See CJEU 3 October 2013, C-59/12, ECLI:EU:C:2013:634, *BKK Mobil Oil*, par. 31.

<sup>107</sup> Business-to-consumer (B2C) commercial practices entail any act, omission, course of conduct, representation and commercial communication. This includes advertising and marketing by a trader, directly connected with the promotion, sale or supply of a product to consumers (art. 2 (d) UCPD). The trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers.

<sup>108</sup> Art. 2 (b) UCPD. Article 2 (2) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, for its part, defines a trader as “any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive”. In light of the Court of Justice of the European Union’s (CJEU) interpretation that the definition of a ‘trader’ exhibits substantial similarity across both Directives and necessitates a uniform





'business-to-consumer commercial practices' as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".<sup>109</sup> The UCPD further clarifies that the scope of the Directive encompasses unfair commercial practices that occur prior to, during, and after a commercial transaction involving a product.<sup>110</sup> Commercial communications, including advertising and marketing, which take place prior to or outside the conclusion of a contract, also fall within the scope of the directive, under the condition that they relate to the promotion, sale or supply of a product to consumers.<sup>111</sup>

It is evident from the language of the Directive that social media influencers must fulfil one of two criteria to fall within the UCPD's personal scope. They must either (i) act for purposes relating to their trade, business, craft or profession, or they must (ii) act in the name of or on behalf of a trader.<sup>112</sup> To meet the criteria of the first category (i), influencers endorsing their own products or business, must regularly engage in professional activities. The European rule-makers have embraced a broad notion of the term 'trader', by targeting any natural or legal person that is regularly engaged in a gainful activity.<sup>113</sup> The element of 'regularity' is hard to assess for influencers, as their involvement in the trade relationship may be occasional or consistently recurring.<sup>114</sup> It requires the consideration of different non-exhaustive and non-exclusive criteria, on a case-by-case basis.<sup>115</sup> Factual elements such as the number of collaborations

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interpretation as they share common objectives, this Chapter exclusively delves into the UCPD to investigate the potential inclusion of virtual influencers within the ambit of traders. See for instance CJEU 4 October 2018, C-105/17, ECLI:EU:C:2018:808, *Kamenova*, par. 25-27.

<sup>109</sup> Art. 2 (d) UCPD.

<sup>110</sup> Art. 3 (1) UCPD.

<sup>111</sup> J. KERCKAERT, "#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing", *ERPL* 2023, vol. 31, iss. 2/3, 15.

<sup>112</sup> CJEU 4 October 2018, C-105/17, ECLI:EU:C:2018:808, *Kamenova*, par. 36.

<sup>113</sup> CJEU 3 October 2013, C-59/12, ECLI:EU:C:2013:634, *BKK Mobil Oil*, par. 32.

<sup>114</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, "The impact of influencers on advertising and consumer protection in the Single Market", 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 24.

<sup>115</sup> CJEU 4 October 2018, C-105/17, ECLI:EU:C:2018:808, *Kamenova*, par. 37. See also Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 27. Examples of the criteria to take into account are whether the sale on the online platform was carried out in an organised manner; whether the sale was intended to generate profit; whether the seller had technical information and expertise relating to the products which he offered for sale that the consumer did not necessarily have, with the result that he was placed in a more advantageous position than the consumer; whether the seller had a legal status which enabled him to engage in commercial activities and to what extent the online sale was connected to the seller's commercial or professional activity; whether the seller was subject to VAT; whether the seller, acting on behalf of a particular trader, on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity; whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods; *etc.* It is important to emphasize that meeting one or more of these criteria alone is insufficient to conclusively determine



the influencer enters into or the quantity of free products they receive can be taken into account for this.<sup>116</sup> Moreover, influencer engagements with brands have a varying nature. Some influencers frequently participate in collaborations, while others only occasionally engage in commercial deals. There are also diverse methods of compensation for advertising services. For these reasons, determining if influencers hold the status of a trader is not always a straightforward task.<sup>117</sup>

The second ground for a qualification as trader requires that (ii) the influencer engages in the promotion of products or services in the name of or on behalf of a third-party trader.<sup>118</sup> This criterium raises a number of questions. First, it is not clear if influencers who act as mere intermediaries should be considered as professional actors. The case law of the CJEU presents an open criterium to this end, as both the trader and the intermediary must “*satisfy the definition of a trader*”, resulting in ambiguity.<sup>119</sup> Secondly, the establishment of criteria to determine if the influencer acts on behalf of another trader proves to be challenging due to various factors, such as the nature of the influencer-brand agreements – including the level of content guidance and the duration of collaboration – and the amount or type of incentive that influencers could receive.<sup>120</sup>

The CJEU only regards an activity as a practice that is commercial by nature if it forms part of the commercial strategy of a trader, and is directly connected with the promotion, sale or supply of its *own products*.<sup>121</sup> Therefore, even when it is established that the influencer is a trader,

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the classification as a trader. See CJEU 4 October 2018, C-105/17, ECLI:EU:C:2018:808, *Kamenova*, par. 38-40.

<sup>116</sup> J. KERCKAERT, “De (minderjarige) socialemidia-influencer als onderneming”, *DCCR* 2023, iss. 2, 52.

<sup>117</sup> *Ibid*, 53-54.

<sup>118</sup> When an influencer acts as an intermediary, the initiating trader will still be responsible for ensuring compliance with the UCPD. See J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 13.

<sup>119</sup> That being said, the guidance on the interpretation and application of the UCPD provided by the European Commission leaves no ambiguity in this regard. It explicitly states that the definition of ‘trader’ encompasses not only individuals who conduct business independently but also those, *including consumers*, who act ‘in the name of’ or ‘on behalf of’ another trader. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 26. It is important to emphasize that while the aforementioned guidance may provide some insights into the language of the directive, it does not have binding authority in terms of interpreting the UCPD, as the definitive interpretation of EU law resides solely within the competence of the CJEU. The preamble to the guidance expressly states: “[t]his Notice is intended purely as a guidance document – only the text of the Union legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court [...]”. For a more comprehensive understanding of these various interpretations under consideration, see J. KERCKAERT, “Influencer Marketing Meets Consumer Protection: The Role of the Rules on Unfair Commercial Practices in Regulating Social Media Influencers”, in J. KERCKAERT and S. GEIREGAT (eds.), *Social Media Influencers and #the Law*, Heverlee, LeA Uitgevers, 2024, forthcoming.

<sup>120</sup> J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 14-15.

<sup>121</sup> CJEU 23 April 2009, C-261/07 and C-299/07, ECLI:EU:C:2009:244, *VTB-VAB and Galatea*, par. 50; CJEU 14 January 2010, C-304/08, ECLI:EU:C:2010:12, *Plus Warenhandelsgesellschaft*, par. 37; CJEU 9



the UCPD only applies to him if his endorsements are part of a trader's commercial strategy and is directly connected with the promotion, sale or supply of that trader's own products to consumers.<sup>122</sup> This may be the case when the influencer promotes products that he sells directly, although such scenario is less common. It is more likely that the influencer promotes the products of a third-party trader.<sup>123</sup> When the influencer does so without acting in their name or on behalf of that trader, the UCPD only imposes obligations on that influencer if there is a direct connection with the promotion of the products of the influencer itself (for a more in-depth understanding of these diverse situations, *infra*, no. 14).<sup>124</sup>

**14. VIRTUAL INFLUENCERS AND THE COMMERCIAL ENTITIES BEHIND THEM AS TRADERS –** While human influencers may be considered as traders in some cases, their virtual counterparts cannot. In its guidance concerning the interpretation of the UCPD, the European Commission does recognize the potential for virtual entities to attain the status of an influencer. The Commission describes an influencer as “*a natural person or virtual entity who has a greater than average reach in a relevant platform* [own emphasis]”.<sup>125</sup> However, unlike human influencers who can be held liable for their own actions and content, it is clear that virtual influencers (irrespective of used AI technology<sup>126</sup>) lack natural and legal personhood, and therefore do not meet the criteria to be classified as traders. The virtual character itself cannot be held liable for its unfair market practices, as it cannot pay damages or make amends.<sup>127</sup>

Because of this liability gap<sup>128</sup>, the law is required to turn to legal entities or natural persons in order to enforce legal obligations. The individuals or entities behind the virtual influencer may be regarded as a trader. To ascertain their eligibility as traders, two distinct parties should be

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November 2010, C-540/08, ECLI:EU:C:2010:660, *Mediaprint*, par. 18; CJEU 30 June 2011, C-288/10, ECLI:EU:C:2011:443, *Wamo*, par. 31; CJEU 2 September 2021, C-371/20, ECLI:EU:C:2021:674, *Peek and Cloppenburg*, par. 31.

<sup>122</sup> J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 23.

<sup>123</sup> *Ibid*, 23.

<sup>124</sup> A direct connection with the influencer's product could be present, for example, when the influencer organises a give-away regarding the products of the third-party trader, requiring people who want to participate to follow or subscribe to the influencer's social media profile. See J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 21-22.

<sup>125</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 97.

<sup>126</sup> See no. 4 *ff.* for an account on the role of AI in virtual influencer accounts, and the businesses behind the virtual influencer.

<sup>127</sup> In the context of AI systems, this is beautifully captured by the statement that AI systems have “*no soul to be damned, and no body to be kicked*”, as they do not own assets or bear liabilities. Neither do they have a social reputation or professional persona to protect. The same goes for virtual influencers, even when they do not incorporate AI. See S.A GRAMITTO RICCI, “Artificial Agents in Corporate Boardrooms”, *Cornell Law Review* 2020, vol. 105, 886; C. PICCIAU, “The (Un)Predictable Impact of Technology on Corporate Governance”, *Hastings Business Law Journal* 2021, vol. 17, 120.

<sup>128</sup> E.g., S. DE CONCA, “Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-empowering Solutions”, in B. CUSTERS and E. FOSCH-VILLARONGA (eds.), *Law and Artificial Intelligence*, The Hague, Asser, 2022, 239-258.



analysed: the *provider* and the *deployer* of a virtual influencer. We are convinced that, in light of the lack of disclosure of the use of AI in virtual influencers, consumers should fall back on AI regulations to substantiate the criteria for identifying these two actors. According to the EU Proposal for an AI Act,<sup>129</sup> the provider is any natural or legal person that *develops* an AI system (here to be understood as the virtual influencer), or has an AI system developed, and places it on the market or puts the system into service under its own name or trademark.<sup>130</sup> The deployer is the natural or legal person that *uses* an AI system (here to be understood as the virtual influencer), under its authority.<sup>131</sup> Both the provider and the deployer could be regarded as traders if they use a virtual influencer as part of their commercial activities within their trade, business, craft, or profession. To qualify as a trader under the UCPD, the use of the virtual influencer should be directly associated with the promotion, sale or supply of a product to consumers in order to comply with the additional condition set forth by the CJEU. For the sake of simplicity, we discern the capacity of a provider from that of a deployer when we delve into their potential qualification of trader under the UCPD.

*With regard to the provider of the virtual influencer*, it is imperative to note that he develops a virtual influencer profile, or directly instructs a third party to develop a virtual influencer profile, and then places it on the market. Analogous to the definition in the EU Proposal for an AI Act, the qualification as provider does not require the use of the profile in his own name, since its later use by another actor is sufficient. In other words, the definition does not make a distinction between the scenario whereby the provider himself eventually operates the influencer to promote products, and the scenario whereby the provider transfers, sells or licenses the virtual persona (potentially with a corresponding AI model) to another person or entity that eventually uses it for the promotion of products,<sup>132</sup> irrespective of the fact that these actions occur for payment or free of charge. In the case where an entity develops a virtual influencer, but never uses it, nor allows someone else to use it for product promotion, that entity cannot be considered a provider.

Notably, the mere qualification of a person as provider is not enough to render this person a trader under the UCPD, since the standalone acts of development and intended use or sale do not imply a current association with the promotion of products to consumers. However, upon the actual realisation of the intent to use the virtual influencer, the provider can be considered as deployer and potentially a trader under the UCPD. Upon the realisation of the intent to transfer, sell or license the virtual influencer, the provider cannot be considered as trader

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<sup>129</sup> Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, 21 April 2021, COM(2021) 206 final (hereinafter: Proposal for an AI Act).

<sup>130</sup> Art. 3 (2) Proposal for an AI Act.

<sup>131</sup> Art. 3 (4) Proposal for an AI Act. See also for the replacement of the term ‘user’ by ‘deployer’: EUROPEAN PARLIAMENT, “DRAFT Compromise Amendments on the Draft Report – Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts”, 16 May 2023, COM(2021)0206 – C9 0146/2021 – 2021/0106(COD), 137.

<sup>132</sup> In correspondence with the definition of art. 3 (2) Proposal for an AI Act; transferring, selling or licensing can be understood as “placing on the market”, whereas the own operation can be understood as “putting into service under its own name or trademark” in the context of virtual influencers.



under the UCPD. Importantly, if the influencer were to deploy AI for certain aspects, the lion's share of the obligations arising from the EU Proposal for an AI Act is still applicable to the provider of that influencer, irrespective of the fact that he is not subject to the UCPD.

*With regard to the deployer of the virtual influencer*, the mere act of using the virtual influencer to promote products to consumers does not always suffice to be subject of the UCPD. The classification as a trader depends on the party from whom the virtual influencer endorses products. If the deployer uses the virtual influencer to promote his own products, then he should in any case be considered as trader. However, two scenarios should be distinguished when the deployer uses the virtual influencer to promote the products of a third-party trader, which is most probable in reality. If the endorsement of those third-party products is made in the name of or on behalf of that third-party trader (*i*), which implies that there is a commercial partnership between the deployer and the third party, then both the deployer and the third party qualify as traders under the UCPD. If the deployer does not act in the name of or on behalf of a third-party trader (*ii*), then the UCPD does not apply to this third-party trader concerning these specific endorsements, and may apply to the deployer insofar as there is a direct connection between the promotion of those third-party products and the promotion of the deployer's own products.<sup>133</sup> The latter is not likely, since virtual influencers rarely sell their own products. In all scenario's where the deployer may be considered a trader, the origin of the virtual influencer is irrelevant.

The deployer may be bound by the UCPD, irrespective of the fact that he created the persona itself (and has a double capacity of provider-deployer), that he bought or received the influencer profile from a third party developer, or that he took a license on the rights to use that profile. Our analysis about the trader-status of virtual influencer deployers is (partially) supported by the European Commission, as it defines a virtual influencer as "*a digital character under the responsibility of a trader or a person acting in the name of or on behalf of a trader*".<sup>134</sup> Only those entities acting in the (potentially double) capacity of deployer have the possibility to control the virtual influencer, and may thus be responsible and liable for its endorsements. The responsibility criterion of the Commission aligns with the scope of the UCPD in the realm of virtual influencers. We are convinced that the continuous control over the influencer is a justified requirement to be recognized as a trader. In the scenario where the provider develops a virtual influencer and subsequently sells it to a deployer, thereby relinquishing its responsibility and control over the social media profile, the provider should no longer be held accountable for the product endorsements made by the influencer, at least not directly by the consumer. Of course, should the deployer be held liable for the virtual influencer's practices, then he may have the means to take recourse on the provider.

The previous paragraphs have underpinned that the provider notion of the EU Proposal for an AI Act is not a satisfying anchor point for the application of the UCPD, whereas the entity

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<sup>133</sup> This condition, which follows from the CJEU case law mentioned in footnote no. 121, does not apply in Belgium and German, which adhere to a broader scope for their national transposition laws. See *infra*, no. 15-16.

<sup>134</sup> Notice (Comm.) – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 1, no. 4.2.6.





serving as deployer is in most cases bound to the provisions of the Directive. For that reason, we refer to the deployer of the virtual influencer in the remainder of this paper. Of course, the doctrinal distinction between both concepts does not exclude the practical possibility that one person has a double capacity, *i.e.*, that of deployer and provider simultaneously.<sup>135</sup>

**15.** AN ‘UNDERTAKING’ UNDER THE BELGIAN CODE OF ECONOMIC LAW – The scope of the Belgian rules on business-to-consumer commercial practices is *nearly* identical to the scope of the UCPD, being a transposition of this Directive. However, the Belgian rules in Book VI of the Belgian Code of Economic Law (hereinafter: CEL) are not linked to ‘traders’, but to ‘undertakings’. The rules apply to product-related commercial practices of undertakings that are directed towards consumers.<sup>136</sup> The concept of an ‘undertaking’ encompasses “*any natural or legal person that pursues an economic objective in a sustainable manner, as well as its associations*”.<sup>137</sup> The criterion of ‘pursuing an economic purpose’ essentially pertains to engaging in economic activities.<sup>138</sup> Consequently, the determining factor in applying the enterprise concept is the nature of the activity, *i.e.*, the professional provision of goods and services on the market.<sup>139</sup> The legal form under which these activities are conducted, and the deployed method of financing, are irrelevant factors.<sup>140</sup> However, the definition also implies that the offering of goods or services on a specific market must be conducted in a manner that ensures continuity (*i.e.*, within

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<sup>135</sup> In its capacity of deployer, that person may be bound to the obligations of the UCPD. At the same time, if AI would be incorporated in the virtual influencer profile, that one person must oblige to both the provisions for providers and deployers in the EU Proposal for an AI Act. In fact, most provisions of the AI Act will apply to providers and not to deployers, with few exceptions such as the provision on deepfakes in art. 52 (3) Proposal for an AI Act.

<sup>136</sup> Only consumers can only invoke the rules on unfair contract terms when they conclude a contract with an undertaking. Consumers are defined as natural persons that act for purposes that fall outside of their trade or profession (art. I.1, 2° CEL).

<sup>137</sup> Art. I.8, 39° CEL. The concept of associations must be interpreted very broadly, meaning every natural or legal person acting for purposes relating to his trade, business or profession. This includes individuals who enter into agreements within the context of their professional activities, regardless of whether they are publicly or privately owned. See CJEU 17 May 2018, C-147/16, EU:C:2018:320, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW*.

<sup>138</sup> The concept of economic activity may be taken broadly to include industrial, financial and commercial activities. See G. STRAETMANS, “Onderneming, vrij beroep en consument”, in G. STRAETMANS and R. STEENNOT (eds), *Wetboek Economisch Recht en de bescherming van de consument*, Antwerp, Intersentia, 2015, 13; G. STRAETMANS, “Commentaar bij artikel I.8. 39° Wetboek Economisch Recht”, in X., *Handels- en economisch recht: commentaar met overzicht van rechtspraak en rechtsleer*, Antwerp, Kluwer, 2023, 116.

<sup>139</sup> CJEU 16 June 1987, C-118/85, ECLI:EU:1987:283, *Commission of the European Communities / Italian Republic*, par. 7; R. STEENNOT, J. WERBROUCK and R. VAN DER BRUGGEN, “Het nieuwe ondernemingsbegrip in het economisch recht”, in D. BRULOOT and H. DE WULF (eds), *Het nieuwe ondernemingsrecht*, Mechelen, Wolters Kluwer, 2020, 25; R. STEENNOT and J. WERBROUCK, “Consumentenbescherming in een gedigitaliseerde wereld”, in M. DELANOTE, B. PEETERS, and I. VAN DE WOESTEYNE (eds), *Digitalisering*, Mechelen, Kluwer, 2021, 79; G. STRAETMANS, “Onderneming, vrij beroep en consument”, in G. STRAETMANS and R. STEENNOT (eds), *Wetboek Economisch Recht en de bescherming van de consument*, Antwerp, Intersentia, 2015, 12-13; G. STRAETMANS, “Het ondernemingsbegrip. Aanknopingsfactor van economisch recht (deel 2)”, *NJW* 2020, iss. 419, 281.

<sup>140</sup> G. STRAETMANS, “Commentaar bij artikel I.8. 39° Wetboek Economisch Recht”, in X., *Handels- en economisch recht: commentaar met overzicht van rechtspraak en rechtsleer*, Antwerp, Kluwer, 2023, 116.





a certain structure and with regularity<sup>141</sup>), and the criterion inherent to the continuous nature of the activity is indeed the objective of making a profit, generating a return or, even more broadly, making a living.<sup>142</sup> Nevertheless, a profit motive in a commercial sense<sup>143</sup> is not required, but merely an additional element to make this assessment.<sup>144</sup> In addition, the person must be independent and bear the financial and other commercial risks of the act or activity themselves.<sup>145</sup>

**16.** DISCREPANCIES BETWEEN THE SCOPE OF NATIONAL TRANSPOSITION LAWS AND THE UCPD – In other words, the deployers of virtual influencers who pursue an economic objective in a sustainable manner are considered undertakings and fall under the scope of Book VI CEL. Notably, if deployers generate a return or sustain their livelihood through virtual influencers, they may be regarded as undertakings, *even when* they independently promote products from a third-party seller *without* being explicitly associated with that third party or acting on their behalf. In those scenario's where the virtual influencer does not promote or sell its deployer's own products, the fact that the virtual influencer sustainably makes money by promoting any other product suffices for the application of the Belgian transposition law. In that respect, the Belgian Book VI of the CEL has a broader field of application than the UCPD. Thus, Belgian law provides additional protection to consumers.<sup>146</sup> Other Member States, such as Germany, also opted to give their transposition laws a broader scope than the UCPD.<sup>147</sup> In spite of the UCPD being based on the principle of full harmonization, the CJEU has previously affirmed

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<sup>141</sup> Non-recurring acts are not sufficient for a person to qualify as a 'undertaking'.

<sup>142</sup> Engaging in an activity for remuneration would undeniably classify the individual as a provider of an economic activity, even if profit is not the primary objective. However, to be considered an undertaking, the activity must demonstrate an organised, continuous, *c.q.* business or professional nature, with the intention of generating profit. See G. STRAETMANS, "Commentaar bij artikel I.8. 39° Wetboek Economisch Recht", in X., *Handels- en economisch recht: commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, 2023, 120.

<sup>143</sup> We refer to the profit motive within the meaning of the (currently disbanded) Belgian Commercial Code of Commerce ("*le but de lucre, de spéculation*"). Profit-making in the broader sense within civil law is deemed satisfactory, which means that the activity must be pursued with the intention of generating income or securing one's livelihood. On the possible distinction between profit motive within the meaning of the Commercial Code and general civil profit motive, see G. STRAETMANS, "Verkoperbegrip uit de Wet op de handelspraktijken: de daden van koophandel ontgroeid?", *TBH* 2004, 462-473.

<sup>144</sup> G. STRAETMANS, "Onderneming, vrij beroep en consument", in G. STRAETMANS and R. STEENNOT (eds), *Wetboek Economisch Recht en de bescherming van de consument*, Antwerpen, Intersentia, 2015, 13.

<sup>145</sup> G. STRAETMANS, "Commentaar bij artikel I.8. 39° Wetboek Economisch Recht", in X., *Handels- en economisch recht: commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, 2023, (109) 113; J. KERCKAERT, "De (minderjarige) socialemedia-influencer als onderneming", *DCCR* 2023, iss. 2, 42.

<sup>146</sup> A similar scenario unfolds in German law, where the definition of a trader also surpasses the scope of the UCPD. German law adopts a more comprehensive notion of 'commercial practices', encompassing acts by third parties aimed at promoting the sales or purchases of a third company not acting on behalf of or in the name of the trader. See Opinion, CJEU 2 September 2021, C-371/20, ECLI:EU:C:2021:520, *Peek and Cloppenburg*, par. 26.

<sup>147</sup> J. KERCKAERT, "#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing", *ERPL* 2023, vol. 31, iss. 2/3, 19.



that broader national transposition laws as such are not incompatible with this principle.<sup>148</sup> The Member States remain free to extend the scope of the UCPD or to regulate, in conformity with other EU legislation, other types of relations.<sup>149</sup>

An illustration of this discrepancy is the case where the deployer of a virtual influencer receives unsolicited information on products from a third-party trader<sup>150</sup> and decides to mention those products favourably on the virtual influencer profile, in spite of not being explicitly instructed to post specific content regarding those products. Suppose that the deployer is found culpable of endorsing products in a manner incongruent with the provisions stipulated in the UCPD. In that case, the third-party trader cannot be held responsible for infringements of the UCPD that are ascribed to the deployer, when an influencer does not have any connections to the trader or brand and the infringements are not committed on behalf of the third-party trader.<sup>151</sup> However, in spite of not being captured by the scope of the UCPD, the Belgian<sup>152</sup> transposition rules are applicable insofar the deployer has an economic objective. In other words, both the deployer and the third-party trader could escape their responsibilities under the UCPD,<sup>153</sup> yet Belgium<sup>154</sup> forces them to adhere to these rules anyway – but the allocation of liability between both actors is uncertain in this case.<sup>155</sup> The bottleneck of this example is the requirement of an economic objective, in order for the deployer to be subject to the national rules. When a virtual influencer shares content on platforms like YouTube or TikTok, they may be compensated for their work through platform-advertisements rather than by directly promoting products in the name of or on behalf of a third-party seller. Under the condition that this practice generates a return or sustains their livelihood, the deployer will be regarded as

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<sup>148</sup> E.g., in the context of mortgage loans: CJEU July 12, 2012, ECLI:EU:C:2012:443, *SC Volksbank România*, par. 40-44. See also in the context of the UCPD itself: Opinion, CJEU 2 September 2021, C-371/20, ECLI:EU:C:2021:520, *Peek and Cloppenburg*, par. 26, “[...] Directive 2005/29 does not preclude the concept of ‘commercial practices’ from being given a broader definition in national law, since that directive governs only one ‘partial aspect’ of law in the field of unfair competition”.

<sup>149</sup> EUROPEAN COMMISSION, *First Report on the application of 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 (‘Unfair Commercial Practices Directive’)*, COM(2013) 139 final, 14 March 2013, <https://eur-lex.europa.eu/>, 9.

<sup>150</sup> As opposed to human influencers, virtual influencers cannot receive physical free products from brands. We assume that the receipt of free information or data on products is the equivalent of this for virtual influencers.

<sup>151</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 26 and 98.

<sup>152</sup> And German, *supra*, footnote no. 146.

<sup>153</sup> This is not the case in Belgium and Germany, as both countries deploy a broader scope for their national transposition laws. For further elaboration, see *supra* no. 16.

<sup>154</sup> And Germany, *supra*, footnote no. 146.

<sup>155</sup> See no. 17.



undertaking under the CEL, while he would not be captured by the UCPD-definition of ‘trader’.

Considering the booming popularity of virtual influencers, the various ways in which they make money and the need for effective consumer protection in the digital environment, we support the harmonisation of this broader field of application. An extension of the UCPD’s scope to this scenario would ensure that consumers receive adequate protection against those virtual influencers who promote the product of a third party that they do not represent, whilst this product is completely unrelated to the influencer’s own products.

17. ALLOCATION OF LIABILITY BETWEEN DIFFERENT PARTIES – Should the virtual influencer promote the products in name of, or on behalf of, a third party, both the deployer of the influencer and the third-party seller are subjected to the UCPD. For instances where the allocation of liability is not explicitly addressed by the UCPD, the European Commission argues that a trader is jointly and severally liable with the other traders for infringements of the UCPD committed by the latter on behalf of the first.<sup>156</sup> In the context of influencers, the responsibility for a breach of the UCPD can be attributed to the influencer and the third-party seller that has engaged the influencer and benefits from the endorsement, depending on the specific circumstances of the case.<sup>157</sup> In other words, both<sup>158</sup> the third-party seller and the deployer of the virtual influencer (acting in name of or on behalf of the third-party seller) can be held liable, jointly and severally.<sup>159</sup>

Nonetheless, ultimately, the distribution of liability hinges on the national legal framework and on the unique circumstances of each particular case. Special questions could arise when at least one of the parties is not captured by the UCPD, but by a broader national transposition law. For such hybrid situations, we contend that the parties will in most cases not be jointly and severally liable, as this requires a specific legal basis. For instance, in the rare scenario where the deployer of the virtual influencer has no affiliation with the third-party seller and

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<sup>156</sup> By application of art. 2 (b) UCPD in conjunction with relevant national laws on liability and sanctions; see Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 27.

<sup>157</sup> *Ibid*, 98.

<sup>158</sup> Potentially, recourse could be feasible among the various liable parties if this is in accordance with both national law and the contractual arrangements between the respective parties.

<sup>159</sup> Some authors argue that article 2 (b) of the UCPD is more connected to accountability than scope, and that reference to “*anyone acting in the name of or on behalf of a trader*” of article 2 (b) indicates that the trader retains primary responsibility for actions carried out by third parties on the trader's behalf. See T. WILHELMSSON, *European fair-trading law: the unfair commercial practices directive*, Aldershot, Ashgate Publishing, 2006, 68; B. KEIRSBILCK, *The New European Law of Unfair Commercial practices and competition law*, Oxford, Hart Publishing 2011, 239-241. However, the liability of intermediaries should not be implicitly harmonized as it could bypass democratic processes and raise legitimacy concerns. None of the existing ‘trader’ definitions should therefore regulate the liability of independent intermediaries and must be an issue left to the discretion of individual nations. See A. DE VRIES, “Liability for Independent Intermediaries in EU Consumer Law”, *Tilburg Law School Research Paper No. 06/2015*, <https://ssrn.com/abstract=2655896>, 15.



misleadingly presents itself as acting on this trader's behalf,<sup>160</sup> the third-party seller may not bear liability although national transposition rules apply to him. The burden to prove a lacking affiliation lies with that third-party seller, as the customer would be distressed to claim its rights otherwise. Then, only the deployer would be responsible for fulfilling his obligations under the UCPD, provided that he qualifies as trader.<sup>161</sup>

## **B. Unfair commercial practices of virtual influencers: the significance of transparency about the hybrid nature of virtual influencers**

**18.** THREE-LAYERED STRUCTURE – The UCPD prohibits all unfair commercial practices.<sup>162</sup> In particular, commercial practices are deemed unfair when they are considered misleading or aggressive. Annex I to the Directive encloses a list of misleading and aggressive commercial practices which are in all circumstances considered unfair (*i.e.*, the so-called 'blacklist'). The commercial practices that are not included in the blacklist may also fall under the general prohibition of misleading<sup>163</sup> and aggressive commercial practices<sup>164</sup>. As last resort, the commercial practices that do not appear on the blacklist and are not considered misleading or aggressive,<sup>165</sup> may still be caught by the general clause. The general clause states that a commercial practice shall be unfair if it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>166</sup>

**19.** IT'S AN #AD, ... – Consumers may not always be conscious of the fact that traders deploy social media as a marketing platform. The combination of commercial elements with social and cultural user-generated content on social media platforms can create heightened risks of concealed advertising.<sup>167</sup> That is the reason why all forms of commercial communications on

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<sup>160</sup> See no. 16 for an example of the differentiating scope of application between the UCPD and national transposition laws.

<sup>161</sup> For instance, suppose that a trader reposts social media content from an influencer, if the influencer promotes the trader's products in exchange. However, the trader fails to appropriately label these posts as commercial communications. Consequently, a national court could find the trader responsible for not implementing essential measures to ensure compliance with consumer law. These measures would have included ensuring transparency in the promotional posts, educating influencers about the disclosure requirements, and implementing control mechanisms to address and cease any infringements promptly. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 99.

<sup>162</sup> Art. 5 (1) UCPD.

<sup>163</sup> Art. 6 and 7 UCPD.

<sup>164</sup> Art. 8 and 9 UCPD.

<sup>165</sup> Art. 6 to 9 UCPD.

<sup>166</sup> Art. 5 (2) UCPD.

<sup>167</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 97.



social media platforms must be clearly disclosed.<sup>168</sup> The disclosure of #Ad or an equivalent label has gained the recognition as an essential element of professional (human) influencer marketing content, in both the US<sup>169</sup> and the EU<sup>170</sup>, and naturally extends itself to virtual influencers. The failure to clearly disclose the commercial element of the virtual influencer's content or practice amounts to a misleading practice under the UCPD.<sup>171</sup>

In this regard, the UCPD's blacklist<sup>172</sup> considers it in all circumstances misleading (and thus unfair) that editorial content is used in the media to promote a product where a trader has paid for the promotion without making that clear in the content, images or sounds that are clearly identifiable by the consumer.<sup>173</sup> In addition, the lack of adequate disclosure creates the risk that the virtual influencer falsely represents itself as a consumer, which is also *per se* misleading.<sup>174</sup>

In general, the UCPD prohibits all misleading actions that are capable of deceiving the average consumer on a wide range of elements, under the condition that those actions are likely to cause a consumer to take a transactional decision that they would not have taken otherwise.<sup>175</sup> A virtual influencer's commercial content shall be regarded as misleading if it contains false

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<sup>168</sup> *Ibid.*

<sup>169</sup> S. 255.5 (a) Guides Concerning the Use of Endorsements and Testimonials in Advertising, [www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255](http://www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255).

<sup>170</sup> See J. KERCKAERT, "Influencer Marketing Meets Consumer Protection: The Role of the Rules on Unfair Commercial Practices in Regulating Social Media Influencers" in J. KERCKAERT and S. GEIREGAT (eds.), *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, forthcoming.

<sup>171</sup> *Ibid.*, 97-98.

<sup>172</sup> Annex I UCPD. This list is implemented in Belgian Law through art. VI.100 CEL.

<sup>173</sup> No. 11 of Annex I UCPD. However, it is not clear if social media content falls under the scope of 'editorial content'. On the one hand, according to the Commission, the concept of 'editorial content' should be interpreted broadly, covering in some cases the content generated by (virtual) influencers or posted by them on social media platforms. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 98. On the other hand, based on the jurisprudence of CJEU, it is possible that the prohibition of advertorials is not applicable to influencer content. In the *RLvS* case, the CJEU states that the prohibition of advertorials does not specifically impose an obligation on newspaper publishers to prevent potential unfair commercial practices by advertisers. It is possible that this exemption for newspaper publishers also extends to influencers who share editorial content. See J. KERCKAERT, "#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing", *ERPL* 2023, vol. 31, iss. 2/3, 25-26. Additionally, in the study regarding Advertising and Marketing Practices in Online Social Media, the European Commission insists that in a narrow interpretation, the wording of the current advertorial prohibition is limited to edited media content, typically journals, blogs, or news publishing. On social media platforms, users create content without editors, and user posts arguably do not qualify as editorial content. See EUROPEAN COMMISSION, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, June 2018, [ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practicessocial-media-0\\_en](http://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practicessocial-media-0_en), 47.

<sup>174</sup> No. 22 Annex I UCPD. However, even in cases where the commercial nature of the content is communicated, uncertainty remains regarding the extent to which the used indicators, such as a link to the trader's website, meet the disclosure requirement outlined in No. 22 of Annex I. See EUROPEAN COMMISSION, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, June 2018, [ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practicessocial-media-0\\_en](http://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practicessocial-media-0_en), 46.

<sup>175</sup> Art. 6 and 7 UCPD.





information and is therefore untruthful, or when it deceives or is likely to deceive the average consumer in any way, about elements such as the existence or nature of the product, the main characteristics of the product or the nature, attributes, and rights of the trader or its agent.<sup>176</sup> This can even be the case when the provided information is factually correct. The influencer's commercial content shall also be regarded as misleading if it omits material information (*i.e.*, misleading omission)<sup>177</sup> such as his commercial intent, by hiding it or providing it in an unclear, unintelligible, ambiguous or untimely manner.

The virtual influencer must disclose its commercial goal (#Ad) in a clear and appropriate manner, considering the medium used for marketing, along with other factors such as the context, placement, timing, duration, language, target audience, and other relevant aspects.<sup>178</sup> The disclosure must be sufficiently salient to adequately inform the average, or – if applicable – vulnerable consumer that is targeted.<sup>179</sup> Such a disclosure is not transparent if it is not prominent. For instance, when an Instagram-post is accompanied by a long text-caption where #advertisement is only added at the very end of the post, the disclosure cannot be considered as sufficiently prominent.<sup>180</sup> This is also the case when the commercial intent can only be discovered by the consumer if he exercises additional steps, for example by clicking 'read more'.<sup>181</sup>

**20.** ... , FROM A #ROBOT – As elaborated on earlier, virtual influencers have a hybrid nature, as they are neither completely human, nor completely artificial.<sup>182</sup> In respect of the first issue of authenticity, it is imperative for consumers to not only be informed about the commercial nature of the influencer's content but also to be made aware of their non-human status. When ambiguity about the virtual influencer's non-human identity leads the average consumer to believe he is interacting with a real and independent person, it can be argued that the endorsement made by this virtual influencer constitutes a misleading practice. To this end, the UCPD contains three separate grounds that may mandate the disclosure of #IAmARobot.

Undoubtedly, virtual influencer marketing can affect the perceived main characteristics of the endorsed product, particularly the results to be expected from its use and the results or material features of tests or checks conducted on the product.<sup>183</sup> Considering that virtual influencers lack the capacity to use or evaluate the product, they are incapable of providing accurate information regarding the expected product outcomes. It is essential to emphasize that for such a commercial practice to be deemed unfair, it must be demonstrated that the practice causes

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<sup>176</sup> Art. 6 (1) (a) to (g) UCPD. This provision is implemented in Belgian Law through art. VI.97 CEL.

<sup>177</sup> Taking account of all features and circumstances of the factual context, in addition to the limitations of the medium of communication. See art. 7 UCPD. This provision is implemented in Belgian Law through art. VI.99 CEL.

<sup>178</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 98.

<sup>179</sup> *Ibid*, 98.

<sup>180</sup> *Ibid*.

<sup>181</sup> *Ibid*.

<sup>182</sup> See no. 11.

<sup>183</sup> Art. 6 (1), (b) UCPD.





or is likely to cause the average consumer<sup>184</sup> to make a transactional decision<sup>185</sup> that they would not have made otherwise. Hence, the anthropomorphism applied by the virtual influencer must have the potential to mislead the average consumer into perceiving the influencer as a genuine and independent individual, which could lead this average consumer into taking a transactional decision he would not have taken otherwise.

In addition, not disclosing the virtual nature of a virtual influencer can as such be regarded as a misleading omission<sup>186</sup>, since it omits material information – *i.e.*, the non-human nature of the influencer – that the average consumer needs to take an informed transactional decision in a specific context. As mentioned, an endorsement entails a misleading omission when the trader hides material information, or provides it in an unclear, unintelligible, ambiguous or untimely manner, or fails to identify the commercial intent of the practice if not already apparent from the context.<sup>187</sup> The UCPD does not define ‘material information’, except for the specific case of an ‘invitation to purchase’.<sup>188</sup> The communication of a virtual influencer does

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<sup>184</sup> The average consumer is one who is reasonably well-informed and reasonably observant and circumspect, considering social, cultural, and linguistic factors. The average consumer test is not a statistical test, which means national courts and authorities will have to exercise their own faculty of judgment, having regard to the case law of the Court of Justice, to determine the typical reaction of the average consumer in each case; see recital 18 UCPD. The UCPD is founded on the notion that a national regulation prohibiting claims that may deceive only highly gullible, inexperienced, or inattentive consumers would be excessive and result in an unwarranted trade barrier. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 33. For example, typically, the average consumer will not associate goods labelled as ‘dermatologically tested’ with authenticity when it is clear that the virtual influencer is not a real person, thus rendering this practice not misleading and unfair. However, based on the principle of proportionality, it is up to the national authorities and courts to assess whether a practice is likely to deceive the average consumer, considering the common expectations of consumers (without the need for expert reports or consumer research polls).

<sup>185</sup> Art. 2 (k) UCPD defines a ‘transactional decision’ as “*any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting*”. This broad concept of a transactional decision applies to a variety of cases and is not limited to the consumer’s decision whether or not to enter into a sales or service contract. The concept of transactional decision also includes decisions directly related to a purchase decision, *i.e.*, pre-purchase decisions, such as the decision to enter a shop or the decision to visit the trader’s website, in addition to post-purchase decisions, such as the decision to withdraw from or terminate a service contract or a decision to switch to another service provider. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 31.

<sup>186</sup> Art. 7 (1) UCPD.

<sup>187</sup> Art. 7 (2) UCPD.

<sup>188</sup> Article 2 (i) UCPD defines an ‘invitation to purchase’ 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 enables the consumer to make a purchase*”. In case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context: (a) the main characteristics of the product, to an extent appropriate to the medium and the product; (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting; (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery



not typically serve as an invitation to purchase.<sup>189</sup> However, one could assert that the notion of ‘material information’ emphasizes the essential nature of the information required for the average consumer to make an informed decision about a commercial transaction.<sup>190</sup> Consequently, information may be qualified as material if its absence will result in or is likely to result in the average consumer making a transactional decision that he otherwise would not have made. Before deciding whether the average consumer may be misled by an omission, it is necessary to consider the factual context of the commercial practice, including all its features and circumstances and the limitations of the communication medium.<sup>191</sup> In other words, it is required to assess on a case-by-case basis whether material information has been omitted and whether the virtual influencer has fulfilled the transparency requirements.<sup>192</sup> That being said, we contend that the scenario whereby a virtual influencer bears a close resemblance to a real individual in the eye of the average consumer and does not disclose its non-human nature, undoubtedly constitutes a misleading omission under the UCPD.

Lastly, consumers have the option to invoke the general clause of the UCPD.<sup>193</sup> This general clause serves as a safety measure to ensure that any unfair practice that does not fall within the scope of other provisions of the UCPD (*i.e.*, practices that are not deemed misleading, aggressive, or blacklisted) can still be subject to penalties. As mentioned, the general clause regards a commercial practice as unfair if (i) it is contrary to the requirements of *professional diligence* and (ii) it materially distorts or is likely to materially *distort the economic behaviour* with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>194</sup> The concept of ‘professional diligence’ encompasses the principles of ‘honest market practice’, ‘good faith’ and ‘good market practice’, embodying normative values

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or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.

<sup>189</sup> An invitation to purchase is a narrower concept than advertising, and not all commercial communications will qualify as an invitation to purchase. An invitation to purchase refers to the information given in the product marketing that sufficiently enables the consumer to take the decision whether to purchase a specific product for a specific price. Content of virtual influencers that includes an exhaustive description of a product or service’s nature, characteristics and benefits, but not its price, cannot be considered an ‘invitation to purchase’. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 53-54.

<sup>190</sup> This line of reasoning aligns with Belgian legislation, as articulated in art. VI.99, §1 CEL, wherein the similar concept of ‘essential information’ is used. See in that same sense B. KEIRSBILCK, “Commentaar bij artikel VI.99 WER”, in X., *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Antwerp, Kluwer, 2018, 61; Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 50.

<sup>191</sup> B. KEIRSBILCK, “Commentaar bij artikel VI.99 WER”, in X., *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, 2018, 61-62.

<sup>192</sup> Under art. 7 UCPD. See also J. KERCKAERT, “#NoFilter? The Application of the Unfair Commercial Practices Directive and the Role of Soft Law in the Context of Influencer Marketing”, *ERPL* 2023, vol. 31, iss. 2/3, 28.

<sup>193</sup> Outlined in art. 5 (2) UCPD.

<sup>194</sup> Art. 5 (2) UCPD.



pertinent to business activities.<sup>195</sup> The UCPD defines ‘to materially distort the economic behaviour of consumers’ as “*using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that they would not have taken otherwise*”.<sup>196</sup> In essence, the requirement in relation to the material distortion of the consumer’s economic behaviour is the same as that under the special general clauses.<sup>197</sup> It is safe to say that when the robotic nature of a virtual influencer is unclear to the targeted average consumer, this ambiguity is likely to materially distort the consumer’s economic behaviour and is likely to cause the consumer to take a transactional decision that he would not have taken otherwise, for the same reasons as the misleading omission. In other words, not disclosing #IAmARobot for a highly anthropomorphised virtual influencer results in a forbidden unfair commercial practice.

**21.** #IAMAI – In the (near) future, a mandatory disclosure of virtual influencers’ non-human nature will likely also follow from the provisions of the AI Act, yet only for those virtual influencers that implement AI methods. In the current version of the Proposal, providers of AI systems that are intended to directly interact with natural persons are obligated to design and develop these systems in such a way that the concerned natural persons are informed of the fact that they are engaging with an AI system, unless this is obvious from the point of view of a natural person who is reasonably well-informed, observant and circumspect, taking into account the circumstances and the context of use.<sup>198</sup> This obligation, if approved in the final version of the Act, will apply to high- and low-risk<sup>199</sup> AI systems intended to interact with natural persons. Both the low- and high-risk AI methods implemented to manage certain aspects of virtual influencers profiles will be captured by this obligation, since social media profiles are self-evidently targeted at engaging interactions with natural persons. In addition, if the virtual influencer profile shares deepfakes, which did not occur yet to our knowledge, the deployer

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<sup>195</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 37.

<sup>196</sup> Art. 2 (e) UCPD.

<sup>197</sup> Art. 6 and 7 UCPD. The requirement that a commercial practice must be capable of distorting the consumer’s economic behaviour in order to be unfair is worded differently in article 5 (2) than in articles 6 and 7. While article 5 (2) UCPD employs the terminology “*materially distorts or is likely to materially distort the economic behaviour of the average consumer*”, articles 6 and 7 prohibit a misleading commercial practice if it “*causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*”. However, to materially distort the economic behaviour of consumers means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that they would not have taken otherwise. Consequently, the same assessment has to be made on the basis of articles 6 and 7.

<sup>198</sup> Art. 52 (1) Proposal for an AI Act. Even though this provision only targets *providers* of AI systems, the *deployer* of the virtual influencer for which certain AI methods are used will also have an incentive to adhere to the disclosure obligation encompassed in that provision. The provider will have solid grounds to hold the deployer liable if the first is sanctioned for a lack of disclosure due to the negligence of the last.

<sup>199</sup> In addition to AI systems incorporated into products governed by the EU’s product safety legislation, the Proposal for an AI Act comprehensively enumerates high-risk AI systems in Annex II, as stipulated in article 6 (2).



of that influencer will be obligated to disclose that the content has been artificially generated or manipulated.<sup>200</sup>

**22.** AND #FROMTRADER – The second authenticity issue of virtual influencers pertains to the fact that they are not entirely artificial, as they cannot make independent decisions on product endorsements. Whereas the human influencer principally retains the autonomous decision-making capability to use the endorsed product, assess its safety and effectiveness, and to then share its honest findings with consumers, virtual influencers are fully controlled by a commercial entity.<sup>201</sup> Consumers may not understand that a brand or other commercial entity is meticulously directing the virtual influencer’s conduct and content.

Upholding transparency about the degree of commercial influence that is wielded by the brand is pivotal. It would be valuable to introduce a transparency requirement and obliging virtual influencers to incorporate the hashtag #FromTrader[X] in their profile bio or posts. The full control of the brand over the endorsement can be deemed as ‘material information’ that is essential for the average consumer to make an informed decision pertaining to a commercial transaction, especially since it is the reasonable expectation of the average consumer to receive an honest, personal and experience-based endorsement from the influencer.<sup>202</sup> Therefore, we assert that in those circumstances wherein virtual influencers are subject to complete control of a trader, not disclosing this fact could conceivably satisfy the criteria for a misleading omission within the scope of the UCPD. Moreover, the disclosure of #FromTrader[X] has the potential to enhance the enforcement of regulations governing virtual influencers, particularly in situations where the entities responsible for the virtual influencer are not easily discernible.<sup>203</sup>

## **C. Enforcement of EU consumer law against virtual influencers**

### **1. General enforcement of UCPD obligations**

**23.** ENFORCEMENT AND PENALTIES – The UCPD does not harmonise enforcement systems,<sup>204</sup> leaving significant discretion to the Member States in accordance with the principle of national procedural autonomy.<sup>205</sup> Member States are free to choose the enforcement mechanisms which suit their legal tradition best, as long as they ensure that adequate and effective

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<sup>200</sup> Art. 52 (3) Proposal for an AI Act.

<sup>201</sup> See no. 6.

<sup>202</sup> See no. 8 and 11.

<sup>203</sup> See no. 26.

<sup>204</sup> European Commission, *First Report on the application of 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 ('Unfair Commercial Practices Directive')*, COM(2013) 139 final, 14 March 2013, <https://eur-lex.europa.eu/>, 26.

<sup>205</sup> K.J. CSERES, “Enforcing the Unfair Commercial Practices Directive: The enforcement model of the Netherlands” in T. TÓTH (ed.), *Unfair commercial practices: the long road to harmonized law enforcement*, Budapest, Pazmany Press, 2014, 20.



means exist to prevent unfair commercial practices.<sup>206</sup> It is also left to the Member States to decide what type of penalties should be applied, as long as they are 'effective, proportionate and dissuasive'.<sup>207</sup>

The UCPD does not specify the exact type of enforcement tools. As a result, a wide diversity of models for enforcing consumer laws exists. In the Member States, three primary enforcement systems can be identified. First, there is administrative enforcement, conducted by public authorities. Secondly, there is judicial enforcement, where private enforcement actions are pursued through the legal system. Finally, some systems combine elements of both administrative and judicial enforcement.<sup>208</sup> Penalties for non-compliance with the UCPD vary and may include injunction orders, damages, administrative fines, and criminal sanctions. In many Member States, a combination of these penalties is applied to ensure effective enforcement of the Directive.<sup>209</sup>

**24. ENFORCEMENT AGAINST THIRD-COUNTRY TRADERS** – The potential application of the UCPD to non-EU traders is governed by the Rome II Regulation on non-contractual obligations.<sup>210</sup> This regulation stipulates that the law governing non-contractual obligations arising from acts of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are affected, or are likely to be affected.<sup>211</sup> This implies

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<sup>206</sup> Art. 11 UCPD. Such means include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may take legal action against such unfair commercial practices in national courts and/or before an administrative authority competent to either decide on complaints or to initiate appropriate legal proceedings. Each Member State is free to decide which of these facilities shall be available and whether the courts or administrative authorities are able to require prior recourse to other established means of dealing with complaints. These facilities shall be available regardless of whether the consumers affected are located on the territory of the Member State where the trader is also established, or that of another Member State.

<sup>207</sup> Art. 13 UCPD.

<sup>208</sup> Some Member States have predominantly private enforcement (e.g., Austria and Germany), while others rely mostly on public bodies (e.g., Denmark, Sweden, Finland, Italy, Ireland, Romania and previously the UK). Nevertheless, most systems combine elements of public and private enforcement (e.g., the Netherlands and Belgium). See EUROPEAN COMMISSION, *First Report on the application of 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 ('Unfair Commercial Practices Directive')*, COM(2013) 139 final, 14 March 2013, <https://eur-lex.europa.eu>, 26; K.J. CSERES, "Enforcing the Unfair Commercial Practices Directive: The enforcement model of the Netherlands" in T. TÓTH (ed.), *Unfair commercial practices: the long road to harmonized law enforcement*, Budapest, Pazmany Press, 2014, 24.

<sup>209</sup> EUROPEAN COMMISSION, *First Report on the application of 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 ('Unfair Commercial Practices Directive')*, COM(2013) 139 final, 14 March 2013, <https://eur-lex.europa.eu>, 26-27.

<sup>210</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), O.J. 31 July 2007, iss. 199, 40. This regulation applies to situations involving conflicts of laws in civil and commercial matters (art. 1 (1) Rome II Regulation).

<sup>211</sup> Art. 6 (1) Rome II Regulation.





that as soon as misleading advertisements are targeted towards EU consumers and cause harm to their collective interests, the obligations set forth in the UCPD come into effect. It is important to note that the Rome II-designated applicable law cannot be overridden by a choice-of-law agreement.<sup>212</sup>

**25. PUBLIC AND PRIVATE ENFORCEMENT IN BELGIUM** – In Belgium, the Federal Public Service of Economy, SMEs, Middle Classes and Energy (*‘Economische Inspectie van de Federale Overheidsdienst Economie, K.M.O., Middenstand en Energie’*, hereinafter: ‘FPS Economy’) is authorised to identify infringements of the CEL.<sup>213</sup> When the FPS Economy determines the occurrence of an unfair commercial practice, they have the authority to impose administrative fines.<sup>214</sup> Additionally, the CEL enables the FPS Economy to issue a warning to the undertaking, compelling them to cease the infringing act.<sup>215</sup> This warning procedure is primarily deployed for minor violations, ensuring compliance with the regulation without resorting to sanctions unless necessary (*e.g.*, when prompt legal recourse is available).<sup>216</sup>

Additionally, the Belgian legislator inserted a specific civil remedy that becomes applicable when a consumer has entered into an agreement subsequent to an unfair commercial practice. According to the CEL, consumers have the right to claim reimbursement of the amount paid<sup>217</sup> without a duty to return the goods or compensate the services provided when an agreement has been concluded as a result of one of the unfair commercial practices listed as *per se* prohibited instances of misleading and aggressive commercial practices.<sup>218</sup> In this situation,

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<sup>212</sup> Art. 6 (4) Rome II Regulation.

<sup>213</sup> The officers of the General Directorate of Economic Inspection are authorised to detect and determine all violations of the Code of Economic Law, apart from the violations stipulated in article XV.75 of the same Code. See Article 1 of the Ministerial Order appointing the officials in charge of detecting and establishing the infringements stipulated in article XV.2 of the Economic Code, *Official Belgian Journal* 5 May 2014.

<sup>214</sup> Art. XV.60/4 CEL. The minimum and maximum amounts of these administrative fines correspond to the respective minimum and maximum amounts of the criminal fines stipulated in Chapters 1 and 2 of Title 3 of Book XV CEL, which address the same offence. See art. XV.60/20, § 1, par. 1 CEL.

<sup>215</sup> Art. XV.31, §1 CEL.

<sup>216</sup> *MvT*, Wetsontwerp houdende invoeging van boek XV, “Rechtshandhaving” in het Wetboek van Economisch recht, *Parl. St. Kamer* 2012-13, n°. 53-2837/001, 32. For further insights into the public enforcement of influencers, see J. VERECKEN, “Keep Calm and Obey the Watchdog? Public Authority Supervision on Influencer Market Practices in Belgium” in J. KERCKAERT and S. GEIREGAT (eds.), *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, forthcoming.

<sup>217</sup> In the event that payment has not transpired, the consumer naturally retains the option to decline payment.

<sup>218</sup> Art. VI.38 CEL. When a consumer agreement was concluded after an undertaking was held culpable of one of the next unfair commercial practices: a) making a materially inaccurate claim concerning the nature and the extent of the risk to the personal security of the consumer or his family, if the consumer does not purchase the product; b) claiming that products are able to facilitate winning in games of chance; c) falsely claiming that a product is able to cure illness, dysfunction or malfunctions; d) creating the impression that the consumer cannot leave the premises until a contract is formed; e) conducting personal visits to the consumer’s home ignoring his request to leave or not to return; f) creating the false impression that the consumer has already won or will win a price or other equivalent benefit by performing a particular act, when in fact there is no price or equivalent benefit, or taking any action in relation to claiming the price is subject to the consumer paying money or incurring a cost. See R.



consumers can simply request the undertaking to reimburse them while retaining the received goods and/or services, which means that there is no immediate need for the consumer to resort to legal action.<sup>219</sup> Legal proceedings will only have to be initiated if the undertaking refuses to reimburse the consumer voluntarily.<sup>220</sup> In all other instances of unfair commercial practices, the courts have the *option* to apply the same remedy. The court may also choose to apply the remedy partially, by for example allowing the consumer to retain the received goods or services if they pay half of the price or determining that the consumer is not required to make a payment but must still return the goods.<sup>221</sup> This does not prevent consumers from invoking traditional rules of tort law, to seek an integral compensation for the damages that they may have suffered.

## 2. Challenges arising from virtual influencers: the enigmatic ghosts of social media?

**26.** WHO ARE THE IDENTIFIABLE (LIABLE) PARTIES? – As explained above, entities are bound by the UCPD as soon as they deploy a virtual influencer to promote, sell or supply their own products to consumers. In addition, should the content of a virtual influencer be directly linked to the promotion, sale or supply of products of a third-party trader in the name or on behalf of that trader, then both the deployer of this virtual influencer and the third-party trader are captured by the UCPD. In both situations, at least one liable party is theoretically known to the consumer. However, in the second situation, it is not unconceivable that the identity of the deployer remains undisclosed, potentially shifting liability risk solely to the known third-party trader. A shifted risk may discourage third-party traders from collaborating with virtual influencers, as they could potentially be the only one to bear the consequences of violations of the UCPD. However, a third-party trader that is held liable by the consumer could of course take (partial or full) recourse on the deployer of the virtual influencer (who is known to him), depending on what is stipulated in their agreement.

**27.** INFORMATION SOCIETY SERVICES – As stated above (*infra*, no. 15), in Belgium, deployers could be considered as undertakings in this abovementioned situation and fall under the scope of Book VI CEL. However, even if we follow the Belgian definition, in reality, authorities may

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STEENNOT, “Belgium: Private Law Remedies for Breach of the Prohibition of Unfair Commercial Practices”, *EuCML* 2015, iss. 5, 189.

<sup>219</sup> Nevertheless, if the undertaking has not yet delivered the goods or rendered the services, the consumer will not be able to demand delivery or performance without paying. In this scenario, the consumer is not obliged to pay for the services already provided, but he is also not entitled to request the costless completion of the outstanding services. See R. STEENNOT, “Belgium: Private Law Remedies for Breach of the Prohibition of Unfair Commercial Practices”, *EuCML* 2015, iss. 5, 189; *MvT*, Wetsontwerp tot wijziging van de wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument/ Project de loi modifiant la loi du 14 juillet 1991 sur les pratiques du commerce et sur l’information et la protection du consommateur, *Parl.St.* Kamer 2006-2007, n° 51-2983/001, 38.

<sup>220</sup> R. STEENNOT, “Belgium: Private Law Remedies for Breach of the Prohibition of Unfair Commercial Practices”, *EuCML* 2015, iss. 5, 189.

<sup>221</sup> *Ibid*, 189-190.



still encounter significant obstacles in effectively monitoring virtual influencers, when they are unable to promptly identify their providers or deployers.

The fact that *providers of information society services* are subject to strict identification requirements could potentially mitigate this problem. These information society service providers encompass both natural and legal persons providing remunerated services at a distance, by electronic means, at the individual request of a recipient of services.<sup>222</sup> Thus, information society services cover a wide range of online economic activities, such as online platforms, online marketplaces, apps, or websites selling goods, services, or digital content, internet search engines and online social network services.<sup>223</sup> They can extend to services which are not remunerated by those who receive them, such as those offering commercial communications. Considering that providers or deployers of virtual influencers may fall within the category of information society service providers, they are obligated to disclose specific details, such as their name, their geographic address, their electronic mail address, the trade register information (*e.g.*, the registration number),<sup>224</sup> and their VAT-identification number.<sup>225</sup>

Nevertheless, this obligation does not apply to service providers based in a third country,<sup>226</sup> which presents a significant challenge since the majority, if not all, of providers or deployers of virtual influencers in today's landscape originate from third countries (such as the US). However, the UCPD does apply to these third-country traders as soon as they target EU consumers.<sup>227</sup> In addition, even within the EU, the enforcement of that disclosure from information service providers poses challenges, primarily stemming from the complexities involved in determining the territorial jurisdiction of entities engaged in virtual influencer operations. As a result, this obligation presents an inherent contradiction: while it emphasizes the necessity of identifying these entities, public authorities can only ascertain that a specific obligation applies to those entities *after* their identities are revealed. Therefore, the enforcement against the entities involved in the operation of virtual influencers appears to be very problematic.

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<sup>222</sup> Art. 2 (a) and (b) Directive on electronic commerce *j*<sup>o</sup> art. 1 (1) (b) Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (*O.J.* 17 September 2015, iss. 241, 1). See also art. I.18, 1<sup>o</sup> *j*<sup>o</sup> 3<sup>o</sup> CEL. The recipient of the service is any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible (art. 2 (d) 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 (*O.J.* 17 July 2000, iss. 178, 1, hereinafter: Directive on electronic commerce)). The definition of 'recipient of a service' covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons (recital 20 Directive on electronic commerce).

<sup>223</sup> Recital 18 Directive on electronic commerce.

<sup>224</sup> In Belgium, influencers who are recognized as entities under the CEL are obliged to register in the 'Kruispuntbank voor Ondernemingen' or 'KBO'.

<sup>225</sup> Art. 5 Directive on electronic commerce.

<sup>226</sup> Recital 58 Directive on electronic commerce.

<sup>227</sup> See no. 24.



**28.** VIRTUAL INFLUENCERS: THEY COME AND GO AS THEY PLEASE – The foregoing issue is strengthened by the fact that virtual influencers can be easily deleted if found to be non-compliant with regulations, therefore enabling providers to create new or updated virtual influencers as replacements. Also, a big concern regarding virtual influencers is their immunity to reputational damage compared to human influencers. In many countries, the consequences for non-disclosure of influencer marketing are limited to negative public exposure (*'naming and shaming'*) without significant penalties. As a result, the legal responsibility of entities involved in the operation of virtual influencers remains uncertain in the context of influencer marketing regulations.<sup>228</sup> In Belgium, the authorities have a more robust array of enforceable sanctions at their disposal. The FPS Economy has the authority to impose administrative penalties, thereby precluding a virtual influencer from evading accountability through disappearance. That being said, the Belgian authorities are equally hindered by the difficulty to identify the accountable trader, which may prevent them from levying sanctions.

### 3. A role for large social media platforms?

**29.** GENERAL OBLIGATIONS FOR VERY LARGE PLATFORMS TO MANAGE 'SYSTEMIC RISKS' – Providers of very large online platforms are obligated to adhere to supplementary requirements. These are providers with a number of active service recipients in the EU that is equal to or higher than 45 million per month on average (such as social media platforms).<sup>229</sup> They must diligently identify, analyse and assess any systemic risks stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services.<sup>230</sup> Subsequently, they are required to take reasonable, proportionate and effective mitigating measures.<sup>231</sup> Four categories of systemic risks must be thoroughly assessed, including the risk of any actual or foreseeable negative effects for the exercise of fundamental rights, such as a high level of consumer protection.<sup>232</sup>

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<sup>228</sup> F. MICHAELSEN, L. COLLINI, C. JACOB, C. GOANTA, S.E. KETTNER, S. BISHOP, P. HAUSEMER, C. THORUN and S. YESILOGLU, "The impact of influencers on advertising and consumer protection in the Single Market", 2022, [www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350), 33.

<sup>229</sup> Art. 33 (1) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), O.J. 27 October 2022, iss. 277, 1-102 (hereinafter: Digital Services Act). Several prominent social media platforms are captured by this category, such as Facebook, Instagram, TikTok, and Twitter (*Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines*, Press release, 25 April 2023, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_2413](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413)).

<sup>230</sup> Art. 34 (1) Digital Services Act.

<sup>231</sup> Art. 35 (1) Digital Services Act.

<sup>232</sup> The other three categories of systemic risks are the following: (a) the dissemination of illegal content through their services, such as the sale of products or services prohibited by Union or national law; (c) any actual or foreseeable negative effects on civic discourse, electoral processes, and public security; (d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being. See art. 34 (1) Digital Services Act.



When evaluating these systemic risks, providers of very large online platforms should focus on factors that might contribute to these risks. This entails a comprehensive review of all pertinent algorithmic systems, while being attentive to associated practices of data collection and utilization. They should assess the appropriateness of their terms and conditions and their enforcement mechanisms, as well as their content moderation processes, technical tools, and allocated resources.<sup>233</sup> When assessing the systemic risks, the platforms should also focus on how their services are used to propagate or amplify misleading or deceitful content, including disinformation. If algorithmic amplification of information contributes to these systemic risks, such influence must be duly acknowledged in their risk assessments.<sup>234</sup> In particular, providers should assess how the design and functioning of their service, as well as the intentional and often coordinated manipulation and use of their services, or the systemic infringement of their terms of service, contribute to such risks. Such risks may arise, for example, through the inauthentic use of the service, such as the creation of fake accounts, the use of bots or deceptive use of a service, and other automated or partially automated behaviours.<sup>235</sup>

**30. MEASURES TO MITIGATE SYSTEMIC RISKS ATTACHED TO VIRTUAL INFLUENCERS** – This framework can be applied to virtual influencers by assessing their role in contributing to systemic risks on online platforms. If providers of very large platforms identify that the content dissemination of virtual influencers may contribute to systemic risks, they must take mitigating actions. In this regard, providers must ensure that generated images, audio or video that appreciably resemble real persons and falsely appear to be authentic or truthful, are distinguishable through prominent markings when presented on their online interfaces, which might necessitate measures to ensure that virtual influencers do not nudge consumers into believing they are real. In addition, they must provide an easy to use functionality that enables recipients of the service to indicate such information. For example, the platform could introduce a ‘virtual influencer’ label that is shown on the influencer’s profile bio, similar to the ‘digital creator’ label that Instagram already uses. In addition, providers could adapt their terms and conditions and accompanying enforcement mechanisms<sup>236</sup> to introduce new requirements or restrictions in this regard.

Moreover, social media platforms may opt to ban the use of virtual influencers, if they find that such influencers pose significant risks or challenges to high-level consumer protection. Alternatively, the providers might choose not to ban virtual influencers entirely, but instead place certain information requirements on their deployers. For instance, they might demand that deployers disclose certain information about the virtual influencer’s robotic nature to enhance transparency. If AI is involved in generating the virtual influencer’s content, platforms could require the disclosure of the respective AI use. Whether or not the social media platform

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<sup>233</sup> Recital 84 Digital Services Act.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> Art. 35 (1) (b) Digital Services Act.





decides to implement the explained measures is up to the platform, as it is currently granted a broad discretion on how it desires to mitigate systemic risks attached to virtual influencers.

#### D. Towards more adequate consumer protection

**31. POTENTIAL SOLUTIONS** – The lack of transparency and authenticity of existing virtual influencers may be resolved or at least alleviated by adjusted legal strategies. In the previous paragraphs, we defended our views on how virtual influencers should be treated under the current framework of the UCPD. That analysis resulted in the finding that the UCPD already prompts special disclosure obligations for virtual influencers, such as ‘#IAmARobot’, which follows from a teleological reading of the directive. In this Section, we elaborate on ideas for novel legislative interventions, which would ensure additional mechanisms of protection for EU consumers. It is our assumption that these extra measures are needed as a complement to the existing obligations that follow from the UCPD, whether directly or indirectly.

**32. CLEAR DISCLOSURE OBLIGATIONS** – Whilst the prohibition of redactional advertisements is clearly embedded in the UCPD,<sup>237</sup> therefore requiring the reference to #Ad, there are no explicit rules (yet) that prompt disclosure of the non-human nature, the potential AI use and the commercial control of virtual influencers. In spite of our contention that the provision of these information pieces is implicitly mandated by current EU law, creators of virtual influencers might not feel the urge to adhere to these arguments in absence of hard law obligations. The transparency provision<sup>238</sup> in the EU Proposal for an AI Act is a first step in the right direction with regard to used AI methods (*supra*, no. 21). The legislator should consider the implementation of a broader legal basis for other disclosure requirements such as the #IAmARobot and #FromATrader tags, as well as the trader name identification, to decrease legal uncertainty. Alternative disclosure methods include a standardized platform label for non-human accounts, AI use and brand control. Instagram already provides the standardised option to label a profile as ‘digital creator’, yet not all virtual influencers use this label.<sup>239</sup> Another solution pertains to the watermarking of content images to make clear they are AI-generated. The latter was already subject of a larger 2023 agreement between US big tech companies about AI-synthesized content.<sup>240</sup> This agreement demonstrates that the industry is embracing new standards of AI transparency, which should be transposed to the realm of virtual influencers.

**33. ENFORCEMENT** – A number of measures may be introduced to ease the enforcement of virtual influencer rules. To avoid third-country influencers from escaping their obligations, the scope of existing disclosure obligations for providers of information services should be

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<sup>237</sup> No. 11 Annex I UCPD.

<sup>238</sup> Art. 52 (1) Proposal for an AI Act.

<sup>239</sup> For examples of virtual influencers that use the label ‘digital creator’, see *inter alia* [www.instagram.com/thalasya\\_/](https://www.instagram.com/thalasya_/) and [www.instagram.com/esther.olofsson/](https://www.instagram.com/esther.olofsson/).

<sup>240</sup> D. BARTZ and K. HU, “OpenAI, Google, others pledge to watermark AI content for safety, White House says”, *Reuters* 2023, [www.reuters.com/technology/openai-google-others-pledge-watermark-ai-content-safety-white-house-2023-07-21/](https://www.reuters.com/technology/openai-google-others-pledge-watermark-ai-content-safety-white-house-2023-07-21/).



extended to all providers who target consumers in the EU (in alignment with the territorial scope of the UCPD's obligations), as opposed to just those providers established in the EU. Advocating for a more stringent approach towards online platforms is equally imperative. While there are already a couple of helpful regulations in place, such as the systemic risk assessment for large online platforms, these mechanisms appear insufficient to ensure comprehensive consumer protection. Heavily relying on the cooperation and self-regulation of platforms may not guarantee adequate safeguards. What is needed, is a more concrete framework, that specifically involves disclosure rules and deferred profile removal. Such measures would likewise enhance transparency, making it clearer who is accountable. A potential remedy for the issue of influencer profiles being simply deleted once violations of consumer rights are identified, is the introduction of a 'cool-off period' (of, for instance, 30 days) before removal is finalized. Additionally, platforms should be obligated to retain profile data even after removal, for a reasonable time period, thereby enabling authorities to access and analyse this data if required. This proposal addresses the heart of the matter and aims to provide a well-rounded solution, striking a balance between consumer protection and the means for accountability.

**34.** A BAN ON VIRTUAL INFLUENCERS? – The unfair market practices committed by current virtual influencers might spark regulatory interest into the introduction of a ban on virtual influencers. It is true that product endorsements made by CGI-influencers are by definition unauthentic, as they cannot be honest, personal and experience-based. This prerequisite of authenticity is based on reasonable consumer expectations, which we defended earlier in this paper. The fact that companies can order their army of virtual influencers, fictional creatures with fake passions, to promote anything in an excessively and deceptively 'personal' manner, creates an undeniable threat of consumer manipulation. Nevertheless, when product advertisements do not fulfil the legitimate expectations of the targeted party, they can still be lawful through disclosure of the deviant element, here the fact that virtual influencers have a mixed human-artificial nature. The standards imposed by the UCPD, and other legal instruments already prompt a minimum level of transparency in this regard, which mitigates consumer deception. As a result, there is already a *ban* on virtual influencer ads without proper disclosure, when the virtual influencer applies a high level of anthropomorphism. However, a complete ban on all virtual influencers, including those who are clear about the fact that they are CGI, would be unjustified. While we refrain from imposing a hard prohibition, we do believe that market forces will punish those who abuse virtual influencers for the purpose of deceiving customers, as was recently the case with clothing brand Levi's.<sup>241</sup> We also back an evolution towards fully autonomous virtual influencers, where the control of brands is more limited (*infra*, no. 36 ff.).

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<sup>241</sup> E. ORMESHER, "Why Levi's decision to use AI models misses the mark on DE&I", *The Drum* 2023, [www.thedrum.com/news/2023/03/28/why-levi-s-using-ai-models-misses-the-mark-dei](http://www.thedrum.com/news/2023/03/28/why-levi-s-using-ai-models-misses-the-mark-dei); S. RUBERG, "Backlash against AI supermodels triggers wider fears in fashion workforce", *NBC News* 2023, [www.nbcnews.com/business/business-news/ai-models-levis-controversy-backlash-rcna77280](http://www.nbcnews.com/business/business-news/ai-models-levis-controversy-backlash-rcna77280).



35. UNNECESSARY LEGAL PERSONHOOD OF AI – Beyond any doubt, the ongoing discussions about legal personhood for AI,<sup>242</sup> which discover the potential of endowing AI systems with a bundle of its own rights and duties, miss the mark in respect of more responsible virtual influencers. As explained earlier, the contemporary realm of virtual influencers comprises little AI use. There is also a strong movement in the literature which condemns voices preaching for AI legal personhood as this would create more issues than it would solve, rendering it a poisoned chalice.<sup>243</sup> Bestowing rights and duties upon AI systems may create a single point of contact for liability claims, but the question remains who would provide the system with the needed assets to satisfy those claims, besides a number of ethical objections.<sup>244</sup> The latter explains why the political appetite for such an initiative is lacking in the EU.<sup>245</sup> If anything, AI

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<sup>242</sup> *Inter alia* L. SOLUM, “Legal Personhood for Artificial Intelligences”, *North Carolina Law Review* 1992, vol. 70, 1231-1287; S. CHOPRA and L. WHITE, “Artificial Agents - Personhood in Law and Philosophy” in R. LÓPEZ DE MÁNTARAS and L. SAIITA (eds.), *Proceedings of the 16th European Conference on Artificial Intelligence (ECAI 2004)*, Amsterdam, IOS Press, 2004, 635-639; F.P. HUBBARD, “Do Androids Dream? Personhood and Intelligent Artifacts”, *Temple Law Review* 2010, vol. 83, 405-474; D.C. VLADECK, “Machines without Principals: Liability Rules and Artificial Intelligence”, *Washington Law Review* 2014, vol. 89, 117-150; T. BURRI, “The EU is right to refuse legal personality for Artificial Intelligence”, *EUROACTIV* 2018, <https://www.euractiv.com/section/digital/opinion/the-eu-is-right-to-refuse-legal-personality-for-artificial-intelligence/>; R. DOWELL, “Fundamental Protections for Non-Biological Intelligences or: How We Learn to Stop Worrying and Love Our Robot Brethren”, *Minnesota Journal of Law Science & Technology* 2018, vol. 19, 305-336; G. TEUBNER, “Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten”, *Ancilla Iuris* 2018, 36-78; V.A.J. KURKI, *A Theory of Legal Personhood*, Oxford, Oxford University Press, 2019, 175-189; J. TURNER, *Robot Rules – Regulating Artificial Intelligence*, Cham, Palgrave Macmillan, 2019, 173-205; T.L. JAYNES, “Legal personhood for artificial intelligence: citizenship as the exception to the rule”, *AI & Society* 2020, vol. 35, 343-354; N. BANTEKA, “Artificially Intelligent Persons”, *Houston Law Review* 2021, vol. 58, 537-596; A. LAI, “Artificial Intelligence, LLC: Corporate Personhood As Tort Reform”, *Michigan State Law Review* 2021, 597-653; E. MIK, “AI as a Legal Person?” in J.-A. LEE, R.M. HILTY, K.-C. LIU (eds.), *Artificial Intelligence and Intellectual Property*, Oxford, Oxford University Press, 2021, 419-439; D.M. MOCANU, “Gradient Legal Personhood for AI Systems – Painting Continental Legal Shapes Made to Fit Analytical Molds”, *Front Robot AI* 2021, vol. 8, art. 788179, 1-11.

<sup>243</sup> *E.g.*, N. BANTEKA, “Artificially Intelligent Persons”, *Houston Law Review* 2021, vol. 58, 537-596; S. CHESTERMAN, “Artificial Intelligence and the Limits of Legal Personality”, *International and Comparative Law Quarterly* 2020, vol. 69, 819-844; S.A. GRAMITTO RICCI, “Artificial Agents in Corporate Boardrooms”, *Cornell Law Review* 2020, vol. 105, 892-893; K. ZIEMIANIN, “Civil legal personality of artificial intelligence. Future or utopia?”, *Internet Policy Review – Journal on Internet Regulation* 2021, vol. 10, 1-22.

<sup>244</sup> *E.g.*, F.P. HUBBARD, “Do Androids Dream? Personhood and Intelligent Artifacts”, *Temple Law Review* 2010, vol. 83, 429-430; N. BANTEKA, “Artificially Intelligent Persons”, *Houston Law Review* 2021, vol. 58, 540; A. BERTOLINI and F. EPISCOPO, “The Expert Group’s Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: a critical assessment”, *European Journal of Risk Regulation* 2021, vol. 3, 652 and 656.

<sup>245</sup> In 2017, the European Parliament had investigated the possibility to endow AI with some sort of electronic personhood, but this initiative was not successful because the EU’s civil law rules were deemed sufficient to address the liability questions of AI; A. HERN, “Give robots ‘personhood’ status, EU committee argues”, *The Guardian* 2017, [www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues](http://www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues); T. BURRI, “The EU is right to refuse legal personality for Artificial Intelligence”, *EUROACTIV* 2018, <https://www.euractiv.com/section/digital/opinion/the-eu-is-right-to-refuse-legal-personality-for-artificial-intelligence/>.



legal personality discussions are a distraction from the relevant debates on the responsibility for virtual influencers and the disclosure of their hybrid nature that we explore in this paper.

### III. The prospect of autonomous virtual influencers

36. TOWARDS AUTONOMOUS VIRTUAL INFLUENCERS – Existing virtual influencers cannot be deemed as autonomous agents who make their own independent endorsement decisions, considering that humans remain largely in the loop of their content creation process. As explained, a few aspects of this process might be trusted to AI (such as image generation and direct messaging), whereas the decision which product will be endorsed, and in which manner, is still in the hands of the commercial entity. The latter two elements have a salient impact on consumer transactional decision-making. However, there is a chance that this process of endorsement selection will become fully AI-based, with autonomous virtual influencers emerging in the future. We argue that, considering the current state of the technological art, AI applications can already be developed to create and operate a virtual influencer account without human intervention or supervision. It seems that a combination of existing text-to-image models and large language models (the latter mostly have a general purpose<sup>246</sup>) could be trained to autonomously create content for virtual influencers. Only in those future cases where most aspects of the influencer profile are autonomously handled by AI, especially the endorsement selection process, one can speak of true *AI-influencers*.

37. MACHINE LEARNING BASED ON REAL CONSUMER EXPERIENCES – AI-influencers have the potential to harness the enormous online dataset of existing consumer experiences. The decision of an autonomous virtual influencer to promote a certain product can be the result of an extensive learning process grounded in online consumer reviews, social media posts, engagement rates and other online sources that reflect consumer experiences.<sup>247</sup> Such an approach lends authenticity to the statements made by the virtual influencer, as the learning process behind the endorsement decision is driven by actual (human) user experiences, and is almost free from brand interference. However, in spite of such endorsements fulfilling consumer

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<sup>246</sup> According to art. 3 (1b) EU Proposal for an AI Act, a ‘general purpose AI system’ means an AI system that – irrespective of how it is placed on the market or put into service, including as open source software – is intended by the provider to perform generally applicable functions such as image and speech recognition, audio and video generation, pattern detection, question answering, translation and others; a general purpose AI system may be used in a plurality of contexts and be integrated in a plurality of other AI systems. A generative large language model such as GPT-4 is a good example of a general purpose AI system, which has an infinite number of purposes for which the user can deploy it. General purpose AI systems that may be used for high-risk applications will for all potential purposes (also those of low risk) be subject to the strictest obligations imposed by the Proposal for an AI Act; according to art. 4b of that Proposal. See e.g., P. HACKER, A. ENGEL and M. MAUER, “Regulating ChatGPT and other Large Generative AI Models” in X (ed.), *FAccT '23: Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency*, New York, Association for Computing Machinery, 2023, 1114-1115.

<sup>247</sup> In relation to this, see R. BYERS, “What are AI influencers? And should your brand care?”, [goat-agency.com/blog/influencer-marketing/ai-influencers](https://goat-agency.com/blog/influencer-marketing/ai-influencers) (retrieved on 2 August 2023).



expectations at face value, the use of an (inherently imperfect<sup>248</sup>) AI system could lead to the risk of misinterpreting user reviews, resulting in unintended consequences or actions based on those misinterpreted reviews. In addition, it is possible that other unfair market practices such as excessive personalization, inappropriate targeting of minors, data manipulation and an exploitation of dark patterns may emerge.<sup>249</sup>

Another benefit of autonomous virtual influencers is the option to make product endorsements more specialized, which allows a personalized and engaging experience for users who are looking for content that best aligns with their views and interests.<sup>250</sup> This way, brands could rely on a variety of different virtual influencers, each tailored to a specific niche. Digital personas could be designed to appeal an audience of a specific ethnicity, gender or age, which does invoke issues of misrepresentation (*infra*, no. 12). They could also tap into a special trend or topic, such as aesthetic travel pictures, *memes*<sup>251</sup>, ASMR-inducing content<sup>252</sup> and the newly emerging TikTok trend where influencers try to mimic the repetitive actions of a video game's non-playable character or *NPC*<sup>253</sup>. Machine learning allows the influencer to quickly adapt to new needs and interests of its intended audience.

**38.** BRAND CONTROL OVER FUTURE AUTONOMOUS VIRTUAL INFLUENCERS – As of now, however, there is little incentive for commercial entities to back the autonomous virtual influencer, as they wish to retain *full* power over its content.<sup>254</sup> We contend that brands can still exert

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<sup>248</sup> AI systems are inherently imperfect, which is mainly caused by their unpredictability, conceptual inexplicability (due to a potential black box) and occasionally erroneous results. See M. HERBOSCH, *Intelligent contracteren – Het precontractueel gebruik van systemen op basis van artificiële intelligentie*, doctoral thesis at Koninklijke Universiteit Leuven, 2023, 57 ff. The fact that the used AI systems for autonomous virtual influencers rely on extensive amounts of data (big data), makes it hard for humans to closely monitor and predict every outcome of the system with absolute certainty.

<sup>249</sup> For an account on the legal implications of these algorithmic malpractices, see no. 39 ff. See also Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, O.J. 29 December 2021, iss. 526, 99-101.

<sup>250</sup> R. BYERS, "What are AI influencers? And should your brand care?", [goatagency.com/blog/influencer-marketing/ai-influencers](https://goatagency.com/blog/influencer-marketing/ai-influencers) (retrieved on 2 August 2023).

<sup>251</sup> A 'meme' is an image, video or piece of text that is typically humorous in nature, that is copied and spread rapidly by internet users, often with slight variations. See A. BENVENISTE, "The Meaning and History of Memes", *The New York Times* 2022, [www.nytimes.com/2022/01/26/crosswords/what-is-a-meme.html](https://www.nytimes.com/2022/01/26/crosswords/what-is-a-meme.html).

<sup>252</sup> 'ASMR' or autonomous sensory meridian response is a sensory phenomenon, in which individuals experience a tingling, static-like sensation across the scalp, back of the neck and at times further areas in response to specific triggering audio and visual stimuli. See E.L. BARRATT and N.J. DAVIS, "Autonomous Sensory Meridian Response (ASMR): a flow-like mental state", *PeerJ* 2015, vol. 3, art. e851.

<sup>253</sup> C. STOKEL-WALKER, "An increasing number of TikTok creators are livestreaming themselves as "non-playable characters". Some are making money off the unconventional phenomenon", *BBC* 2023, [www.bbc.com/worklife/article/20230811-the-npc-livestream-tiktok-trend-helping-creators-earn-cash](https://www.bbc.com/worklife/article/20230811-the-npc-livestream-tiktok-trend-helping-creators-earn-cash).

<sup>254</sup> See no. 0.





influence over autonomous virtual influencers in the stage of development and goal-setting,<sup>255</sup> for example by programming their primary objective to be favourable product promotion.<sup>256</sup> This approach still involves a level of AI supervision and is frequently referred to as the ‘human-in-command’ strategy.<sup>257</sup> The deployer of the influencer is also able to implement certain constraints on the used inference database, with the result that only the brand’s own products are endorsed. For instance, when the CGI-influencer was given the goal to promote a product of *Coca Cola* and only reviews of such products are included in the database, the AI system might suggest an *Appletiser* ad during summer, and a *Coco Cola Zero* ad during winter, based on what online consumers like most during these timespans.<sup>258</sup>

Human oversight ceases once the virtual influencer is activated. From that moment on, the deployer or brand cannot control the content creation process anymore. Consequently, the commercial entity no longer has the authority to curate posts as this decision-making process becomes the domain of autonomous AI. In this process, it is possible that the AI system goes beyond the scope of its pre-programmed purpose and decides to recommend the product of a competitor. Then, brands could still try to intervene in the decision-making process by manipulating the data that is fed to the system, for example by including misleading or false consumer reviews generated by other AI systems.

**39.** MISLEADING USER REVIEWS AND COMMENTS – The use of AI and big data for endorsement decision-making can facilitate a better comprehension of customers’ emotions and

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<sup>255</sup> See also S. CHOPRA and L.F. WHITE, *A Legal Theory for Autonomous Artificial Agents*, Ann Arbor, The University of Michigan Press, 2011, 9; P. DOMINGOS, *The master algorithm: How the quest for the ultimate learning machine will remake our world*, New York, Basic Books, 2015, 283.

<sup>256</sup> For an account on the final goals of fully autonomous AI systems, see the philosophical theory of N. BOSTROM, *Superintelligence: Paths, dangers, strategies*, Oxford, Oxford University Press, 2014, 122-125. See also S. CHOPRA and L.F. WHITE, *A Legal Theory for Autonomous Artificial Agents*, Ann Arbor, The University of Michigan Press, 2011, 9; P. DOMINGOS, *The master algorithm: How the quest for the ultimate learning machine will remake our world*, New York, Basic Books, 2015, 283. In the context of autonomous weapons, the US Defense Science Board even emphasized that “there are no fully autonomous systems just as there are no fully autonomous soldiers, sailors, airmen or Marines” since either the system designer or an operator would at least have to program the weapon in order for it to function in pursuant to specified parameters, and an operator would have to decide to employ it in a particular battlespace, or more general, to employ it under specific conditions; M.N. SCHMITT and J.S. THURNHER, ““Out of the Loop”: Autonomous Weapon Systems and the Law of Armed Conflict”, *Harvard National Security Journal* 2013, vol. 4, 235; see also DEFENSE SCIENCE BOARD, “Task Force Report: The Role of Autonomy in DoD Systems”, 2012, [irp.fas.org/agency/dod/dsb/autonomy.pdf](http://irp.fas.org/agency/dod/dsb/autonomy.pdf), 24.

<sup>257</sup> For more information about the ‘human-in-command’ AI supervision model and its distinction from ‘human-in-the-loop’, ‘human-on-the-loop’ and ‘human-out-of-the-loop’, see HIGH-LEVEL EXPERT GROUP ON ARTIFICIAL INTELLIGENCE, “Ethics Guidelines for Trustworthy AI”, 2019, [op.europa.eu/en/publication-detail/-/publication/d3988569-0434-11ea-8c1f-01aa75ed71a1](http://op.europa.eu/en/publication-detail/-/publication/d3988569-0434-11ea-8c1f-01aa75ed71a1), 16. See also R. KOULU, “Human Control over Automation: EU Policy and AI Ethics”, *European Journal of Legal Studies* 2020, vol. 12, 31-32; E. HICKMAN and M. PETRIN, “Trustworthy AI and Corporate Governance: The EU’s Ethics Guidelines for Trustworthy Artificial Intelligence from a Company Law Perspective”, *European Business Organization Law Review* 2021, vol. 22, 600-603.

<sup>258</sup> This example is purely fictional, is not sponsored and does not represent the personal preferences of the authors.



opinions, particularly by analysing online reviews. AI systems are able to identify patterns, sentiment, and context within these reviews.<sup>259</sup> This enables businesses to gain a deeper understanding of how customers feel about products, services, or experiences and therefore empower entities to make more informed decisions, enhance customer experiences, and drive growth by aligning their efforts with customer preferences and expectations.<sup>260</sup> Nonetheless, the use of an (inherently imperfect<sup>261</sup>) AI system introduces the risk of misinterpreting negative user reviews.<sup>262</sup> Instead of accurately comprehending the intended meaning and sentiment of these reviews, the AI system may mistakenly interpret them as positive feedback. Consequently, there is a possibility that the system may generate or post content based on these erroneous positive reviews. Furthermore, deployers of autonomous virtual influencers may intentionally use the influencer's AI system in a deceptive manner to fabricate a considerable number of positive online reviews or reactions on social media platforms. AI-influencers can be exploited to generate seemingly authentic (but fake) positive reviews and enable the covert promotion and sale of a trader's goods and services.<sup>263</sup> Due to the anonymity of the AI-influencer's deployer, consumers may remain unaware that the influencer may be promoting its own products, leading consumers to believe that the endorsements (and reviews) are genuine.

These practices could undermine the integrity and trustworthiness of user-generated content on social media platforms. Misleading or fabricated reviews have a detrimental impact on consumer trust in the authenticity of online reviews, resulting in consumer harm. A fake review is one that represents a positive perspective but fails to represent an honest and unbiased opinion of a genuine consumer or accurately reflect their actual experience with a product, service, or business.<sup>264</sup> Such deceptive practices also compromise the individual's ability to make well-informed decisions based on trustworthy information, as consumers often rely on reviews and recommendations from others to guide their purchasing decisions. When a substantial number of these reviews are artificially generated, it becomes challenging for consumers to discern genuine feedback from manipulated or fake endorsements.<sup>265</sup> Therefore, the

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<sup>259</sup> S. GARG, S. GUPTA and B. GUPTA, "Issues and challenges with fake reviews in Digital Marketing", *ICCCI*, Coimbatore, IEEE, 2022, (1) 2. See also S. HUANG, S. MCINTOSH, S. SOBOLEVSKY and P. HUNG, "Big Data Analytics and Business Intelligence in Industry", *Information Systems Frontiers* 2017, vol. 19, iss. 6, 1229-1232.

<sup>260</sup> S. GARG, S. GUPTA and B. GUPTA, "Issues and challenges with fake reviews in Digital Marketing", *ICCCI*, Coimbatore, IEEE, 2022, (1) 2.

<sup>261</sup> See no. 37.

<sup>262</sup> M. PURDY, J. ZEALLEY and O. MASELI, "The Risks of Using AI to Interpret Human Emotions", 18 November 2019, <https://hbr.org/2019/11/the-risks-of-using-ai-to-interpret-human-emotions>.

<sup>263</sup> P. COLLINSON, "Fake reviews: can we trust what we read online as use of AI explodes?", 15 July 2023, [www.theguardian.com/money/2023/jul/15/fake-reviews-ai-artificial-intelligence-hotels-restaurants-products](http://www.theguardian.com/money/2023/jul/15/fake-reviews-ai-artificial-intelligence-hotels-restaurants-products).

<sup>264</sup> EPRS, *Online consumer reviews – The case of misleading or fake reviews*, PE 571.301, October 2015, [www.europarl.europa.eu](http://www.europarl.europa.eu), 5.

<sup>265</sup> *Ibid.*



proliferation of fake positive reviews can lead to deceptive marketing practices, manipulate consumer perceptions and influence their purchase decisions.<sup>266</sup>

Directive (EU) 2019/2161<sup>267</sup> strengthens the UCPD by introducing specific rules for consumer reviews and endorsements. The blacklist explicitly prohibits the practice of claiming that a product review is submitted by a genuine consumer who has used or purchased the product, while no reasonable and proportionate steps are taken to verify the authenticity of this review.<sup>268</sup> Furthermore, the blacklist prohibits traders to submit false consumer reviews or endorsements.<sup>269</sup> Such misleading or fraudulent claims about the origin of consumer reviews are automatically considered unfair commercial practices. Even when a review does not appear to be fraudulent at face value, traders cannot assert that the reviews they provide come from authentic sources, when they did not implement reasonable and proportionate measures to ensure that the reviews genuinely reflect the experiences of real users. Consequently, traders must adopt substantial measures to combat fraudulent consumer reviews facilitated by AI, by ensuring the efficient functionality and reliability of the AI system.<sup>270</sup>

**40.** AGGRESSIVE COMMUNICATION TOWARDS CONSUMERS – Autonomous virtual influencers can interact with consumers in real-time and within their specific contexts. Therefore, it is crucial to recognize that an imperfect AI system might demonstrate unforeseen behaviour in these interactions, diverging from its intended utility function or programmed goal,<sup>271</sup> and arrive at decisions that seem erroneous of which it is unlikely that a human would make the same mistake.<sup>272</sup> This could lead autonomous virtual influencers to engage in offensive actions towards others, such as consumers, as aggressive or coercive communication may increase the AI system's success rate in selling third party products.

Future providers and deployers of AI-influencers should be cautious about the risk that their influencer generates aggressive endorsements, as they may qualify as aggressive commercial

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<sup>266</sup> *Ibid*, 2-3.

<sup>267</sup> DIRECTIVE (EU) 2019/2161 of the European Parliament and of The Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *O.J.* 18 December 2019, iss. 328, 7-28.

<sup>268</sup> No. 23b Annex I UCPD.

<sup>269</sup> No. 23c Annex I UCPD.

<sup>270</sup> This may include considering some of the measures applicable to high-risk AI systems outlined in the proposed AI Act. According to this proposal, high-risk AI systems should only be placed on the Union market, put into service or used if they comply with certain mandatory requirements. By implementing these measures, traders could mitigate the risks associated with AI-driven review fraud and ensure the effectiveness of their AI systems.

<sup>271</sup> It is important to note that while the AI learning process is established upon pre-programmed rules, the subsequent generation of output does not adhere strictly to these predetermined rules. Instead, the AI system adapts and refines its output based on the patterns and insights it derives from the data it processes. In essence, the output is a result of the AI system's ability to discern complex relationships, rather than a rigid adherence to static programming.

<sup>272</sup> See A. NGUYEN, J. YOSINSKI and J. CLUNE, "Deep Neural Networks are Easily Fooled: High Confidence Predictions for Unrecognizable Images", *IEEE Conference on Computer Vision and Pattern Recognition (CVPR)*, Boston, IEEE, 2015, 427-436.



practices under the UCPD. The UCPD regards a commercial practice as aggressive if, by harassment or coercion, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and is thereby likely to cause him to take a transactional decision that they would not have taken otherwise.<sup>273</sup> The UCPD provides a set of criteria to help assess that the commercial practice uses harassment or coercion, including the use of physical force or undue influence.<sup>274</sup> The Commission claims that influencers could easily exert undue influence on consumers as they tend to expand their reach by building trust and personal connection with their audience.<sup>275</sup> In addition, the use of threatening or abusive language by a trader can be deemed as an aggressive practice, if it is likely to impair the average consumer's freedom of choice or conduct regarding the product, again, ultimately influencing them to make a transactional decision they would not have made otherwise. In other words, existing rules also refrain autonomous virtual influencers from generating aggressive communication in relation to their commercial practices. When the AI-influencer uses offensive communication to the consumer without an accompanying inducement to purchase a product, the communication is not captured by the UCPD.

## **Conclusion: misleading practices of virtual influencers tackled by EU consumer law, but clarifications needed**

**41.** THE PERILS AND PROMISES OF VIRTUAL INFLUENCERS – Virtual influencers are the novel online phenomenon to be reckoned with by consumers. While hailed by public media sources as the new product of artificial intelligence, this technology's role is (currently) primarily limited to generating content media. Most other aspects of virtual influencer profiles remain in the hands of humans, as well as businesses seeking commercial success through product endorsements. The do's and don'ts of existing virtual influencers are under complete control of the businesses that operate them. Together with their increasing popularity, this makes virtual influencers an attractive and cost-efficient marketing tool for brands. At the same time, the far-reaching commercial control wielded over virtual influencers is rarely disclosed to their online audiences. Any transparency about the hybrid nature of these profiles, *i.e.*, the fact that they are not fully artificial and not fully human, is equally lacking. Given that virtual influencers have a significant impact on the transactional decision-making of the average consumer, the foregoing ambiguities create a serious danger for consumers. Consumers reasonably expect that influencers base their endorsements on their own personal and genuine experiences. However, virtual influencers are artificial creations and lack the capability to genuinely test

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<sup>273</sup> Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 99.

<sup>274</sup> Art. 9 UCPD.

<sup>275</sup> This raises particular concerns when the influencers' audience is particularly vulnerable, such as children or young people. See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, *O.J.* 29 December 2021, iss. 526, 99.



the products they are recommending. For this reason, we argue that the advertisements of existing virtual influencers constitute a general deception of the average consumer, in absence of proper transparency. In their current state, the deception of consumers plays at three levels, namely the fact that their endorsements are hidden ads, originating from a (hybrid) robot, which is under complete control of a commercial entity that wants to sell its own products or promote the products of one or more third-party sellers.

However, if artificial intelligence were to be fully deployed for future virtual influencers, it is possible that their product endorsements become experience-based through a proper use of machine learning on extensive sets of consumer reviews. Such autonomous virtual influencers would diminish the control that brands exert over the profile, thereby making them less misleading for consumers.

**42.** ENFORCEMENT MECHANISMS NEEDED TO PREVENT STRONG LEGAL STANDARDS FROM BECOMING A PAPER TIGER? – This paper establishes that the businesses behind virtual influencers must adhere to the obligations stemming from the protective EU Unfair Commercial Practices Directive. This is the deployer of the virtual influencer, in addition to the third-party seller of the endorsed product in some cases. However, the definition of a trader in the Belgian and German transposition law is more comprehensive than the one enshrined in EU law, as it encompasses a broader range of scenarios involving virtual influencers. This approach provides a more robust form of consumer protection, as it takes into account the situation where a virtual influencer earns money without being directly associated with the third-party seller of the endorsed product. However, the most prominent CGI-influencer schemes are already captured by EU law.

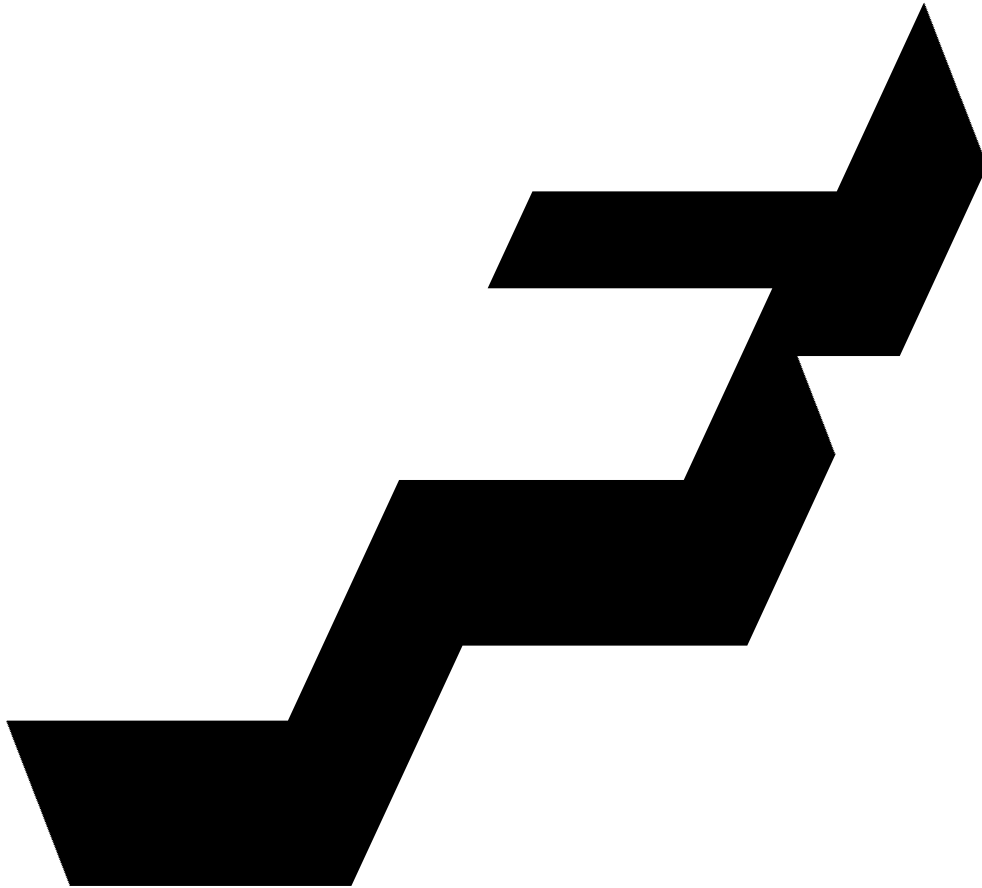
As per the standards set by EU law, the deceiving endorsements of highly-anthropomorphised virtual influencers result in unfair commercial practices by definition, when those virtual influencers do not explicitly disclose both their commercial and virtual nature. The commercial entities behind the virtual entities are jointly and severally liable for these practices, depending on the facts of the case. To escape liability, transparency measures should be implemented in the influencer's posts and profile bio for each level of consumer deception induced by virtual influencers (#Ad, #IAmARobot, #FromATrader[X] and #IAmAI insofar as AI is used). We argue that existing EU consumer law already prompts the disclosure of these separate elements, although refinements would be welcome to reduce legal uncertainty in this respect. Algorithmic malpractices of existing virtual influencers remain very limited due to a modest AI use. Deepfakes are not yet widespread in the influencer world. Moreover, should autonomous virtual influencers emerge in the future, which are fully based on (inherently imperfect) AI systems, EU law already imposes sufficient hard law provisions to combat the misleading use of data and potentially aggressive communication caused by these systems. Overall, we contend that a general ban on virtual influencers is unjustified, as existing disclosure and safety obligations reduce consumer deception in conjunction with market forces.





Nevertheless, the most pressing issue of today pertains to the enforcement of legal rules against virtual influencers, as lacking disclosure makes it challenging to hold the parties involved with the influencer profile accountable. With no clear entities to hold liable, the responsibility becomes elusive, thereby weakening the robust material standards set by EU law. This could render the legal framework a paper tiger. We believe that the systemic risk assessment of large social media platforms could be the right tool to tackle this issue, in addition to the mandatory labelling of profiles and a reasonable data retention policy.

As we move forward, it will be essential to obtain binding interpretations from the CJEU or to implement additional legislative measures that specifically address the rights and obligations of the parties involved with virtual influencers, with due consideration for the enforcement mechanisms at hand.



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