



# **Wageningen MSc Thesis**

LAW GROUP 2025 February

The Regulation of Food Influencers in the EU

Georgios Tsoumpris

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LAW80436

WAGENINGEN UNIVERSITY  
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Georgios Tsoumpris  
Supervisor: Dr Francesco Montanari

LAW80436 36 ECTS

**Wageningen MSc Thesis**  
2024-2025, February

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© 2025 Georgios Tsoumpris  
Published in the Netherlands  
Wageningen University  
Law Group  
P.O. Box 8130 | 6700 EW  
Wageningen  
Visiting address:  
Hollandseweg 1 Wageningen  
The Netherlands  
[www.wageningenur.nl/law](http://www.wageningenur.nl/law)

# The Regulation of Food Influencers in the EU

Georgios Tsoumpris

## Abstract

The rise of social media has transformed how food products and services are marketed, with influencers being key actors that shape consumer behaviors and ultimately drive purchase decisions. This potential comes with certain risks for consumers that are identified in this thesis. The research focuses on how the current EU legal framework regulates food influencers for the protection of consumers. Through an interdisciplinary approach, the research analyzes key EU consumer and food laws, including but not limited to the UCPD, GFL, and NHCR, as well as the national approaches of France, Spain and Italy. The main findings showed that while certain core aspects of consumer protection such as the need for transparency and food safety are extensively addressed, the lack of a harmonized law focused specifically on the matter and definition of influencers can leave some gaps, such as effectively addressing micro-influencers. The national approaches were found to be somewhat divergent, which can create additional challenges to the regulation, enforcement and lastly to the functioning of the internal market. Future steps are suggested and could include the implementation of a harmonized specialized law, the strengthening of enforcement through AI tools and the continued platform accountability, in order to foster a more robust approach and increased trust in influencer marketing.

*Key words:* influencer, food influencer, consumer protection, social media marketing, food marketing

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## **Abbreviations**

BPR IM: Best Practice Recommendation on Influencer Marketing

CRD: Consumer Rights Directive

CSGD: Consumer Sales and Guarantees Directive

CJEU: Court of Justice of the European Union

DSA: Digital Services Act

EASA: European Advertising Standards Alliance

EEA: European Economic Area

EU: European Union

FBO: Food Business Operator

FIC: Food Information to Consumers Regulation

GFL: General Food Law

IMST: Influencer Marketing Standards Agency

NHCR: Nutrition and Health Claims Regulation

SRO: Self-Regulatory Organization

TEU: Treaty of the European Union

TFEU: Treaty on the Functioning of the European Union

UCTD: Unfair Contract Terms Directive

UCPD: Unfair Commercial Practices Directive

USR: User of Special Relevance

# Introduction

## Background Information & Problem Statement

Over the last years, the rise of social media platforms like *Instagram*, *TikTok*, and *YouTube*, has irreversibly transformed the way people interact, socialize, consume entertainment or information, but also how they interact with brands and make purchase decisions. As of 2024, there are more than 4.9 billion active social media users, with the number growing every year.<sup>1</sup> Companies, as well as some individuals, recognized the business potential of these platforms, which gave rise to social media marketing and the emergence of influencers.

Influencers are generally understood as individuals, users of social media, who through the content they create and put out in these platforms, gain popularity and build an audience of people known as followers, which they can leverage for various lucrative activities such as advertising or the direct sale of products and services to consumers.<sup>2</sup> Through these practices, which can involve expressing opinions, giving recommendations or suggestions or simply endorsing a brand, they can exert influence over consumer opinions, choices and even create mass trends.<sup>3</sup> This phenomenon already existed in traditional advertising and was exercised by celebrities who already had popularity because of their independent careers.<sup>4</sup> The difference with influencers is that their main profession is the monetization of social media platforms and the maintaining and growth of the followers base.<sup>5</sup> This can happen either in collaboration with existing companies and brands or for they own account, regardless of whether

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<sup>1</sup> DataReportal, 'Digital 2024: Global Overview' (25 January 2024) <https://datareportal.com/reports/digital-2024-global-overview-report>, accessed 17 September 2024.

<sup>2</sup> Vangelov, Nikola. "Efficient communication through influencer marketing." *Styles of Communication* 11.1 (2019) p. 74, 75 [https://biblioteca-digitala.ro/reviste/styles-of-communication\\_univ-bucu/styles-of-communication\\_11\\_nr-01\\_2019.pdf#page=73](https://biblioteca-digitala.ro/reviste/styles-of-communication-univ-bucu/styles-of-communication_11_nr-01_2019.pdf#page=73), accessed 20 October 2024.

<sup>3</sup> Ibid

<sup>4</sup> Joshi, Yatish, et al. "Social media influencer marketing: foundations, trends, and ways forward." *Electronic Commerce Research* (2023): 1-55, <https://link.springer.com/article/10.1007/s10660-023-09719-z> accessed 20 October 2024.

<sup>5</sup> Ibid

they have used the products or fully understand legal or technical specifics over the products and services they advertise or sell.<sup>6</sup> For example, an influencer can advertise and sell beauty products, without being aware of safety regulations, formulation chemistry etc. or they can give wellness or financial recommendations, without having the proper academic education. This not only creates risks for consumers, but also makes it difficult for influencers to abide by various legal obligations for consumer protection and product commercialization, as they have to navigate a very complex environment, which often requires specific education.

Food businesses and the overall food sector make up an important part of influencer marketing activities, with companies heavily relying on this type of marketing to advertise their food products, mainly because of how well visual media work with food.<sup>7</sup> According to Kolsquare, one of the biggest online marketing platforms in Europe, influencer marketing for foods is on track to achieve a 42% growth between 2019 and 2024, while the return of investment for influencer advertising campaigns is ten times more effective when comparing it to traditional advertising initiatives, making it very attractive for the food sector.<sup>8</sup> Food influencers, apart from taking advantage of the effect of visual media for their content, oftentimes use nutrition, health or other claims to make their marketing communications more effective or appealing to consumers, despite not having a relevant academic or scientific background.<sup>9</sup>

Influencer marketing practices often blur the line between personal opinions, factual or scientific evidence and paid promotions, increasing the risk

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<sup>6</sup> Emily Hund, 'Authenticity Is an Illusion: How Influencers Rule Our Social Media World' The Guardian (2 April 2023) <https://www.theguardian.com/media/2023/apr/02/social-media-analyst-emily-hund-influencer-authenticity-interview> accessed 20 October 2024.

<sup>7</sup> Kolsquare, State of Play of Influencer Marketing in the Food Sector (Kolsquare Blog, 2020) <https://www.kolsquare.com/en/blog/state-of-play-of-influencer-marketing-in-the-food-sector>, accessed 20 October 2024.

<sup>8</sup> Ibid

<sup>9</sup> Nikki Hancocks, 'Call for Regulatory Change: Influencers Making Health Claims While Experts Are Silenced' (NutraIngredients, 27 April 2023) <https://www.nutraingredients.com/Article/2023/04/26/Call-for-regulatory-change-Influencers-making-health-claims-while-experts-are-silenced>, accessed 20 October 2024.

of harming consumer interests due to the lack of transparency.<sup>10</sup> As noted by Clara Riedenstein, most influencers, especially the ones with small follower bases, do not see themselves as professionals subject to certain legal obligations, while others deliberately hide the nature of their content and communications.<sup>11</sup> According to Influencity in its 2023 study, there were more than 10.5 million active social media users in Europe that qualified as influencers in *Instagram* only. Considering other platforms as well, it is evident that there is a very high number of influencers. Additional complexity is added when thinking about the international reach of social media content, as for example content created by an influencer based in Germany can potentially reach a consumer in the Netherlands, or even overreach geographies outside of Europe.<sup>12</sup> A 2021 investigation realized by the consumer protection authority of France, concluded that 60% of the influencers whose content was examined, failed to comply with the applicable legal obligations around consumer protection and advertising.<sup>13</sup> Similar findings have been reported from other countries as well.<sup>14</sup>

Due to the difficulties and complexities inherent to food influencer marketing, specifically in relation to ensuring the protection of consumers' interests and food safety, there is a need for regulation of these practices. In the European Union (EU), there is a stringent regulatory framework, both from the consumer protection and food safety perspectives, but to date, there are no specific influencer subject matter laws, while many of the existing legal texts predate the rise of influencers and food influencers, who can present certain sector-specific needs. Additionally, in certain legal areas there can be differences

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<sup>10</sup> Clara Riedenstein, 'Europe Gets Tough on Influencers' Tech Policy Press (30 May 2024) <https://techpolicy.press/europe-gets-tough-on-influencers/>, accessed 17 September 2024.

<sup>11</sup> Ibid

<sup>12</sup> Influence Hunter, 'How to Reach International Audiences with Influencer Marketing' (Influence Hunter Blog, 1 April 2022) <https://influencehunter.com/2022/04/01/how-to-reach-international-audiences-with-influencer-marketing/>, accessed 20 October 2024.

<sup>13</sup> Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique, 'Marketing d'influence: 60% des influenceurs ciblés par la DGCCRF en anomalie' (Ministère de l'Économie, 23 January 2023) <https://www.economie.gouv.fr/dgccrf/marketing-dinfluence-60-des-influenceurs-cibles-par-la-dgccrf-en-anomalie-0>, accessed 20 October 2024.

<sup>14</sup> Ibid (n. 10)

among the EU Member States, both in the regulation of influencer marketing, as well as the enforcement of EU or national laws.

## Research question

The objective of the thesis is to identify the key pieces of EU legislation that apply to food influencers, to ultimately determine what obligations food influencers have and how consumer's rights are being safeguarded. The main research questions is:

*Does the current legal framework in the EU effectively regulate the marketing of food products in social media platforms by influencers, in order to ensure a high level of protection of consumers' interests and the functioning of the internal market? If not, what are the key challenges in the regulation of food influencers and what are the key areas for improvement?*

The topic will be approached by tackling the following sub-questions:

1. How do food influencers use social media for marketing purposes and what factors contribute to the success of food influencer marketing?
2. What risks do consumers face with food influencer marketing?
3. In the absence of a legal definition for the terms 'influencer' and 'food influencer' at an EU level, how can these terms be legally defined?
4. What are the Consumer Protection Laws that apply to food influencers in the EU, and what are the main resulting general obligations?
5. Which are the key Food Laws in the EU that apply to food influencers, and what are the main resulting food-specific obligations?
6. How are EU Member States addressing the regulation of influencers and what does their approach consist of?

## Thesis Outline

Chapter 1 of the thesis focuses on gaining the required context and background information on influencer and food influencer practices. It deals with the sub-questions 1 and 2, additionally examining the mechanisms responsible for the success of influencer marketing and the risks this can create for consumers. Chapter 2 analyzes the current legal framework for the definition of and regulation of food influencers, in order to respond to sub-questions 3 and 4, focusing on the general requirements set by EU Consumer Laws. Chapter 3 points out the main food-sector specific responsibilities resulting from EU Food Laws, to provide context for sub-question 5. Sub-question 6, which focuses on the examples of current national approaches at Member State level, is examined in Chapter 4.

The Discussion part analyzes the chapters, notably as to how they answer the research sub-questions, while the Conclusion deals with the context of the main research question.

## Methodology

The topic covered by this thesis is approached through multidisciplinary lens, leveraging resources from various scientific areas such as human and social sciences, information science and law, in order to gain a holistic understanding about the background of food influencer marketing, the mechanisms with which it influences consumers choices and the ensuing risks it can pose to consumers, before analyzing the legal framework that governs food influencer commercial practices in the EU.

For the legal analysis doctrinal research was employed, seeking to identify and critically analyze the laws that apply to food influencers, and how these translate to practically applicable obligations or prohibitions around food influencer marketing practices. The legal texts analyzed, include EU laws and guidelines, as well as national laws at Member State level and relevant case law.

Additionally, rules and best practices from self-regulation bodies were taken into account.

The collection of information was carried out exclusively in online legal and academic databases, as well as news media and industry webpages. The majority of the academic sources were tracked through Google Scholar and Science Direct, while, for legal texts, EUR-lex, CVRIA and the European Commission's websites were used.

# Chapter 1. The rise of food influencers

## 1.1. Social media & marketing

Social media emerged in 1997 with platforms such as *Six Degrees*, which enabled people to create user-owned profiles to connect with other users.<sup>15</sup> In the early 2000s, networking environments such as *Friendster* and *MySpace* became popular across the globe, further enabling the creation and sharing of content in virtual communities.<sup>16</sup> It was not, however, until the launch of Facebook in 2004 that social media really grew in popularity, transforming the scene globally. Facebook introduced a platform that was more user-friendly and streamlined, allowing real-time interactions between users, and shaping all other future platforms.<sup>17</sup> More social media platforms kept emerging, notably *YouTube* in 2005, *Twitter* in 2006, *Instagram* in 2010, and *TikTok* in 2016. Each different platform made use of unique ways for users to create audiovisual or multimedia content to express themselves socially and/or artistically, and also to interact with each other.<sup>18</sup>

To date, over 4.9 billion people actively use at least one social media platform, with users oftentimes having accounts on several different platforms at once.<sup>19</sup> Through these platforms, they can connect with friends, consumer news or other media and engage with brands. Popular platforms like *Instagram* and *TikTok* have had great success in engaging users increasingly, by focusing on content of images and short videos instead of written texts, which are generally easier consumed, contributing thus to an ever-growing dependence of visual content for the communication of messages.<sup>20</sup> As pointed out by Van Dijck

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<sup>15</sup> Danah Boyd and Nicole Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 (1) *Journal of Computer-Mediated Communication* p. 214 <https://doi.org/10.1111/j.1083-6101.2007.00393.x>, accessed 17 September 2024.

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> Andreas M Kaplan and Michael Haenlein, 'Users of the World, Unite! The Challenges and Opportunities of Social Media' (2010) 53(1) *Business Horizons* 59, 59-68.

<sup>19</sup> *Ibid* (n.1)

<sup>20</sup> Charlotte Rogers, 'Social Media Marketing Sees Huge Growth As Ad Spend Tops \$268bn Globally' *Marketing Week* (22 January 2024)

and Poell, social media have evolved into mediators of social life, dictating the way users create and consume content, and also interact with each other.<sup>21</sup>

Social media platforms created an innovative opportunity for companies to easily and inexpensively reach and target consumers to advertise and sell their products and services. The era of digital social media marketing begun in 2007, when *Facebook* launched their advertising platform, which enabled companies to run advertising campaigns in the platform by leveraging user data to target specific demographics and to optimize the effectiveness of the campaign.<sup>22</sup> As a result of the new capabilities these tools introduced, advertising in general shifted from broad campaigns to targeted, precise ads based on user-specific preferences, thus enabling companies to carry out campaigns that felt more personal and direct to the chosen audience.<sup>23</sup>

Social media platforms that are based on visual content, became particularly important platforms for advertising in several industries like beauty, fashion, and food, strategically utilizing the visual appeal of products to attract consumers.<sup>24</sup> In these platforms, brands can create aesthetically pleasing content that users can view, share, comment and actively engage with, creating organic forms of advertisement. As Kaplan and Haenlein note, the interactive nature that social media have helps build emotional connections between consumers and brands, something that traditional forms of advertising fail to establish.<sup>25</sup> As of 2024, the global market value of social media advertising was estimated at 268 billion US dollars, with the food and beverage industry

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<https://www.marketingweek.com/social-media-ad-spend-268bn>, accessed 17 September 2024.

<sup>21</sup> José Van Dijck and Thomas Poell, 'Understanding Social Media Logic' (2013) 1 *Media and Communication* 2, 2-4, [https://www.researchgate.net/publication/263566996\\_Understanding\\_Social\\_Media\\_Logic](https://www.researchgate.net/publication/263566996_Understanding_Social_Media_Logic), accessed 25 October 2024.

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Irene Cheng Chu Chan, Zhaoyu Chen, Daniel Leung, 'The more the better? Strategizing visual elements in social media marketing', *Journal of Hospitality and Tourism Management*, Volume 54, 2023, p. 268-289, <https://doi.org/10.1016/j.jhtm.2022.11.007>, accessed 26 October 2024.

<sup>25</sup> Ibid (n. 20)

accounting for a significant percentage.<sup>26</sup> When thinking about the food industry in particular, the visual nature of platforms like *Instagram* and *TikTok* make them very useful in creating appeal to consumers. Content around food can be highly engaging and create emotional responses to ultimately drive consumer decisions.<sup>27</sup>

## 1.2. Influencer marketing

Similarly to how companies saw commercial opportunities in the rise of social media, individual users were also presented with new ways to capitalize on their creativity, content and most importantly the popularity and audience they could build on these platforms. These individuals, through cultivating a sense of personal connection with other users, building a large audience/follower base and creating engaging content on social media, can exert influence over other users.<sup>28</sup> This was the birth of what came to be known as influencers. The term influencer, as mentioned earlier, is commonly understood as an individual, user of social media, who through publishing content, gains popularity followers, which can be leveraged for various lucrative activities such as advertising or the direct sale of products and services.<sup>29</sup>

Though the first influencers were people who already were famous outside of social media, ordinary people started building their own audience and attract attention from companies who wanted to collaborate with them for advertising purposes because of their reach.<sup>30</sup> Influencers in fashion, beauty, fitness and food industries became particularly prominent, focusing on being relatable and gaining consumer's trust in their opinions, recommendation and lifestyle.<sup>31</sup>

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<sup>26</sup> Ibid

<sup>27</sup> Ibid (n.25)

<sup>28</sup> Zak Stefan and Maria Hasprova, 'The Role of Influencers in the Consumer Decision-Making Process' (2020) SHS Web of Conferences, vol. 74, 03014 <https://doi.org/10.1051/shsconf/20207403014>, accessed 20 October 2024.

<sup>29</sup> Ibid (n.2)

<sup>30</sup> Ibid

<sup>31</sup> Madiha Atiq, Ghulam Abid, Aizza Anwar, and Muhammad Fazal Ijaz, 'Influencer Marketing on Instagram: A Sequential Mediation Model of Storytelling Content and

Companies started to collaborate with influencers, as they could get across commercial messages to their followers, giving rise to influencer marketing.

Different academic studies have proposed categorizations for influencers based on the number of followers they have. Some academic research suggested the terms "micro-influencers" for 1,000- 100,000 followers, "macro-influencers" for 100,000 - 1 million and "mega-influencers" for more than 1 million followers.<sup>32</sup> A monitoring program and study conducted across several EU member states, used a more precise split and defined the terms "nano-influencers" for less than 10,000 followers, "micro-influencers" for a range of 10,000 to 40,000 followers, "medium-influencers" for 40,000- 500,000 followers, "macro-influencers" for 500,000- 1 million and "mega-influencers" for more than 1 million followers<sup>33</sup>. Each category has a different level and style of influence over their followers, with smaller scale influencers usually fostering stronger personal connections due to their smaller but highly engaged audiences.<sup>34</sup> Contrary to that, macro- and mega-influencers have a broader reach, resembling traditional celebrities, and their influence can shape trends through projecting their success, lifestyle or creating a sense of subject matter expertise.<sup>35</sup>

The special Influencer marketing is currently a multi-billion-dollar industry, with estimations suggesting continued growth, attributed mainly to the

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Audience Engagement via Relatability and Trust' (2022) Information, vol 13, 345 <https://doi.org/10.3390/info13070345>, accessed 20 October 2024.

<sup>32</sup> Rita Conde and Beatriz Casais, 'Micro, Macro and Mega-influencers on Instagram: The Power of Persuasion via the Parasocial Relationship' (2023) 158 Journal of Business Research 113708 <https://doi.org/10.1016/j.jbusres.2023.113708>, accessed 17 September 2024.

<sup>33</sup> Frithjof Michaelsen, Luena Collini, and others, *The Impact of Influencers on Advertising and Consumer Protection in the Single Market* (Study requested by the IMCO Committee, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, PE 703.350, February 2022) Annex: notes on the methodology of the study, Social media monitoring [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), accessed 1 October 2024.

<sup>34</sup>Ibid (n.32)

<sup>35</sup> Ibid

growing population and increase of social media users.<sup>36</sup> As of 2024, the global worth was estimated at 32.5 billion US dollars and is expected to reach 40 billion US dollars by 2028.<sup>37</sup>

### 1.3. Influencer marketing success explained

The reasons for the success of influencer marketing are rooted in basic human psychology principles. Some of the main mechanisms, as described by Kishor Bhanushali, are *social proof* and *authority*<sup>38</sup>. Social proof is the mechanism according to which people tend to follow the actions and opinions of others, especially those they perceive as authoritative, credible and trustworthy<sup>39</sup>. Additionally, on social media platforms, influencers and especially those with a large follower base, act as figures of authority and expertise, making suggestions for endorsed products and followers tend to perceive them as genuine recommendations instead of advertising.<sup>40</sup> Consumers are more likely to trust these product recommendations, as they are seen as authentic and relatable.<sup>41</sup> The theory of *bandwagon heuristics* supports that a high number of likes or engagement can result in a sense of increased credibility.<sup>42</sup> These individually contribute to the creation of the *authority bias* for consumers,

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<sup>36</sup> Simon Kemp, 'Digital 2024: 5 Billion Social Media Users' We Are Social (26 January 2024) <https://wearesocial.com/uk/blog/2024/01/digital-2024-5-billion-social-media-users/>, accessed 26 October 2024.

<sup>37</sup> Parker, E, 'Global Influencer Marketing: Market Size & Growth (2024 Update)' Business Insider (5 September 2024) <https://www.businessinsider.com/global-influencer-market-size>, accessed 17 September 2024.

<sup>38</sup> Kishor Bhanushali, 'Influencer Marketing: Leveraging Social Proof and Authority', Marketing Mastery- Strategies for captivating audiences, Chapter 11, 136-143, [https://books.google.es/books?hl=el&lr=&id=RgEJEQAAQBAJ&oi=fnd&pg=PA136&dq=influencer+social+proof&ots=06Puhklwmm&sig=hX00gEmPRvzpfKw-tGYCuafbZSE&redir\\_esc=y#v=onepage&q=influencer%20social%20proof&f=false](https://books.google.es/books?hl=el&lr=&id=RgEJEQAAQBAJ&oi=fnd&pg=PA136&dq=influencer+social+proof&ots=06Puhklwmm&sig=hX00gEmPRvzpfKw-tGYCuafbZSE&redir_esc=y#v=onepage&q=influencer%20social%20proof&f=false), accessed 26 October 2024.

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Eva L Jenkins, Jasmina Ilicic, Amy M Barklamb, Tracy A McCaffrey, 'Assessing the Credibility and Authenticity of Social Media Content for Applications in Health Communication: Scoping Review', 2020, <https://www.jmir.org/2020/7/e17296/>, accessed 26 October 2024.

making them more likely to follow suggestions from influencers they perceive as authoritative or experts. This is particularly relevant to cases when influencers introduce themselves as scientists, nutritionists, life coaches, etc. projecting expertise.

Another mechanism in play is *wishful identification*.<sup>43</sup> As iterated by Koay and Lim, wishful identification describes the human tendency to imitate and desire to be like an admired person, in this case the influencer.<sup>44</sup> This mechanism plays an important role in shaping and driving consumer decisions.<sup>45</sup> As shown in a study by Schouten et al., consumers are more likely to trust and ultimately be influenced by an influencer they perceive as relatable rather than by a celebrity because of the important role the sense of identification plays.<sup>46</sup>

The development of *parasocial relationships* is another important psychological factor, with the follower creating a one-sided emotional relationship with the influencer, feeling as if they know them personally, despite the absence of real connection.<sup>47</sup> These relationships create a false sense of intimacy, making consumers more likely to follow influencer recommendations, like they would from a trusted friend.<sup>48</sup> Online interactions through comments, likes or private messages can further amplify those feelings of personal connection.<sup>49</sup>

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<sup>43</sup> Koay, K.Y. and Lim, W.M. (2024), "Congruence effects in social media influencer marketing: the moderating role of wishful identification in online impulse buying intentions", *Journal of Product & Brand Management*, Vol. ahead-of-print No. ahead-of-print. <https://doi.org/10.1108/JPBM-09-2023-4709>, accessed 26 October 2024.

<sup>44</sup> Ibid

<sup>45</sup> ibid

<sup>46</sup> Alexander P. Schouten, Loes Janssen, Maegan Verspaget, 'Celebrity vs. Influencer endorsements in advertising: the role of identification, credibility, and Product-Endorser fit', *Leveraged Marketing Communications*, 2021, <https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003155249-12/celebrity-vs-influencer-endorsements-advertising-role-identification-credibility-product-endorser-fit-alexander-schouten-loes-janssen-maegan-verspaget>, accessed 26 October 2024.

<sup>47</sup> Ibid (n. 32)

<sup>48</sup> Ibid

<sup>49</sup> ibid

Apart from the psychological factors, the content that influencers publish determines the success of influencer marketing. Specifically, as summarized by Cheung et al., the quality of information builds credibility, the creativity in the design of posts is crucial for capturing the attention of consumers, while the use of immersive technology in ways that allow the consumers to interact both with the brands and the influencers is key in creating psychological connection and fostering parasocial relationships, driving greater engagement and effectiveness of the marketing initiatives.<sup>50</sup>

In influencer marketing, *trust transfer* is another mechanism that has been observed. Influencers, through the mechanisms mentioned above, build trust with their audiences. This trust is then transferred to the brands or companies they promote through association.<sup>51</sup> As described by Hu et al., influencer trust creates a halo effect, transmitting credibility to the advertised brands, increasing consumers' purchase intention.<sup>52</sup> Influencers, in turn, benefit from collaborating with reputable and popular brands, with trust transfer working both ways.<sup>53</sup>

#### 1.4. Influencer business models

Influencers and content creators in general interact with consumers and monetize their platforms and content through different business models, or they

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<sup>50</sup> Man Lai Cheung, Wilson K.S. Leung, Eugene Cheng-Xi Aw, Kian Yeik Koay, 'I follow what you post!': The role of social media influencers' content characteristics in consumers' online brand-related activities (COBRAs)', *Journal of Retailing and Consumer Services*, Volume 66, 2022, <https://doi.org/10.1016/j.jretconser.2022.102940>, accessed 26 October 2024.

<sup>51</sup> Haihua Hu, Dandan Zhang, Chengjun Wang, 'Impact of social media influencers' endorsement on application adoption: A trust transfer perspective', *Social Behavior and Personality An International*, 2019, <https://www.ingentaconnect.com/content/sbp/sbp/2019/00000047/00000011/art00012;jsessionid=bq2dnn95lab5m.x-ic-live-02>, accessed 27 October 2024.

<sup>52</sup> Ibid

<sup>53</sup> Linlin Liu, Matthew K.O. Lee, Renjing Liu, Jiawen Chen, 'Trust transfer in social media brand communities: The role of consumer engagement', *International Journal of Information Management*, Volume 41, 2018, p 1-13, <https://doi.org/10.1016/j.ijinfomgt.2018.02.006>, accessed 27 October 2024.

can employ a combination of methods, personalizing their brand. As summarized in the “Content monetization business models and best practices” legal brief of the Influencer Legal Hub<sup>54</sup>, and based on data from an academic study conducted at the request of the European Parliament “The impact of influencers on advertising and consumer protection in the Single Market” (2022)<sup>55</sup>, influencer commercial activities can be categorized under five main categories:

- Direct selling of products and services

In this business model, the influencer creates their own branded physical or digital products (e.g. make-up products, e-books), or services (e.g. coaching sessions) and places them for sale to consumers. Manufacturing can vary from home-made to outsourced manufacturing (*contract-manufacturing*<sup>56</sup>) or owned-manufacturing, and the sale of the products can happen through built-in marketplace of social media platforms, third-party selling websites or some influencers can even get out of the digital world and into retail stores or limited time pop-up shops. Social media platforms are generally leveraged to provide the links or product information necessary for consumers to buy the products and also to promote their products and overall influencer brand or reach to consumers<sup>57</sup>.

- Marketing

This category mainly consists of different practices of product and service promotions and advertising, with the influencer being compensated through

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<sup>54</sup> European Commission, ‘Content monetization business models and best practices’ in Influencer Legal Hub (European Commission, 2023) [https://commission.europa.eu/document/download/df5a20ca-48b5-4666-a0b5-b1c840173915\\_en?filename=Legal%20brief%205.pdf](https://commission.europa.eu/document/download/df5a20ca-48b5-4666-a0b5-b1c840173915_en?filename=Legal%20brief%205.pdf), accessed 3 October 2024.

<sup>55</sup> Frithjof Michaelsen, Luena Collini, and others, *The Impact of Influencers on Advertising and Consumer Protection in the Single Market* (Study requested by the IMCO Committee, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, PE 703.350, February 2022) [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), accessed 1 October 2024.

<sup>56</sup> Thomas Brandl, *Introduction to Contract Manufacturing Relationships* (2023) ch 1.1 [https://link-springer-com.ezproxy.library.wur.nl/chapter/10.1007/978-3-658-41359-0\\_1](https://link-springer-com.ezproxy.library.wur.nl/chapter/10.1007/978-3-658-41359-0_1), accessed 3 October 2024.

<sup>57</sup> Ibid (n.54, 55)

remuneration, gifts in the form of products, experiences, services, or even deals for more platform visibility with the prospect of gaining followers, and lastly compensation based on sales driven by the influencer. These different types of marketing based on the form of compensation have been described as *endorsement*, *banter* and *affiliate marketing* respectively<sup>58</sup>.

- Ad revenue/ on-platform advertising

Certain social media and digital platforms provide the space for influencers and content creators to host third party advertising in their account page. The creators in such cases usually have a business relationship with the platform itself and not with the advertised entity, and compensation is paid by the platform based on the views or clicks driven<sup>59</sup>.

- Subscriptions

In this business model, influencers offer paid subscriptions to consumers through a hosting platform. Consumers purchase exclusive access to digital content, in the form of audiovisual content, e-books and webinars, or live interaction with the influencer, such as coaching, live chats or calls etc.<sup>60</sup>

- Creator funds

The last business model does not involve a direct interaction of influencer with consumers, but rather the engaging of the influencer or content creator with a platform that offers some form of partner program, where creators are compensated by the platform for making their content available on that platform.<sup>61</sup>

These categories do not comprise an exhaustive list of possible ways influencers can monetize their content, platform and audience, and new platforms keep being created, which can provide new ways for influencers to interact with consumers. A fairly recent example is the creation of the on-

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<sup>58</sup> Ibid (n.54, 55)

<sup>59</sup> Ibid (n.54, 55)

<sup>60</sup> Ibid (n.54, 55)

<sup>61</sup> Ibid (n.54, 55)

platform Tik Tok Creator Marketplace<sup>62</sup>, where companies can come into direct contact with influencers to advertise their products, thus facilitating business communications that were previously carried out in more traditional ways, with the interested companies individually reaching out to creators through direct messages or email.

Influencers working with food, and other consumer goods, mainly carry out *direct sale* and *marketing* business activities, without excluding the parallel use of additional methods, though not directly related to physical food products. The legal framework examined in this thesis will focus on these two main activities.

## 1.5. Food influencer marketing

Influencers working with the food and hospitality sectors (e.g. restaurants) can range from amateur food enthusiasts to professional food critics and restaurant reviewers, or from cooking enthusiasts to chefs, and wellness lifestyle coaches or advertisers of retail food products.<sup>63</sup> Marketing industry experts recommend the use of influencer marketing to food businesses for enhancing brand and product awareness, increasing consumer engagement and driving cost-effective advertising, with aims to increase sales.<sup>64</sup> The marketing strategies suggested by some professionals, like for example choosing a credible influencer whose image is compatible with the brand, or using creative content<sup>65</sup>,

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<sup>62</sup> TikTok, *TikTok Creator Marketplace* [https://getstarted.tiktok.com/gofulltiktok?lang=en&attr\\_source=google&attr\\_medium=search-br-ad&attr\\_adgroup\\_id=131982932049&attr\\_term=tiktok%20creator%20marketplace&no\\_parent\\_redirect=1&gad\\_source=1&gclid=CjwKCAjwgfm3BhBeEiwAFfxrG7RDRGG5p2qkvkRg9AseZNVJ7QbvCIWEDcxIBhEPOYfmeeWT6duRdxoCJDoQAvD\\_BwE&ab\\_version=control#formAnchor](https://getstarted.tiktok.com/gofulltiktok?lang=en&attr_source=google&attr_medium=search-br-ad&attr_adgroup_id=131982932049&attr_term=tiktok%20creator%20marketplace&no_parent_redirect=1&gad_source=1&gclid=CjwKCAjwgfm3BhBeEiwAFfxrG7RDRGG5p2qkvkRg9AseZNVJ7QbvCIWEDcxIBhEPOYfmeeWT6duRdxoCJDoQAvD_BwE&ab_version=control#formAnchor), accessed 3 October 2024.

<sup>63</sup> Bernard Koh, 'Leveraging Influencer Marketing in the Food Industry: Strategies for Success', 2024, [https://medium.com/@Bernard\\_Koh/leveraging-influencer-marketing-in-the-food-industry-strategies-for-success-67e77279b40b](https://medium.com/@Bernard_Koh/leveraging-influencer-marketing-in-the-food-industry-strategies-for-success-67e77279b40b), accessed 27 October 2024.

<sup>64</sup> Callidus Pixels Pvt Ltd, 'The Role of Influencer Marketing in the Food Industry: A Comprehensive Guide', 2024, <https://www.linkedin.com/pulse/role-influencer-marketing-food-industry-comprehensive-thtdf/>, accessed 27 October 2024.

<sup>65</sup> Metric Connect- Creative social media studio, 'Working With Food Influencers: 5 Strategies to Consider', 2023, <https://www.linkedin.com/pulse/working-food-influencers-5-strategies-consider-metric-connect-itsfe/>, accessed 27 October 2024.

are aligned with and aim to optimize and leverage the mechanisms described in chapter 1.3., maximizing trust transfer and consumer engagement.

Food influencer content in popular social media like *Instagram*, generally follows certain themes focusing on recipes and cooking, nutrition and health practices, fitness including weight-loss or muscle gain and content framed as educative.<sup>66</sup> Commercial messages in these posts can include opinion giving or reviews, storytelling, where the influencer frames a product as part of a personal story, creative interactive content like quizzes or questionnaires, or even plain promotions and open advertising, like for example giving out a code that consumers can use to purchase goods.<sup>67</sup>

Academic research has confirmed that social media marketing has a significant impact on influencing food attitudes and driving the purchase decisions of consumers<sup>68</sup>, with influencer marketing being a vital part of the sector. Leveraging visual media for food advertising can be highly effective in marketing strategies, especially when foods are portrayed as healthy.<sup>69</sup> According to Abell et al., consumers are more likely to try new food products and identify with influencers through parasocial relationships, when they are presented along with healthy foods.<sup>70</sup> At the same time, influencer marketing has been found effective in increasing the consumption of advertised foods by children.<sup>71</sup>

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<sup>66</sup> Emily Denniss, Rebecca Lindberg, Sarah A. McNaughton, 'Nutrition-Related Information on Instagram: A Content Analysis of Posts by Popular Australian Accounts', 2023, <https://doi.org/10.3390/nu15102332>, accessed 29 October 2024.

<sup>67</sup> Quinn Schwartz, '21 Successful Strategies for Food Influencer Marketing', GRIN, 2023, <https://grin.co/blog/food-influencer-marketing/>, accessed 29 October 2024.

<sup>68</sup> Listia Rini, Joachim Jietse Schouteten, Ilona Faber, Michael Bom Frøst, Federico J A Perez-Cueto, Hans De Steur, 'Social media and food consumer behavior: A systematic review', *Trends in Food Science & Technology*, Volume 143, 2024, <https://doi.org/10.1016/j.tifs.2023.104290>, accessed 27 October 2024.

<sup>69</sup> Annika Abell, Dipayan Biswas, 'Digital Engagement on Social Media: How Food Image Content Influences Social Media and Influencer Marketing Outcomes', <https://doi.org/10.1177/10949968221128556>, accessed 27 October 2024.

<sup>70</sup> Ibid

<sup>71</sup> Anna Elizabeth Coates, Charlotte Alice Hardman, Jason Christian Grovenor Halford, Paul Christiansen, Emma Jane Boyland, 'The effect of influencer marketing of food and a "protective" advertising disclosure on children's food intake', 2019, <https://doi.org/10.1111/ijpo.12540>, accessed 27 October 2024.

Food influencer content very often includes some form of lifestyle, nutrition or health positioning, with many influencers focusing on building a signature 'brand' for themselves.<sup>72</sup> They often specialize on a specific type of content, like recipes, and a lifestyle theme such as vegan diet, anti-processed foods, keto diet and more. This specialization many food influencers have works to attract the right audiences and helps with the building of parasocial relationships, as consumers can identify with the messages and influencers consistently. This additionally helps food influencers appear more credible and be perceived as subject-matter experts. Nutrition is one of the most discussed topics on *Instagram*.<sup>73</sup>

The positive potential of food influencers working with governments and advocating for good change, like the increase of consumption of vegetables, has been recognized.<sup>74</sup> Additionally, influencer marketing has been identified as an effective medium for green advertising.<sup>75</sup> It can be a tool for sustainable food consumption, as consumer choices can be positively impacted by influencers expressing concerns about the environment and their interest or benefits from consuming sustainable foods.<sup>76</sup> Understandably, however, food influencer practices bring certain risks to consumer's interests and potentially public health.

A study conducted by Misra et al., found that micro-influencers can have just as much impact on consumer choices and the willingness to purchase as macro-influencers, when the audience focuses on finding information over food products, versus using social media for entertainment purposes.<sup>77</sup> This was

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<sup>72</sup> Alice Rogers, Shelley Wilkinson, Olivia Downie, Helen Truby, 'Communication of nutrition information by influencers on social media: A scoping review', 2021, <https://doi.org/10.1002/hpja.563>, accessed 29 October 2024.

<sup>73</sup> Ibid (n. 66)

<sup>74</sup> Ibid (n. 74)

<sup>75</sup> Sarah Konig, Eric Maier, 'Preaching to the choir: Do green influencers make a difference?', 2024, <https://doi.org/10.1016/j.jclepro.2024.141449>, accessed 27 October 2024.

<sup>76</sup> Yanhong Wu, Shaohua Yang, Danping Liu, 'The effect of social media influencer marketing on sustainable food purchase: Perspectives from multi-group SEM and ANN analysis', 2023, <https://doi.org/10.1016/j.jclepro.2023.137890>, accessed 27 October 2024.

<sup>77</sup> Ankita Misra, Tam Duc Dinh, Soo Yeong Ewe, 'The more followers the better? The impact of food influencers on consumer behaviour in the social media context', 2024,

additionally confirmed by Sati et al., who found that when it comes to influencer marketing, the follower engagement with the influencer's content is a better metric for a marketing campaign's success than the number of followers.<sup>78</sup> This practically means that micro-influencers can be just as successful as macro-influencers, if not more. Food influencer practices need to be examined and regulated independently of the audience size.

## 1.6. Risks and the need for regulation

Based on the way influencer marketing functions and the mechanisms with which it can affect consumer choices, it can render them vulnerable to certain risks. Consumers, because of the one-sided parasocial relationships and the fact that they normally lack background information on the nature or motive of a social media post published by an influencer, are in a weak position. Transparency over commercial practices on social media and the clear disclosure of the nature of commercial content depends solely on the influencers. If, for example, a food influencer is sharing an opinion about how good a product tastes and recommends it to their followers, the consumer does not have the means to know whether the influencer is being honest or if they have received compensation from the brand for making this post etc.

A 2023 research "sweep" from the European Commission, which scanned and analyzed websites across the EU with the aim to identify violations of consumer law by influencers, found that only about 20% of digital content was being consistently disclosed as commercial. Conversely, several bad practices were identified, including the use of unclear terminology like "collaboration", or

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<https://www.emerald.com/insight/content/doi/10.1108/BFJ-01-2024-0096/full/html>, accessed 27 October 2024.

<sup>78</sup> Aypar Sati, Ipek, Kazancoglu, 'The effect of food influencers on consumers' intention to purchase food', 2020, <https://dergipark.org.tr/en/download/article-file/1479603> accessed 27 October 2024.

the fact that disclosure was not made adequately visible.<sup>79</sup> A 2018 behavioral study by the European Commission confirmed that consumers cannot easily identify commercial content on social media, this being particularly the case for subtle product placements that did not provide explicit brand names and shopping links.<sup>80</sup>

Additional risks concern the contents of the commercial messages included in influencer posts and their potential to mislead consumers. Such practices can spread false or inaccurate information about a food product, from its physical or pricing aspects to nutritional and health properties. When it comes to food specifically, there can be risks for the safety and well-being of consumers. In 2023, the case of the “liver king” influencer made the news globally. This influencer used his social media to promote a wellness and fitness lifestyle, and promoted the consumption of raw meat and organs, like liver (hence the name “liver king”), to which he was attributing his muscular physique, when in fact he was using performance-enhancing drugs (steroids).<sup>81</sup> Another famous case was that of an Australian influencer who falsely claimed to have recovered from cancer due to the plant-based diet she had developed and who sold through a book and a smartphone application.<sup>82</sup> This misled people into getting out of medical care and putting their hopes in this diet. Both influencers in the examples referred above had very large follower bases and their high visibility contributed to their being exposed in the end. Such practices, however, are not

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<sup>79</sup> European Commission, ‘2023- sweep on influencers’, Consumer rights and complaints, Enforcement of consumer protection, [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps\\_en?ref=hellopartner.com](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en?ref=hellopartner.com), accessed 28 October 2024.

<sup>80</sup> European Commission, ‘Behavioural study on advertising and marketing practices in social media’, 2018, [https://commission.europa.eu/document/download/5bfb0ebf-22ef-41d9-aab0-12d3a82ac449\\_en?filename=osm-final-report\\_en.pdf](https://commission.europa.eu/document/download/5bfb0ebf-22ef-41d9-aab0-12d3a82ac449_en?filename=osm-final-report_en.pdf), accessed 29 October 2024.

<sup>81</sup> Nicholas Gibbs, Timothy Piatkowski, ‘he Liver King Lie: Misrepresentation, justification, and public health implications’, 2023, <https://doi.org/10.1016/j.drugpo.2023.103979>, accessed 29 October 2024.

<sup>82</sup> Hannah Price, ‘Belle Gibson: The influencer who lied about having cancer’, BBC, 2021, <https://www.bbc.com/bbcthree/article/b2538e04-87f5-4af5-bd6f-f6cf88b488c4>, accessed 29 October 2024.

uncommon among influencers with smaller audiences, who can also pose dangers to public health.

The research by A. Groenen (2024) provide additional insights on the impact of health claims used by influencers in the advertising of food supplements.<sup>83</sup> The study examined consumer perception of two types of claims, i.e., the prescribed wording of scientific claims in accordance with EU regulations and free-style claims made by influencers online.<sup>84</sup> The findings showed that consumers view the prescribed scientific claims as more credible and accurate, but the free-style claims led to a higher purchase intention in the end.<sup>85</sup> These claims carry a risk for misinformation, as they do not provide comprehensive explanations for mitigation of health risks, such as the need for a varied and balanced diet.<sup>86</sup>

Social media in general function based on algorithms, which are designed to optimize the content presented to each and every user, in order to ensure high engagement with the platform and the content.<sup>87</sup> This is done through the use of certain metrics, such as the number of likes, comments, search history, time spend looking a post of a certain type such as “weight-loss” etc.<sup>88</sup> The data is analyzed, and a profile is generated for each user, based on their preferences.<sup>89</sup> The user is then presented with content that is compatible to what the algorithm classifies as relevant to these interests.<sup>90</sup> Through this mechanism, these profiles can be used for advertising content, targeting specific consumers groups. If, for example, someone uses social media to search for “weight-loss”

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<sup>83</sup> Annefleur Josiphine Cornelia Groenen, 'The Impact of Advertisement Type and Health Claims on Consumers' Perceived Accuracy and Purchase Intentions of Dietary Supplements', Tilburg University, 2024, <https://arno.uvt.nl/show.cgi?fid=171199>, accessed 29 October 2024.

<sup>84</sup> Ibid

<sup>85</sup> ibid

<sup>86</sup> Ibid

<sup>87</sup> Chandaveer Singh, 'Socia Media Algorithms in 2024: A complete guide', Social Pilot, 2024, <https://www.socialpilot.co/blog/social-media-algorithm>, accessed 29 October 2024.

<sup>88</sup> Ibid

<sup>89</sup> ibid

<sup>90</sup> ibid

tips, then the algorithm will very likely start pushing weight-loss content to them outside of the active research.

Academics have analyzed how this function that the social media algorithms have can create the so called “echo chambers”, describing the phenomenon of isolation of social media users from topics or messages that are different to their current interests or that oppose their opinions, thus creating strong biases through the lack of opportunity for critical thinking and exposure to other messages.<sup>91</sup> This phenomenon can amplify the negative effects of harmful or scientifically unsubstantiated claims or views, as for example people who follow “raw eating” content and influencers will be shown positive content for such a topic, they will be presented with raw eating suitable content and will be recommended to connect with users who share the same interests. This will significantly reduce any exposure to content that presents alternative dietary preferences or different opinions like the importance of proper cooking.

During the COVID-19 pandemic, social media platforms such as *Instagram* and *Facebook*, in an effort to tackle the spread of scientific misinformation, implemented several actions to guarantee consumer protection, including the blocking of certain hashtags with misinformation, or the display of automatic disclaimer labels in pandemic-related posts, with links to government sites where users could find official information.<sup>92</sup> However, to date similar actions have not been put in place for digital content relating to nutrition, food or health in general.

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<sup>91</sup> Matteo Cinello, Gianmarco De Francisci Morales, Alessandro Galeazzi, Michele Starnini, ‘The echo chamber effect on social media’, University of Oslo, 2021, <https://doi.org/10.1073/pnas.2023301118>, accessed 29 October 2024.

<sup>92</sup> Mitchell Clark, ‘Instagram is rolling out new notifications about COVID-19 information / It’s joining many other social media platforms trying to combat the spread of misinformation’, 2020, <https://www.theverge.com/2020/12/17/22187298/instagram-coronavirus-covid19-misinformation-notifications>, accessed 29 October 2024.

## Chapter 2: Food Influencer General Obligations

### 2.1. Consumer protection in the EU

The protection of consumers' rights has been a key area on which EU legislation has been focusing for more than 50 years<sup>93</sup> and has been continuously evolving through various legislative acts, including treaties, regulations and directives. Pursuant to the Treaty on the Functioning of the EU (TFEU), consumer protection is a shared competence between the EU and its Member States.<sup>94</sup> In practice, this means that laws can be adopted both at EU and national level, but EU Member States can only legislate over areas that the EU is not actively doing so or when it explicitly permits it.<sup>95</sup>

The current EU framework for the protection of consumers that is relevant to the regulation of influencers is mostly comprised of Directives. These are legally binding acts adopted at EU level, which establish common goals or standards / obligations that EU Member States must meet through their transposition into national law.<sup>96</sup> Directives additionally set requirements on the level of harmonization required for their transposition nationally, and, in some cases, where minimum harmonization is provided, EU Member States can adopt stricter requirements or goals than those set out in those acts.<sup>97</sup>

The main laws that apply to influencer practices at EU level, and that are examined below are:

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<sup>93</sup> European Commission, '50 Years of Consumer Legislation' (2022) [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/50-years-consumer-legislation\\_en](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/50-years-consumer-legislation_en), accessed 25 September 2024.

<sup>94</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, art. 4, para 2 (f).

<sup>95</sup> European Union, European Citizens' Initiative, 'FAQ EU competences and Commission powers', EU competences, [https://citizens-initiative.europa.eu/faq-eu-competences-and-commission-powers\\_en](https://citizens-initiative.europa.eu/faq-eu-competences-and-commission-powers_en), accessed 30 October 2024.

<sup>96</sup> European Union, 'Types of legislation', Directives, [https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en), accessed 30 October 2024.

<sup>97</sup> European Union, European Union directives, 'Summary of Article 288 of the Treaty on the Functioning of the European Union- directives', <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html>, accessed 30 October 2024.

- Unfair Commercial Practices Directive, Directive 2005/29/EC
- Consumers Rights Directive, Directive 2011/83/EU
- Unfair Contract Terms Directive, Directive 93/13/EEC
- Consumer Sales and Guarantees Directive, Directive (EU) 2019/771
- Digital Content Directive, Directive (EU) 2019/770
- Digital Services Act, Regulation (EU) 2022/2065

In EU laws, there are two important concepts for the terms ‘average consumer’ and ‘vulnerable consumer’. The average consumer, refers to an individual that is reasonably well-informed, observant, and cautious, considering in parallel possible social, cultural, and linguistic factors, and whose presumed actions serve as a benchmark to assess consumer behaviors in commercial exchanges.<sup>98</sup> In turn, the vulnerable consumer refers to individuals or groups (in this case the average member of the affected group is considered) that due to their mental and physical status, age, credulity, or context-dependent factors such as personal difficulties like financial struggles, are more likely to fall victim to unfair commercial practices under the UCPD (Chapter 2.3), and whose purchase decisions are likely to be manipulated in ways that a trader could reasonably predict, thus needing higher protection.<sup>99</sup>

## 2.2. The Legal definition of Influencers in the EU

The term “influencer” is not provided explicitly in the current legal texts of the EU, as most consumer protection laws generally pre-date the rise of digital marketing and social media platforms. In the Influencer Legal Hub, influencers are described as “*anyone making money through creating social media content*”<sup>100</sup>. The current legal framework analyzed below provides definitions

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<sup>98</sup> Commission Notice – 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 [2021] OJ C 526 para 2.5

<sup>99</sup> Ibid para 2.6.

<sup>100</sup> European Commission, ‘European consumer law and influencer marketing: An introduction to the Influencer Legal Hub’ in Influencer Legal Hub (European Commission, 2023), para 1, <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and->

that encompass the business activities of influencers, which therefore translate into specific obligations, aimed at ensuring the protection of consumers' interests. Overall, influencer activities fall under the definition of 'trader', which, in turn, includes additional categorizations based on the specific commercial activities carried out, such as 'advertiser' and 'seller'<sup>101</sup>. The term 'seller' is mostly used in EU laws that focus only on the creation and execution of sales contracts - such as the Consumers Sales Directive. Conversely, the term 'trader' is generally used in legal texts that regulate a broader range of activities, which includes the provision of services, while still covering the term 'seller'.

Under EU Consumer Law, influencers are classified as 'traders'. The definition of the term 'trader' is laid out in the Unfair Commercial Practices Directive<sup>102</sup> ('UCPD'), and it includes any physical person or commercial entity engaging in commercial practices with consumers for their own interest or on one's behalf:

*"Any natural or legal person who, in commercial practices covered by this Directive, 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>103</sup>*

The UCPD additionally provides definitions for the terms 'consumer' and 'product', which are important in contextualizing its application and better understanding the definition of 'trader'. Consumers are natural persons who, in the context of the Directive, do not engage with a trader for purposes related to their trade, business or profession<sup>104</sup>, while the term 'product' encompasses any good, service, digital service and digital content<sup>105</sup>. The UCPD applies primarily

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[complaints/influencer-legal-hub\\_en#part-1-overview-of-consumer-protection-legislation-in-the-eu](#), accessed 1 October 2024.

<sup>101</sup> Ibid, 'Video trainings', paras 2, 3

<sup>102</sup> 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 (Consolidated version 28 May 2022) [2022] OJ L149/22 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528>, accessed 1 October 2024.

<sup>103</sup> Ibid, art 2(b)

<sup>104</sup> Ibid, art 2 (a)

<sup>105</sup> Ibid, art 2 (c)

to business-to-consumer relationships, though it can apply to business-to-business relations if Member States provide so, and apart from the sale of products, it includes any activity of representation for promotion and advertising purposes.<sup>106</sup> Therefore, social media users selling products or services, conducting product promotions and advertising, making content on product reviews in exchange for money or accepting sponsorships from businesses, or any other activity generating revenue, are to be considered traders for the purposes of the UCPD.

The Court of Justice of the EU ('CJEU') provided additional insights on the meaning of the term 'trader' in its ruling on the *Kamenova* case<sup>107</sup>. This concerned the interpretation of Articles 2 (b) and (d) of the UCPD and, notably, the definitions of the terms 'trader' and 'business-to-consumer commercial practices'. In this case, Ms Kamenova, a natural person and Bulgarian citizen, had sold new and second-hand goods through an online platform a total of eight times. One of the consumers who had purchased a watch offered for sale by her and had not been able to return it and be refunded, on grounds of untruthful and misleading product advertising, filed a complaint to the Bulgarian Consumer Protection Commission<sup>108</sup>. Following several local legal proceedings and appeals from both sides, the competent court referred to the CJEU the question as to whether Ms Kamenova, having sold goods and advertised the sale of these goods a total of 8 times, fell under the definition of 'trader' of the UCPD and also whether these transactions were to be considered 'business to consumer commercial practices'<sup>109</sup>. The CJEU, in its interpretation, considered the following elements for determining if Ms Kamenova had been acting as a 'trader'<sup>110</sup>:

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<sup>106</sup> Ibid, art 2 (d)

<sup>107</sup> Case C-673/16 *Komisija za zashtita na potrebitelite v Evelina Kamenova* [2018] ECLI:EU:C:2018:808. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=206437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2432074>, accessed 1 October 2024.

<sup>108</sup> Ibid para 13

<sup>109</sup> Ibid para 19

<sup>110</sup> Ibid para 38

- Whether the sale was done in an organized manner, if the goods were initially purchased in order to be sold and to the end of generating profit.
- Whether the seller had more information on the product than what was available to the buyer, putting the seller in an advantageous position.
- Whether the seller had a legal status enabling them to exercise commercial activities, such as a professional/ commercial license, and whether the sale was subject to VAT.
- Whether the sale was conducted regularly and frequently, and if it was done for the seller's own account or on behalf of a different agent against economic compensation.

In its ruling, the CJUE highlighted that these considerations did not constitute an exhaustive nor an exclusive list of requirements, in the sense that meeting one or several of those requirements did not automatically qualify as a 'trader' within the meaning of the UCPD<sup>111</sup>. The sole fact that profit is generated by a sale or that advertisement is made for the sale of these goods is not enough to qualify a natural person as a 'trader'<sup>112</sup>. According to the CJEU, to fall under the UCPD, a 'commercial practice' must be performed by a 'trader'.<sup>113</sup> Besides, an activity such as the sale of goods or their advertising can be considered as a 'commercial practice', when the actor is performing it in the context of their "trade, business, craft or profession"<sup>114</sup>.

The *Kamenova* ruling and the rationale followed by the CJEU show that not all individuals selling goods online qualify as 'traders', although an organized, profit-oriented and repeated or frequent activity may warrant this classification. The criteria applied by the CJEU are relevant when examining influencer selling, marketing or other promotional activities carried out through social media platforms. For influencers, occasional marketing content might not be sufficient to prove they act as 'traders'. However, consistent professional involvement in activities that generate revenue or benefits, including in the form of gifts or

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<sup>111</sup> Ibid para 39

<sup>112</sup> Ibid para 40

<sup>113</sup> Ibid paras 42, 43

<sup>114</sup> Ibid para 45

discounts, and that make use of a creative skill, such as advertising or content creation, are likely to indicate that we are in the presence of a 'trader', even in the absence of a registered business<sup>115</sup>.

The Influencer Legal Hub provides for a checklist to help influencers establish whether they fall under the definition of 'trader'<sup>116</sup>. This list is based on the legal context described above and should serve as a tool for helping influencers, although without no legal value.

The criteria relevant to this effect are split into 3 different general categories. The first one concerns the generation of income or benefits and the frequency of it. It includes making money by monetizing content, receiving gifts, travel or other benefits and selling directly products or services to consumers<sup>117</sup>. The second criterion is the relationship with consumers and, specifically, if the influencer is targeting natural persons who act as consumers and not businesses, and if the influencer as the seller has access to technical information or expertise in relation to the product or service offered that is not available to the consumers, hence creating a power imbalance<sup>118</sup>. The third aspect concerns the exercise of a business activity, which includes whether the influencer makes use of a skill, expertise or specialization, if he or she is registered as a self-employed professional or acts through a company, with their revenue being subject to VAT. Lastly, it also relevant if their activities are carried out in an organized manner, like, for example, by creating posts regularly to grow the number of followers or to increase the income<sup>119</sup>.

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<sup>115</sup> European Commission, 'Legal Brief #3: When is an influencer a trader?' in Influencer Legal Hub (European Commission, 2023) [https://commission.europa.eu/document/download/55e73447-8c21-4728-a42b-05bd030f7627\\_en?filename=Legal%20brief%203.pdf](https://commission.europa.eu/document/download/55e73447-8c21-4728-a42b-05bd030f7627_en?filename=Legal%20brief%203.pdf), accessed 30 October 2024.

<sup>116</sup> European Commission, 'Checklist: Are you a 'trader'?' in Influencer Legal Hub (European Commission, 2023). [https://commission.europa.eu/document/download/99f23b57-2786-42ae-90d9-d4bbdfbcc9db\\_en?filename=Trader%20checklist\\_1.pdf](https://commission.europa.eu/document/download/99f23b57-2786-42ae-90d9-d4bbdfbcc9db_en?filename=Trader%20checklist_1.pdf), accessed 2 October 2024.

<sup>117</sup> Ibid Ch. 1

<sup>118</sup> Ibid Ch. 2

<sup>119</sup> Ibid Ch. 3

Influencers who qualify as traders and target EU consumers are subject to certain legal obligations that result from relevant general laws, consumer protection laws, and depending on their specific type of activity, other specific areas under EU law, in addition to local national requirements.

In the context of this thesis, a 'food influencer' will be defined as:

*A natural or legal person who leverages social media platforms to promote, advertise or sell own-branded or third-party branded food products, services relating to food, and/or digital content relating to food (e.g. diet plans or cooking lessons), or makes use of food information to grow an audience and monetize the platform, and who falls under the legal definition of 'trader', as laid down in the UCPD.*

The above definition is formulated using as a base the definition of a "trader" according to the UCPD, adding specific mentions of practices used commonly by influencers and that would constitute them "food influencers". As there is no legal or widely acceptable academic definition of the term, the intention for this definition is to help contextualize exactly through which lens the different laws are examined in this thesis.

### 2.3. Unfair Commercial Practices Directive (UCPD)

With the UCPD, the EU legislator aimed to establish a coherent regulatory framework across the EU, to strengthen the protection of consumers' interests in the single market, and to empower EU Member States to tackle issues relating to unfair commercial practices, before, during and after the conclusion of commercial transactions between traders and consumers<sup>120</sup>. The directive is based on the maximum harmonization principle, meaning that, as a rule, EU Member States may not adopt stricter rules unless in areas specified by other

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<sup>120</sup> Ibid (n.102), art 1

laws, in order to ensure the proper functioning of the internal market.<sup>121</sup> As mentioned previously with regard to the legal definition of influencers, the Directive applies primarily to business-to-consumer commercial relationships, i.e. involving a trader and a consumer.

Under the directive, unfair commercial practices are explicitly prohibited<sup>122</sup>. Practices considered unfair in the context of the law include those that contravene professional diligence and honest market practices<sup>123</sup> and are likely to distort the purchasing behavior of the average consumer in the audience a message or product is addressed to<sup>124</sup>. Actions or omissions with a misleading character<sup>125</sup> and aggressive practices<sup>126</sup>, such as harassment, are unfair commercial practices. A list of unfair commercial practices is provided in Annex I of the Directive<sup>127</sup>.

Misleading actions involve business practices containing false or untruthful information, which can be deceitful to the average consumer, including possible cases when the information can be viewed as factually right and influences a purchase decision that the average consumer would otherwise not make<sup>128</sup>. Misleading information can concern the identity of the trader, the consumers' rights, the nature of the product, its state and characteristics or the pricing<sup>129</sup>. Additionally, any marketing activity creating confusion around the identity of a product as a competitor's product, or that makes claims of the trader abiding by a certain code of conduct when in fact they do not, and lastly the marketing of different products as the same across different Member States<sup>130</sup>.

In turn, misleading omissions are defined as practices that fail to provide important information to the average consumer, thus distorting their purchase

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<sup>121</sup> Ibid (n. 100) para 1.1.

<sup>122</sup> Ibid (n.102) art 5 para 1

<sup>123</sup> Ibid art 5 para 2 (a)

<sup>124</sup> Ibid art 5 para 2 (b)

<sup>125</sup> Ibid art 5 para 4 (a)

<sup>126</sup> Ibid art 5 para 4 (b)

<sup>127</sup> Ibid Annex I

<sup>128</sup> Ibid art 6 para 1

<sup>129</sup> Ibid art 6 para 1 (a)-(g)

<sup>130</sup> Ibid art 6 para 2 (a)-(c)

decisions<sup>131</sup>. The same applies to the provision of information in unclear, ambiguous ways<sup>132</sup>. Important information includes the identity and characteristics of the product, its price and the existence of hidden costs, the geographical address and identity of the trader, the contractual conditions of the transactions and the rights of the consumer in that context, including the payment and delivery of the product, and the identification of the seller as a trader when products are sold through online platforms<sup>133</sup>. Moreover, the presentation of product reviews must be accompanied by information on whether and how the trader ensures the opinions come from actual consumers<sup>134</sup>.

Finally, unfair practices that qualify as aggressive are those that employ coercion, harassment or undue influence methods that impair consumers' freedom to make free choices and thus leading to a purchase decision the consumer would not normally make<sup>135</sup>. The nature, timing and persistence of a communication, the use of threats or retaliation actions, the creation of non-contractual barriers at the expense of the consumer, or the taking advantage of consumers' weaknesses such as personal circumstances to the extent that it impacts their decision-making are all factors that may determine the aggressive nature of a commercial practice<sup>136</sup>.

The enforcement of the directive lies with Member States, which have the responsibility to adopt national legislation to ensure the existence and the availability of legal means to counter unfair commercial practices<sup>137</sup>, and to determine the appropriate sanctions in case of infringement of the provisions of the directive<sup>138</sup>. Lastly, traders are expected to substantiate any claims, or information around their commercial practices if challenged<sup>139</sup>.

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<sup>131</sup> Ibid art 7 para 1

<sup>132</sup> Ibid art 7 para 2

<sup>133</sup> Ibid art 7 para 4 (a)-(f)

<sup>134</sup> Ibid art 7 para 6

<sup>135</sup> Ibid art 8

<sup>136</sup> Ibid art 9 (a)-(e)

<sup>137</sup> Ibid art 11 para 1

<sup>138</sup> Ibid art 13 para 1

<sup>139</sup> Ibid art 12

## **Application to Influencer commercial practices**

Influencers qualifying as traders are subject to certain prohibitions and obligations, which stem from the application of the UCPD. As further clarified in the Guidance on the interpretation of the UCPD<sup>140</sup>, trader obligations might also apply when an influencer who does not directly qualify as a trader acts on a trader's behalf<sup>141</sup>.

One of the fundamental obligations that influencers have according to the UCPD is using their media in a transparent manner and making use of appropriate disclosures, to ensure consumers are sufficiently informed of the role of the influencer as a trader and the purpose behind any message or content they produce, as part of their commercial practices. Hidden marketing practices are prohibited, as failure to disclose would be considered a misleading omission<sup>142</sup>. Additionally, the "blacklist" of unfair practices provided by Annex I of the UCPD explicitly includes practices in which content with commercial information is presented as an objective opinion, when, in reality, it is advertising ('advertorials'), although not clearly identified as such<sup>143</sup>. Also, cases where traders present themselves, whether purposefully or not, as consumers or having a role other than that of a trader with commercial motives are prohibited<sup>144</sup>. The transparency obligation applies irrespective of whether the trader is also the producer or supplier of the goods or services<sup>145</sup>. However, when commercial communication made by influencers concerns their own products or brands, the content also needs to bear the appropriate disclosures, even if the company or brand name is the very name of the influencer<sup>146</sup>.

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<sup>140</sup> Ibid (n.121)

<sup>141</sup> Ibid para 2.2.

<sup>142</sup> Ibid (n.102) Art 7 (2)

<sup>143</sup> Ibid Annex I (11)

<sup>144</sup> Ibid Annex I (22)

<sup>145</sup> Ibid (n. 131) art 4.2.6. para 2

<sup>146</sup> Ibid para 8

Overall, disclosure methods need to be effective, appropriate to the content and context of the specific commercial practice, its messaging and overall presentation of the social media content in question, taking into account the concepts of the average and vulnerable consumers.<sup>147</sup> Some examples of non-compliant practices include, for example:

- Disclosures that are not easily and readily visible, requiring the consumer to search for the information in external links or to press “read more”;
- At the end of long texts, not making direct and explicit disclosure of the commercial nature of a post (e.g. tagging a sponsor to a post would not be enough); or
- Omitting the disclosure on each individual commercial communication regardless of whether they are part of the same advertising campaign<sup>148</sup>.

Additional practices that are likely to be deemed not sufficient taking into account the disclosure requirements set out by the UCPD include:

- Merely thanking a brand or company for a product or service;
- Using language that is unclear or open to interpretation when making disclosures such as “#partner”; or
- Informing the public about the commercial nature of a post only in speech inside a video or masking/ hiding such disclosure visually by using font sizes and colors that reduce its visibility<sup>149</sup>.

As influencer marketing usually relies on building connections and trust with consumers who make up its target audience, special attention needs to be paid to refraining from using potentially aggressive practices, which the UCPD prohibits. This includes pressuring followers into purchasing products via persistent messages<sup>150</sup>, creating a false sense of urgency through untrue time-

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<sup>147</sup> Ibid para 4

<sup>148</sup> Ibid paras 4, 5

<sup>149</sup> European Commission, ‘Dos and Don’ts: Best practices for advertising disclosures’ [2023] [https://commission.europa.eu/document/download/28ddc0cb-8097-455c-b1e1-c28599011ef8\\_en?filename=Disclosure%20dos%20and%20don%27ts.pdf](https://commission.europa.eu/document/download/28ddc0cb-8097-455c-b1e1-c28599011ef8_en?filename=Disclosure%20dos%20and%20don%27ts.pdf) accessed 12 October 2024.

<sup>150</sup> Ibid (n.102) Annex I (26)

bound offers or communicating that the influencer's livelihood depends on the consumer's choice to buy a good or a service<sup>151</sup>. Exhortation practices towards children are explicitly prohibited<sup>152</sup>. Aggressive practices additionally cover messages that are aimed to take advantage of consumers' fear. This is exemplified by a Swedish court case concerning an Instagram advertisement of a fish oil food supplement, which claimed that the product provided protection against Covid-19, thus exploiting consumers' concern of contracting the virus<sup>153</sup>.

All product information used by the influencers to either advertise or sell a product or service needs to be factually accurate. In fact, influencers have the burden of proof (obligation of party in a legal case to submit evidence in support of a claim) in case any claim is challenged in court. For cases when there are technical sectoral laws over certain areas, the UCPD is applied in parallel with the specific laws as a safety net, when these do not adequately address consumer protection.<sup>154</sup> It has been confirmed by case law that, in case of a conflict between a sector-specific law and the UCPD, the first takes precedence.<sup>155</sup> This is important for food influencer marketing, notably due to their frequent use of nutrition and health claims. Indeed, in case of conflict between the provisions of the UCPD and specific legislation for such claims, which is analyzed later on in Chapter 3, the latter applies to and regulates unfair commercial practices involving the use of those claims.<sup>156</sup> The same applies to the use of green claims, i.e. claims regarding the sustainability and/or the environmental impact of a good, service or event of the trader's activity.<sup>157</sup> Besides, the provision of inaccurate information about product elements such as

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<sup>151</sup> Ibid (n.102) Annex I (30)

<sup>152</sup> Ibid Annex I 28

<sup>153</sup> Stockholm District Court, *The Patent and Market Court prohibits marketing that gives the impression that fish oil has an effect on covid-19 and influenza* [2020] <https://www.domstol.se/nyheter/2020/12/patent--och-marknadsdomstolen-forbjuder-marknadsforing-som-ger-intryck-av-att-fiskolja-har-effekt-pa-covid-19-och-influensa/>, accessed 13 October 2024.

<sup>154</sup> Ibid (n.121) art. 1.2.1.

<sup>155</sup> Ibid

<sup>156</sup> C-363/19 *Konsumentombudsmannen v Mezina AB* [2020] ECLI:EU:C:2020:693 <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62019CJ0363> accessed 31 October 2024.

<sup>157</sup> Ibid (n. 121) art 4.1.1.5.

the quality state, price, market permissibility etc. of a product is prohibited under Article 6 UCPD.

Lastly, influencers are required to provide all material information whenever there is an invitation for consumers to make a purchase.<sup>158</sup> This information includes the geographical address of the influencer acting as a trader.

## 2.4. Consumer Rights Directive (CRD)

The CRD applies to business-to-consumer transactions providing similar definitions for 'consumer' and 'trader' as laid down in the UCPD.<sup>159</sup> Its purpose is to strengthen consumer protection and the functioning of the internal market<sup>160</sup> through maximum harmonization, which, as already mentioned earlier on, means that, as a rule, EU Member States cannot impose stricter provisions in national laws.<sup>161</sup> The main aim of the CRD is to establish rights for consumers and obligations for traders in relation to sales and service contracts concluded between them. A sales contract is defined as any contract with which a consumer pays or commits to make a payment in return for the ownership of a good to be transferred from the trader, while service contracts concern non-sale contracts with which traders commit to provide a service to consumers in return for a payment.<sup>162</sup> The directive applies to traditional trade as well as to digital trade, including online marketplaces and the provision of digital goods or services, with some exceptions including healthcare, financial services or frequent food delivery for immediate consumption services.<sup>163</sup>

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<sup>158</sup> Ibid (n. 133)

<sup>159</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, art 2.

<sup>160</sup> Ibid art 1

<sup>161</sup> Ibid art 4

<sup>162</sup> Ibid art 2 (5), (6)

<sup>163</sup> Ibid art 3 paras 1,2, 3

In the case of food influencers, they are bound by the requirements and obligations of the CRD, when they make use of social media or online marketplaces to sell goods or services to consumers. It must be noted that digital content or remote-access services also fall under the scope of the directive. If, for example, a food influencer offers to consumers cooking lessons online or through access to pre-recorded videos, a personalized diet plan, or an e-book in exchange for compensation, then this constitutes a sale or service contract. For cases where the exchange of information, communication or the agreement to make a purchase take place remotely over the phone or through other means, or in virtual online marketplaces, the Directive defines and regulates distance contracts.<sup>164</sup>

The first requirement established is the responsibility for traders to provide clear information to consumers, prior to a contract taking effect.<sup>165</sup> The following elements, summarized from Article 6 of the CRD<sup>166</sup>, are defined as mandatory:

- The nature and main features of the product or service and, if applicable, any technical information on the use of the product or service;
- The identity of the trader, its geographical address and contact details;
- The price of the product or service, how it is calculated and whether there are any possible additional costs for shipments or use of another intermediary service;
- The terms for any payment arrangements;
- A reminder of the consumers' rights relating to the quality of the goods and the legal guarantee and of the existence of and the terms of the right of withdrawal (product returns).

Specifically for online marketplaces, which are commonly used by influencers selling products online, the host websites must ensure that the general information as described above can be provided to consumers and that it is easily

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<sup>164</sup> Ibid art 8 paras 2, 6

<sup>165</sup> Ibid art 6 para 1

<sup>166</sup> Ibid art 6 para 1 (a)-(t)

accessible prior to the purchase.<sup>167</sup> Additionally, for cases where third parties are selling goods or services through the online marketplace, consumers need to be informed of how contracts are to be executed between the three parties (consumer, trader or non-trader selling party, and the online marketplace), whether the selling entity is a trader under the definition of the CRD, and if not that the legal protection of the directive does not cover the specific contract.<sup>168</sup>

For the legality of distance contracts, the mandatory information must be provided with appropriate means to consumers and the trader must ensure that consumers explicitly agree to the payment commitment and contract terms.<sup>169</sup> For contracts concluded through means with restrictions such as limited time or lack of mean to review the contractual terms, traders must provide as a minimum the mandatory information<sup>170</sup>. Then, once the contract is in place, traders must provide, at the latest when the good or service is delivered, a confirmation of the agreed contract with the full terms, information and the consumer's explicit prior agreement.<sup>171</sup>

The CRD establishes the consumers' right of withdrawal from contracts, within a standard timeline of 14 days, called 'cooling off period', without the need for justification unless there is an exception.<sup>172</sup> The withdrawal time can be up to 30 days in certain cases such as for goods under one order, but that arrive separately or for services that take time to be completed.<sup>173</sup> If the trader fails to inform consumers of their right for withdrawal the time is changed to 12 months, or 14 days from the time the trader rectifies the omission.<sup>174</sup> For exercising this right, consumers need only communicate their request to the trader with a legal form or any other explicit way, within the time limits set by the law.<sup>175</sup> When the

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<sup>167</sup> Ibid art 6a para 1 (a)

<sup>168</sup> Ibid (b)- (d)

<sup>169</sup> Ibid art 8 paras 1, 2

<sup>170</sup> Ibid para 4

<sup>171</sup> Ibid para 7

<sup>172</sup> Ibid art 9 para 1

<sup>173</sup> Ibid para 2 (a), (b)

<sup>174</sup> Ibid art 10

<sup>175</sup> Ibid art 11

withdrawal is correctly exercised, the contract is effectively cancelled.<sup>176</sup> Consumers are responsible for returning any goods received back to the trader unless the trader offers means for retrieval<sup>177</sup>, which may result in some direct cost burden for the consumers. Consumers might additionally be liable for proportional costs in case a service was used before the withdrawal, or if the value of the good has diminished during the time before the right was exercised.<sup>178</sup> Traders must reimburse consumers for all direct costs related to the product or service, unless an exception such as the ones mentioned above apply.<sup>179</sup> Lastly, the Directive accounts for some cases where a withdrawal cannot be exercised, such as for custom-made goods at the order of the consumer, goods that have a very short shelf life or for digital content that has been delivered digitally and cannot be returned, with prior acknowledgement from the consumer.<sup>180</sup>

An additional right provided to consumers concerns the delivery of the goods, which is set at a maximum of 30 days, if the consumer has not previously agreed to another timing.<sup>181</sup> If traders fail to meet the deadline even after a subsequent communication with the consumer for the agreement on additional time, the consumer can terminate the contract.<sup>182</sup> Upon the termination, traders must reimburse consumers, as appropriate.<sup>183</sup>

### **Application to Influencer commercial practices**

The CRD applies directly to influencers who sell products to consumers, insofar as they qualify as sellers. Article 6 of the Directive is very important for influencers, as it establishes a clear list of information that must be provided to consumers prior to a contract being formed. EU consumer law, and specifically

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<sup>176</sup> Ibid art 12

<sup>177</sup> Ibid art 14 para 1

<sup>178</sup> Ibid art 14 paras 2, 3

<sup>179</sup> Ibid art 13 paras, 1, 2

<sup>180</sup> Ibid art 16 (c), (d), (m)

<sup>181</sup> Ibid art 18 para 1

<sup>182</sup> Ibid art 18 paras 1, 2

<sup>183</sup> Ibid art 18 para 3

the CRD, considers the power imbalance between the trader and the consumer, which is generally attributed to the latter's disadvantage when it comes to knowing product or service information about the products, pricing or industry standards.<sup>184</sup>

Influencers selling products or services online need to ensure that consumers have clear and easily accessible information about what is sold. This includes accurate information about the characteristics of the products or services. For example, if a food influencer sells nutrition coaching sessions, a description about the number of sessions included in the purchase, the payment details etc. needs to be made available to consumers. Another important piece of information is the name and geographical address of the influencer. As acknowledged in the Influencer Legal Hub, influencers without a registered business address can find themselves in a tough spot, as the requirement applies regardless of if they only dispose of a personal home address, which may raise privacy issues.<sup>185</sup> As commented previously, this is additionally stipulated in the UCPD, for cases that an invitation of purchase is made by influencers. An additional important information requirement is related to the consumers' rights, such as the withdrawal/ cancellation right within 14 days, which is established by the CRD. At the Launching Webinar of the Influencer Legal Hub, Melissa Kekenbosch noted that, in Belgium, influencers who sell to consumers often fail to comply with these requirements<sup>186</sup>.

## 2.5. Unfair Contract Terms Directive (UCTD)

The UCTD provides a harmonized principle-based framework for the protection of consumers against unfair contract terms.<sup>187</sup> It is based on minimum

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<sup>184</sup> European Commission, 'Legal brief #8: Influencers as sellers- Information duties and Consumer contracts' in Influencer Legal Hub (European Commission, 2023) [https://commission.europa.eu/document/download/d99a7b82-35df-44e0-aa9c-2ce1722c39e8\\_en?filename=Legal%20brief%208.pdf](https://commission.europa.eu/document/download/d99a7b82-35df-44e0-aa9c-2ce1722c39e8_en?filename=Legal%20brief%208.pdf) accessed 3 November 2024.

<sup>185</sup> *ibid*

<sup>186</sup> European Commission (n.54), Launching Webinar.

<sup>187</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, art. 1 para 1

harmonization, meaning that Member States can adopt stricter requirements<sup>188</sup>. The UCTD applies to business-to-consumer contracts in parallel with other EU consumer or sector-specific laws, specifically between the '*seller or supplier*' and the '*consumer*'. The term seller is defined in a broad sense, to include legal or natural persons or businesses who engage with consumers for business/ trade purposes.<sup>189</sup> In turn, the consumer is a natural person, whose purposes are different to their trade or profession.<sup>190</sup> The term 'seller' in this Directive is equivalent to the term 'trader' in other consumer laws like the UCPD, which has been confirmed by the European Commission.<sup>191</sup>

The Directive defines as unfair contract terms those that have not been individually negotiated and, contrary to the requirement of good faith, cause a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer, with pre-drafted terms, particularly in standard contracts, being regarded as not individually negotiated if the consumer could not influence the content.<sup>192</sup> The Directive includes a non-exhaustive list of clauses that are unfair in all cases.<sup>193</sup> Some examples are clauses that exempt the seller from responsibility in case consumers are injured because of an omission from the seller's side, asking consumers to give up a legal right or permitting that the seller withholds money after the consumer has exercised the right of withdrawal from the contract.<sup>194</sup>

Under the UCTD, contracts must be written in clear easily understandable language, while, in case of ambiguity, the interpretation must always be the most beneficial to the consumer's interests.<sup>195</sup> The fairness of contractual clauses can be challenged and assessed by courts, based on the nature of the product or service and the circumstances around the consumer's agreement with the

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<sup>188</sup> Ibid art. 8

<sup>189</sup> Ibid art 2 (c)

<sup>190</sup> Ibid (b)

<sup>191</sup> Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts [2019] OJ C 323, 1.2.1.1.

<sup>192</sup> Ibid (n.184) art 3 paras 1,2

<sup>193</sup> Ibid Annex I

<sup>194</sup> Ibid Annex I (a), (b), (d)

<sup>195</sup> Ibid art 5

contract, as well as its terms and overall redaction.<sup>196</sup> Unfair contract clauses are not binding to consumers, regardless of if they have agreed to them or not.<sup>197</sup> If a contract contains both fair and unfair clauses, it can only be valid in case the fair clauses are enough to justify its existence.<sup>198</sup>

### **Application to Influencer commercial practices**

The UCTD applies to influencers who conclude sales contracts with consumers for the sale of goods or services. The requirements apply both to cases where the influencer makes a direct sale to consumers as well as indirectly through drop shipping.<sup>199</sup> This is a practice where the influencer is never in possession of the goods nor for their storage and shipping; in practical terms, the order is received by the influencer and then passed on to a fulfillment company that executes it.<sup>200</sup>

Contracts need to be clear and easily understandable, without any ambiguity, and based on good faith to safeguard the legitimate interests of both the seller and the consumer, while, in case of any interpretation issue, this should be solved in favor of the consumer in court. This is aligned with the Directive's goal to prevent any imbalance in contractual negotiations which is at the detriment of the consumers. Therefore, influencers must ensure that the clauses of their contracts are fair, and be aware that any terms that may create imbalance vis-à-vis consumer may be deemed invalid. For example, influencers working through a drop shipping model cannot make use of clauses in their contracts that would exonerate them from their responsibility to sell safe products. The same applies to terms and conditions for returns, refunds, etc.

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<sup>196</sup> Ibid art 4

<sup>197</sup> Ibid art 6

<sup>198</sup> ibid

<sup>199</sup> European Commission, Influencers as Sellers: Information Duties and Consumer Contracts, Influencer Legal Hub, 2023, [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/influencer-legal-hub\\_en#part-3-influencers-as-sellers](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/influencer-legal-hub_en#part-3-influencers-as-sellers), accessed 4 November 2024.

<sup>200</sup> Amazon, What is dropshipping? How does it work in 2024?, 2024, <https://sell.amazon.com/learn/what-is-dropshipping>, accessed 4 November 2024.

## 2.6. Consumer Sales and Guarantees Directive (CSGD)

The CSGD aims to achieve a high level of protection of consumers' interests and the proper functioning of the internal market, by establishing rules and requirements for sales contracts between sellers and consumers, focusing on rules and remedies around the state of quality of products, which must be in conformity with the contract.<sup>201</sup> It is based on the principle of maximum harmonization. The definition of 'sales contract' is the same as the one laid down in the UCTD. The same applies to the terms 'consumer' and 'seller', which are aligned with the definitions previously mentioned. Food influencers forming contracts for the sale of goods to consumers qualify as sellers and are bound by the CSGD's obligations. However, the CSGD does not apply to digital content or digital services, unless these are provided as accessory to physical goods or services.<sup>202</sup> This would be the case of a robot vacuum, which is supposed to be accompanied by an application for remote use.

The Directive provides clear subjective and objective requirements that goods must conform with. The subjective requirements include that the goods must match the description, quantity, functionality, etc. provided in the contract, meet any consumer needs or use purposes that the consumer communicated at the time of purchase, and be delivered, installed or provided with updates as provided in the contract.<sup>203</sup> The objective requirements are complementary to the subjective ones, and must be met as well. Goods must be suitable for the purpose that similar products serve, according to any relevant laws or industry standards, match the quality and functionality of any sample shown to the consumer prior to the formation of the contract, be delivered as the consumer would reasonably expect, including accessories, packages etc., and, lastly, be in

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<sup>201</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136, art 1.

<sup>202</sup> Ibid art 3 para 3

<sup>203</sup> Ibid art 6 (a)- (d)

line with the quality and characteristics that a consumer would reasonably expect to find in similar goods.<sup>204</sup> Sellers are liable for products that do not conform to these requirements for a general timeframe of 2 years from the conclusion of the contract, with the possibility of Member States to provide for longer periods.<sup>205</sup> Issues that are detected or identified within the first year are to be considered as if they were existing at the time of delivery, unless the seller proves otherwise.<sup>206</sup>

Whenever products are found to be non-conform, consumers are entitled, in accordance with the hierarchy established by the Directive, to first request the repair or replacement of the product,<sup>207</sup> and if these are not feasible, excessive, or cannot be completed within a reasonable time, to seek a proportionate price reduction<sup>208</sup> or, in case the non-conformity is substantial, the termination of the contract and a refund.<sup>209</sup> The seller must assume any costs related to the repair, replacement and return of products.<sup>210</sup> Sellers making commercial guarantees must provide the information to consumers clearly, including the consumer's right to the remedies, terms and how the consumer can initiate any such action.<sup>211</sup> These guarantees, called warranties, can extend the standard two-year guarantee, but not limit it.<sup>212</sup>

### **Application to Influencer commercial practices**

The main feature of the CSGD is the application of the objective and subjective requirements that all products sold to consumers must meet. These requirements could be summarized as follows: consumers must be delivered

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<sup>204</sup> Ibid art 7

<sup>205</sup> Ibid art 10 paras 1, 3

<sup>206</sup> Ibid art 11 para 1

<sup>207</sup> Ibid art 13 para 2

<sup>208</sup> Ibid para 4

<sup>209</sup> Ibid para 5

<sup>210</sup> Ibid art 14 para 1 (a), art 16 para 3

<sup>211</sup> Ibid art 17

<sup>212</sup> Your Europe, Guaranteed and Returns, Commercial guarantees [https://europa.eu/youreurope/citizens/consumers/shopping/guarantees-returns/index\\_en.htm](https://europa.eu/youreurope/citizens/consumers/shopping/guarantees-returns/index_en.htm), accessed 2 November 2024.

what was promised in terms of quality, functionality, operability and extras and for the product to be what a consumer would expect based on legal or industry standards. Therefore, influencers engaging with consumers must be sufficiently informed about the products they sell, enough to ensure they can honestly and accurately inform consumers about their characteristics. If a consumer buys a product that is sold as waterproof, this must meet the claim and also be in line with industry standards applying to similar products, thereby providing the same protection as other products normally would.<sup>213</sup>

The influencer's responsibility requires that any non-conformity would need to be rectified, or it would result in the negation of the sales contract in favor of the consumer, who would be owed a refund for the purchase. The Directive additionally specifies that costs resulting from non-conformity need to be covered by the seller. Influencers would need to ensure that they have the mechanisms in place to fulfill these requirements in case of issues, as well as to be able to comply with the standard guarantee timing of normally two years (contact information, carrier for making returns or repairs, etc.). This could potentially prove challenging for influencers working with drop shipping, but it must be met.<sup>214</sup>

## 2.7. Digital Content Directive (DCD)

The DCD specifically addresses the rules and requirements for sales or service contracts, when these are of a digital nature and are provided digitally and are not under the scope of the CSGD. The definitions provided are equivalent to the consumer law directives mentioned before, returning to the use of the term 'trader' instead of 'seller', to account for the provision of services

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<sup>213</sup> European Commission, 'Legal brief #7: influencers as sellers - non-conformity Issues with goods and services', Influencer Legal Hub, [https://commission.europa.eu/document/download/fd4a0021-efe6-45b3-8ab7-7dcd326be079\\_en?filename=Legal%20brief%207.pdf](https://commission.europa.eu/document/download/fd4a0021-efe6-45b3-8ab7-7dcd326be079_en?filename=Legal%20brief%207.pdf), accessed 6 November 2024.

<sup>214</sup> Ibid

as well.<sup>215</sup> Specifically, the topics of the conformity of the goods with subjective and objective criteria, as well as the remedies are addressed, based on a maximum harmonization approach<sup>216</sup>. It must be noted that the rules described above also apply to digital content and services, even if the consumer did not pay money, but allowed the seller to use personal data in exchange instead.<sup>217</sup> Such an example would be the provision of a free e-book in exchange for information that the seller can use for future advertising. This can be relevant to influencer commercial practices, like giveaways or contests.

The subjective requirements include meeting of the description, quality, quantity and functionality, as described in the contract and according to the intended purpose of use communicated by the consumer, as well as the obligation to provide all standard extras, accessories and agreed updates to the digital content or service.<sup>218</sup> In turn, the objective requirements include meeting industry standards and normal consumer expectations for the type of product, as well as meeting what was communicated before the contract was concluded, including technical assistance for installation, provision of updates or features that the consumer would expect as standard for the type of product.<sup>219</sup> For example, if a consumer purchases an application, the industry standard security updates would need to be provided by default.

Traders are liable for non-conformity at the time the content or service was supplied to the consumer, while, when national law provides a specific timeframe for the guarantee, it has to be of a least two years.<sup>220</sup> Claims for products that do not conform within a year from the time of delivery are to be considered as equal to claims at the time of supply, unless proven otherwise by the trader.<sup>221</sup> The remedies provided by the Directive are equivalent to the ones

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<sup>215</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136, art 2.

<sup>216</sup> Ibid art 4

<sup>217</sup> Ibid (n. 207) Digital Content and Digital Services

<sup>218</sup> Ibid (n. 208 )art 7

<sup>219</sup> Ibid art 8

<sup>220</sup> Ibid art 11 para 2

<sup>221</sup> Ibid art 12 para 2

of the CSGD, and include the repair, return, proportionate price reduction or contract termination and reimbursement if the trader is unable to rectify the issue.<sup>222</sup>

### **Application to Influencer commercial practices**

The DCD establishes requirements and obligations for digital goods and services, very similar to those of the CSGD. Influencers forming sales contracts with consumers for the provision of digital content need to accurately inform consumers about the features of what they sell, as well as meet quality requirements as promised and as expected from industry standards. An example would be a food influencer selling an application subscription, which offers personalized diet plans. If the consumer was promised weekly check-in calls or the provision of a complementary e-book, then these must be duly delivered. Additionally, digital safety protocol standards must be met, as they apply for all similar applications in the market.<sup>223</sup> In cases of non-conformity, the influencer would need to rectify it or, if he or she is not able to, to compensate and reimburse the consumer. Influencers need to ensure they have the resources, mechanisms and means to meet these obligations.

## 2.8. Digital Services Act (DSA)

The DSA Regulation<sup>224</sup> came into force in 2022, and, although it is not a consumer protection law, it indirectly contributes to the cause through setting obligations and requirements for intermediary platforms, such as social media.<sup>225</sup> Social networks such as *Instagram*, which are used by influencers for commercial practices, fall under the legal definition of intermediary service of the Regulation.

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<sup>222</sup> Ibid art 14, 15, 16

<sup>223</sup> Ibid

<sup>224</sup> 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) [2022] OJ L 277.

<sup>225</sup> Ibid art 1

This is because they can store and transfer data and content from creators to the general public<sup>226</sup> and even enable the creation of distance contracts with traders<sup>227</sup>.

As summarized in the European Commission website, the Regulation establishes certain requirements that aim to improve user safety in these platforms.<sup>228</sup> The first is to establish standardized and user-friendly ways for consumers to report illegal content and goods, with the platforms being responsible to respond duly to such reports. Additionally, platforms must be informed about the identity of traders using their service. For this purpose, traders must provide information such as name, address, copy of the identification document, bank details and the written commitment that the trader will abide by EU law.<sup>229</sup> Secondly, the DSA imposes certain limitations to targeted advertising while reinforcing the obligation for transparency in social media advertising. Advertisements targeting children or groups based on specific personal data such as sexual orientation and religion are prohibited. Social network platforms must provide a means for traders to disclose the nature of their content, notably if the content is commercial<sup>230</sup>.

Illegal content is defined in a broad sense to include any information or the sale of products and services that does not comply with applicable EU or national laws.<sup>231</sup> This is important to influencer marketing, as it encompasses any commercial activity such as misleading or aggressive practices, undisclosed marketing, not meeting requirements of contract law or even generally selling unsafe goods. In practice, this would additionally apply to illegal claims for product properties, such as nutrition and health claims, which are very relevant to food influencers.

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<sup>226</sup> Ibid art 2

<sup>227</sup> Ibid (13)

<sup>228</sup> European Commission, The Digital Services Act package, <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>, accessed 2 November 2024.

<sup>229</sup> Ibid (n.216) art 30 para 1

<sup>230</sup> Ibid art 39

<sup>231</sup> Ibid art 2 (h)

## **Application to Influencer commercial practices**

Influencers acting as traders must ensure they cooperate with the social media platforms and that they duly provide the necessary information to allow them to fulfil their obligations towards the traceability of traders, as provided in Article 30.<sup>232</sup> Apart from elements of identification, influencers are required to provide a certificate through which they commit to only offer goods or services that comply with applicable EU law. Depending on the type of business, different laws can apply. For general products, the General Product Safety Regulation applies requiring that only safe products are placed on the market.<sup>233</sup> For food products, food laws such as the General Food Law, which will be examined further on, apply.

Additionally, influencers need to ensure that they comply with the transparency requirements set for social media advertising through their content, in line with the UCPD as well. For this purpose, they need to ensure that appropriate disclosure is provided with their content. Social media platforms must provide a standardized way for influencers to do so, like for example flagging of an *Instagram* post with the title "paid partnership". Influencers are responsible for ensuring that their disclosure obligations are consistently met.

## 2.9. Self-regulatory organizations (SROs)

Self-regulatory organizations are industry groups from the advertising sector, in which stakeholders voluntarily join and participate, and which create rules and obligations for members to follow as part of codes of conduct, thus

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<sup>232</sup> Ibid art 30

<sup>233</sup> Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC [2012] OJ L 135, art 5.

contributing to the voluntary regulation of the sector.<sup>234</sup> Codes of conduct, which can be sector-specific like on influencer marketing, can contain practical and applicable explanations of legal requirements that already apply, and also introduce additional requirements to support good practices, guiding and ethical principles or rules that members must abide by.<sup>235</sup> Apart from creating the rules, SROs are responsible to enforce them, and can handle consumer complaints and issues with members not complying with the codes of conduct, through Juries whose decisions are binding to SRO members. As noted by Tudor Manda, 67% of the complaints filed to SROs are resolved within two weeks.<sup>236</sup>

The European Advertising Standards Alliance (EASA), a network of national SROs and industry members from around Europe, has been actively working to ensure fair and transparent practices in influencer marketing, since 2015, when the scope of its best practices code was extended to include digital marketing.<sup>237</sup> SRO members of EASA begun working on national self-regulation standards for influencers in 2017, with EASA publishing the “*Best Practice Recommendation on Influencer Marketing*” (BPR IM) in 2018.<sup>238</sup> The BPR IM provides a concise guide for SROs to create their own national guidelines, to address the issues of influencer marketing, including definitions, clarification of editorial oversights, transparency in advertising, the definitions of responsibilities for different stakeholders, as well as the use of ethical guidelines for enhanced transparency in user-generated content.<sup>239</sup> National SROs implemented the principles of the BPR IM to their local codes of conduct, with

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<sup>234</sup> Communicate Staff, ‘Self-Regulatory Organizations: Tackling Influencer Marketing Transparency Globally’, What are self-regulatory organizations (SROs)?, Communicate, 2022, <https://communicateonline.me/category/brand-studio/post-details/self-regulatory-organizations-tackling-influencer-marketing-transparency-globally>, accessed 6 November 2024.

<sup>235</sup> Ibid

<sup>236</sup> Kolsquare, ‘How are influencer marketing regulations evolving in Europe?’, 2023, <https://www.kolsquare.com/en/blog/how-are-influencer-marketing-regulations-evolving-in-europe>, accessed 6 November 2024.

<sup>237</sup> European Advertising Standards Alliance (EASA), ‘Influencer Marketing’, <https://www.easa-alliance.org/issues/influencer-marketing/>, accessed 6 November 2024.

<sup>238</sup> Ibid

<sup>239</sup> Ibid

additional training and monitoring activities to reinforce the implementation.<sup>240</sup> The BPR IM was last updated in 2023, with additional guidance on influencer advertising transparency, including best practices for disclosure.<sup>241</sup>

The BPR IM defines influencer marketing as the publication of content by any person controlling a social media account, in exchange for some form of compensation, whether financial or other, and that influences the public.<sup>242</sup> Influencer content is deemed as marketing, whenever there is compensation by a brand, ranging from money to gifts or discounts, or when the brand has control over the content, through suggestions or approvals.<sup>243</sup> Disclosure is identified as key for consumer audiences to differentiate marketing from normal content, with acceptable methods including the use of in-platform labels, hashtags such as “#ad”, or explicitly stating the nature of the content.<sup>244</sup> Lastly, it is provided that SROs can offer training and certification to influencers in relation to legal and ethical advertising, in order to help brands identify influencers with proven history of being compliant, though this would not exonerate from additional monitoring.<sup>245</sup>

EASA developed and offers, through the national SROs, the “*Influencer Marketing Standards Agency (IMST)*” and the “*Certification for Responsible Influencer Marketing*” to influencers.<sup>246</sup> The first is an online course focused on training influencers on all relevant legal obligations and self-regulatory code rules, including those related to misleading advertising and transparency.<sup>247</sup> The second is a monitoring and certification program that uses artificial intelligence to track content made by certified influencers on a regular basis.<sup>248</sup> This program

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<sup>240</sup> Ibid

<sup>241</sup> Ibid

<sup>242</sup> European Advertising Standards Alliance (EASA), ‘Best Practice Recommendation on Influencer Marketing (BPR IM)’, 2023, Ch 2.2.1, 2.3.1, [https://www.easa-alliance.org/wp-content/uploads/2023/05/FINALISED\\_BPR-ON-INFLUENCER-MARKETING-APRIL-2024.pdf](https://www.easa-alliance.org/wp-content/uploads/2023/05/FINALISED_BPR-ON-INFLUENCER-MARKETING-APRIL-2024.pdf), accessed 6 November 2024.

<sup>243</sup> Ibid 2.3.1

<sup>244</sup> Ibid 2.3.2

<sup>245</sup> Ibid 2.3.4.1

<sup>246</sup> European Advertising Standards Alliance (EASA), ‘Responsible Influencer Marketing’, <https://www.easa-alliance.org/responsible-influence/>, accessed 6 November 2024.

<sup>247</sup> Ibid

<sup>248</sup> Ibid

is currently implemented across SROs in 13 countries, with EASA looking to expand coverage to more countries.<sup>249</sup>

Additionally, a tool called “DiscloseMe” is available for influencers interested in knowing what disclosure requirements apply to the media used by them in the country where their content should be displayed.<sup>250</sup> The tool is user-friendly and encompasses four steps.<sup>251</sup> Through simple and short multiple-choice questions, the user is asked why they are using the tool, then which social media platform they want to publish content into (*Instagram, Tik Tok, etc.*) and, lastly, the language and the country where the content will be displayed.<sup>252</sup> Based on this input, a report is then generated, which includes practical rules about how to disclose commercial content divided in four sections: “*use social media tools*”, “*tag the brand*”, “*#alert! Put your hashtags in place*”, add “*keywords and sentences*”, along with instructions of where to place the disclosures.<sup>253</sup> The hashtags and statements are provided in languages acceptable to the market, and the content of the report is created by the specific country SRO and useful links like decision-trees about when to disclose etc. are usually provided at the end of the report.<sup>254</sup>

From a legal perspective, the UCPD provides that private codes of conduct, whose development EU Member States are free to encourage, can be used for the purposes of self-regulation and enforcement, although the latter is neither equivalent nor can replace the role and the decisions taken by courts or as a result of administrative proceedings, as provided by the Directive.<sup>255</sup> Overall, the principles of codes of conduct or guidance documents, such as BPR IM, are based on the application of EU and national laws, as explained in earlier chapters. Additionally, it should be noted that claiming that an influencer abides by a certain code of conduct when in fact he or she does not constitutes a misleading

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<sup>249</sup> Ibid

<sup>250</sup> Ibid

<sup>251</sup> EASA, DiscloseMe tool, <https://www.easa-alliance.org/discloseme/>, accessed 6 November 2024.

<sup>252</sup> Ibid

<sup>253</sup> Ibid

<sup>254</sup> Ibid

<sup>255</sup> Ibid (n. 102) art 10

action, explicitly mentioned in the blacklist of the UCPD.<sup>256</sup> As mentioned in the Influencer Legal Hub, national rules set by SROs can vary in some cases, so it is advisable to check the specific standards that apply at country level.<sup>257</sup> Some examples of national SROs will be presented and discussed in Chapter 4.

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<sup>256</sup> Ibid art 6 para 2 (b), Annex I para 1

<sup>257</sup> European Commission, 'Legal brief #6: how to disclose advertising on social media', 2023, [https://commission.europa.eu/document/download/74f60707-1207-4a6f-a9aa-033ca8a3d382\\_en?filename=Legal%20brief%206.pdf](https://commission.europa.eu/document/download/74f60707-1207-4a6f-a9aa-033ca8a3d382_en?filename=Legal%20brief%206.pdf), accessed 6 November 2024.

## Chapter 3: Food sector-specific obligations

### 3.1. Food Law in the EU

One of the main cornerstones of the regulation of the food sector in the EU is the establishment of the internal market in the Treaty of the European Union (TEU).<sup>258</sup> Within the internal market, the principle of the free movement of goods applies, which includes the trade of foods.<sup>259</sup> Food law therefore needs to generally bring a high level of harmonization among the member states, to avoid limitations to the movement of goods in the form of barriers to trade.<sup>260</sup>

The EU shares competence with its Member States in the regulation of the agriculture sector and the protection of public health.<sup>261</sup> However, contrary to consumer law, which is mostly comprised of Directives, food laws usually come in the form of Regulations with general direct application within the territory,<sup>262</sup> contributing thus to a higher level of harmonization. Food laws of the EU are generally categorized as horizontal, meaning that they apply generally to all foods, or vertical, which apply to specific foods or concern specific topics.

The main laws that apply to food influencer commercial activities such as advertising or direct selling, and that are examined below are:

- General Food Law, Regulation (EC) No 178/2002
- Food Information to Consumers Regulation, Regulation (EU) No 1169/2011
- Nutrition and Health Claims Regulation, Regulation (EC) No 1924/2006

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<sup>258</sup> Consolidated version of the Treaty on European Union [2016] OJ C 202, art 3 para 3

<sup>259</sup> TFEU n. art 28

<sup>260</sup> TFEU n. art 34, 35

<sup>261</sup> TFEU n. art 4

<sup>262</sup> European Union, 'European Union Regulations' (EUR-Lex, 16 March 2022) <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-regulations.html>, accessed 16 November 2024.

## 3.2. Key definitions & scope

The first key definition for food influencer practices is the very definition of food, as provided in the General Food Law (GFL).<sup>263</sup> All substances or products, independently to their level or processing, that are marketed with the intention or expectation to be consumed by people is defined as food.<sup>264</sup> The definition includes drinks, water and any other product, like chewing gum, but exclude other products and substances, like feed, live animals, and plants that have not been harvested or cosmetic and medicinal products.<sup>265</sup> Food supplements also fall under the definition of 'food'.<sup>266</sup>

Actors in the food sector generally fall under the legal definitions of 'food business' and/or 'food business operator', as defined in the GFL.<sup>267</sup> The term food business includes any public or private venture that has a role in the commercialization of food across the supply chain, including any activity such as the primary production or secondary manufacturing, storage and distribution, import, and finally the sale of foods.<sup>268</sup> Food business operators ('FBO') are natural or legal persons that are responsible for the compliance of foods with the applicable legal requirements, within the food business they operate in.<sup>269</sup> An additional important concept is the 'placement of food on the market', which is described as the possession of food aimed to be sold, and the transfer of ownership of food, regardless of if it is economically compensated or not.<sup>270</sup> This

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<sup>263</sup>Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1 (consolidated version as of 1 July 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0178-20240701> accessed 16 November 2024.

<sup>264</sup> Ibid art 2

<sup>265</sup> Ibid

<sup>266</sup> European Food Safety Authority, 'Food Supplements' (EFSA, 16 November 2024) <https://www.efsa.europa.eu/en/topics/topic/food-supplements> accessed 16 November 2024.

<sup>267</sup> Ibid (n.263) art 3

<sup>268</sup> Ibid paras 2, 16

<sup>269</sup> Ibid para 3

<sup>270</sup> Ibid para 8

is relevant for both business-to-business as well as business-to-consumer relations.

Food laws do not provide definitions specific to influencers like consumer laws do. Food influencers participating in any of the above-mentioned business practices around food (production, storage, processing, distribution, sale) could fall under the definition of 'food business' or 'food business operator', independently of their activity on social media. According to the food influencer commercial practices analyzed earlier in the thesis, the main commercial practices/ functions of food influencers are those of the *seller* and the *advertiser*. Influencers who merely advertise food products would not be categorized as food businesses, while those who directly sell food products could qualify as such if they produce, store, process or distribute food. Since such activities would normally require professional licenses and facilities that go way beyond the scope of the normal business activities of an influencer, this thesis will not examine in detail the responsibilities and obligations of food businesses and FBOs in general, but will rather focus on the sector-specific requirements aimed at ensuring the protection of consumers' interests and human health, as they apply to influencer marketing practices.

Pursuant to Consumer law, certain pieces of information are considered as material information in the context of certain activities carried out by traders, such as the formation of a contract with consumers. In this sense, when the product offered for sale is food, food information is considered material information. The Food Information to Consumers Regulation (FIC)<sup>271</sup> defines 'food information' as any piece of information regarding food that is communicated to consumers, including physical or digital product labels and any other type of information regardless of the type or the media with which it is being communicated.<sup>272</sup> Food information used for advertising food products falls

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<sup>271</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers [2011] OJ L304/18 (consolidated version as of 1 January 2018) <https://eur-lex.europa.eu/eli/reg/2011/1169/2018-01-01>, accessed 16 November 2024.

<sup>272</sup> Ibid art 2 para 2 (a)

under the definition provided in FIC.<sup>273</sup> The FBO definition laid down in the GFL applies also in the context of the FIC Regulation, which specifies that the responsibility for the compliance of food information lies with the FBO under whose name or business name a food product is marketed.<sup>274</sup> This is usually the owner of a branded product, or the importer who places the food product on the EU market.

Concerning the use of claims, these are defined as voluntary declarations or representations attributing certain characteristics or properties to food.<sup>275</sup> When they focus on aspects of energy or emphasizing the content or absence of certain nutrients, they are nutrition claims.<sup>276</sup> Claims communicating a specific positive or negative relation between food and consumer's health are defined as health claims.<sup>277</sup> Though these categories encompass a wide range of claims that can be made about food, there are many more types such as allergen-free claims (e.g. gluten-free), organic, dietary preference claims (e.g. vegan, vegetarian), country of origin claims (e.g. local product), and more. These, in the absence of specific laws, are regulated based on general principles established by horizontal laws, such as the FIC Regulation (see chapter 3.4).

### 3.3. General Food Law (GFL)

The GFL regulation is the foundation of food law in the EU. Its aim is trifold and includes ensuring the protection of human health, the protection of consumers' interests, and finally the functioning of the internal market.<sup>278</sup> The scope of the regulation spans across the production, processing and distribution

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<sup>273</sup> Ibid art 7 para 4 (a)

<sup>274</sup> Ibid art 8

<sup>275</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [2006] OJ L404/9 (consolidated version as of 13 December 2014), art 2 para 2 <https://eur-lex.europa.eu/eli/reg/2006/1924/2014-12-13>, accessed 16 November 2024.

<sup>276</sup> Ibid

<sup>277</sup> Ibid

<sup>278</sup> Ibid (n.263) art 1 para 1

of foods,<sup>279</sup> establishing basic principles and requirements that apply to the legislation of the food sector in the EU. These principles are the basis for other laws around food, such as the regulation of novel foods and food labelling.<sup>280</sup> The responsibility for compliance with the regulation lies with the FBOs, across the different stages of the supply chain, while the monitoring and enforcement of the law is entrusted to EU Member States through official controls.<sup>281</sup>

The responsibility FBOs have in the context of the GFL extends to activities conducted in the food business they are part of and are limited to activities that are under their control.<sup>282</sup> As explained by the Commission, the aim of article 17 on the responsibility is to clearly define the separation of responsibility between the FBO and authorities, and to ensure that FBOs remain as the responsible party for food safety in the EU.<sup>283</sup> The scope is not however to create a responsibility framework or the definition of responsibilities among the different operators in food supply chains, whose relations are getting increasingly complex.<sup>284</sup> When there is infringement of food law, the responsibility of FBOs is examined as to whether they have met their own obligations.<sup>285</sup>

The key obligations for FBOs, as summarized by the European Commission, are “*safety, responsibility, traceability, transparency, emergency, prevention and co-operation*”.<sup>286</sup> Food that is unsafe in the sense that it is not suitable for human consumption or harms health cannot be placed on the EU market.<sup>287</sup> FBOs are responsible for the safety of foods, and must ensure

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<sup>279</sup> Ibid art. 4 para 1

<sup>280</sup> Ibid para 2

<sup>281</sup> Ibid art 17

<sup>282</sup> Ibid

<sup>283</sup> European Commission, General Food Law: Implementation Guidance, Article 17, Responsibilities, Ch. II.2, II.3.2., [https://food.ec.europa.eu/document/download/4cea21a6-ec96-49a7-a3a0-e1747c2c595d\\_en?filename=gfl\\_req\\_implementation-guidance\\_en.pdf](https://food.ec.europa.eu/document/download/4cea21a6-ec96-49a7-a3a0-e1747c2c595d_en?filename=gfl_req_implementation-guidance_en.pdf), accessed 16 November 2024.

<sup>284</sup> Ibid

<sup>285</sup> Ibid

<sup>286</sup> European Commission, General Food Law: Requirements for Food Business Operators [https://food.ec.europa.eu/document/download/7ac8a089-0a81-4080-8955-e5d672aa11ab\\_en?filename=gfl\\_req\\_business\\_operators\\_obligations\\_en.pdf](https://food.ec.europa.eu/document/download/7ac8a089-0a81-4080-8955-e5d672aa11ab_en?filename=gfl_req_business_operators_obligations_en.pdf), accessed 16 November 2024.

<sup>287</sup> Ibid (n.263) art 14 paras 1, 2

compliance with additional requirements.<sup>288</sup> These include maintaining and working towards food traceability that spans one step back and one step forward along the supply chain<sup>289</sup>, being transparent and cooperating with authorities when there is reason to believe that food is unsafe<sup>290</sup> and act to withdraw or recall such products.<sup>291</sup> Lastly, FBOs must implement processes and measures that prevent risks for consumers.<sup>292</sup>

The regulation, apart from safety, addresses the protection of consumers' interests, which is embedded in the principles of food law. Specifically, practices that are likely to mislead consumers, including fraud, deception or the adulteration of food are to be prevented by food law, in order to enable consumers to make informed decisions.<sup>293</sup> As a general requirement, aspects such as the labels, advertising and the overall presentation or representation of food must not be misleading to consumers.<sup>294</sup>

### **Application to Influencer commercial practices**

Food influencers making direct food product sales to consumers could fall under the definition of an FBO. In such a case, they would be acting as an online marketplace / retail store, and they would be responsible to uphold the obligations for activities under their control, including over food safety, traceability, transparency and cooperation with the competent authorities. This could include due diligence activities to ensure the products they sell are safe and compliant with EU laws (especially if imported), to maintain traceability information about their products, as well as participate along with other actors in the food supply chain in any market actions such as recalls, in a transparent way.

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<sup>288</sup> Ibid art 17

<sup>289</sup> Ibid art 18

<sup>290</sup> Ibid art 19 paras 3, 4

<sup>291</sup> Ibid art 19 para 1

<sup>292</sup> Ibid art 19 para 3

<sup>293</sup> Ibid art 8

<sup>294</sup> Ibid art 16

If, however, influencers merely advertise food products, it is unlikely they would be subject to the requirements set in the GFL. When it comes to consumer protection and the prohibition of misleading practices, in accordance with the GFL, the party responsible for compliance is the FBO. Food businesses engaging with influencers for the advertising of their products are responsible for ensuring the messages of these communications are accurate and do not mislead consumers. As already referred earlier on, the responsibility extends to actions that are under the FBO's control. This would include the decision and choice of media to advertise products. If an influencer was to change the messaging used for food advertisement, without the FBO's consent they would likely have limited liability for example towards the consumer that has been misled. Food influencers would however be responsible for meeting the obligations set in consumer and advertising laws, which include similar prohibitions to misleading practices (e.g. unfair commercial practices in the UCPD).

### 3.4. Food Information to Consumers Regulation (FIC)

The FIC regulation aims to establish horizontal requirements for food information and safeguard consumers' right to information, in order to contribute to the protection of consumer's health and interests, as well as to support harmonization for the functioning of the internal market.<sup>295</sup> It applies to all foods destined for consumption by the final consumer, and to all FBOs whose activities relate to the communication of food-related information to consumers.<sup>296</sup> It is specifically provided that the FBO responsible for the provision of food information and its compliance with applicable legal requirements, is the FBO "*under whose name or business name the food is marketed*".

The fundamental requirement established by FIC is that, whenever food is supplied to consumers, the relevant food information must be provided as well.<sup>297</sup> The information, which includes advertising and the overall presentation

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<sup>295</sup> Ibid (n.271) art 1 para 1, 2, art 3 para 1, 2

<sup>296</sup> Ibid art 1 para 3

<sup>297</sup> Ibid art 6

of the products,<sup>298</sup> must meet certain general requirements, also known as “*fair information practices*”. Food information should always be clear, accurate and easily understandable by consumers.<sup>299</sup> It must not be misleading, especially when describing the characteristics of food, such as its composition, properties, origin, etc.<sup>300</sup> Additionally, false claims that a food product has certain effects or properties, as well as that it is special in comparison to other similar products because of a feature that in reality all those products possess, are prohibited.<sup>301</sup> The same applies to the use of pictorial or other representation to imply that a food has a certain ingredient, expected for such foods, when in fact it does not.<sup>302</sup> Lastly, food information cannot claim or imply that a food product can prevent, treat or heal human illnesses, unless provided by other laws of the EU.<sup>303</sup>

The regulation establishes a list of general mandatory pieces of information, which must be provided in an easily accessible format, directly attached to the packaging of food products, for pre-packed foods. It also establishes certain technical requirements for the presentation of the information, such as minimum font size etc.<sup>304</sup> The mandatory elements include the typical information that all food labels have, namely the food product name, ingredients and allergen declarations, the quantity of certain ingredients, nutrition information, the net weight or volume of the product, instructions for the storage and use of the food, the expiry date and details of the FBO marketing the products, and, in some cases, the geographical origin (e.g. for meat<sup>305</sup>).<sup>306</sup> The information needs to be written in a language easily understandable by consumers in the country that the food is sold.<sup>307</sup> Lastly, it is explicitly provided for distance-selling practices, such as in digital marketplaces, that all mandatory

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<sup>298</sup> Ibid art 7 para 4

<sup>299</sup> Ibid art 2

<sup>300</sup> Ibid art 1 para 1 (a)

<sup>301</sup> Ibid para 1 (b), (c)

<sup>302</sup> Ibid para 1 (d)

<sup>303</sup> Ibid para 3

<sup>304</sup> Ibid art 9, 12 13

<sup>305</sup> Ibid art 26 para 2 (b)

<sup>306</sup> Ibid art 9 para 1 (a)-(l)

<sup>307</sup> Ibid art 15

elements except the expiry date, must be provided to consumers before the sale contract is concluded, with means appropriate to the sales method.<sup>308</sup>

Apart from the mandatory information, FBOs have the right to voluntarily provide additional information for foods.<sup>309</sup> Voluntary declarations must not be misleading or entail ambiguity likely to confuse consumers and be substantiated by scientific evidence.<sup>310</sup> Such elements might include, but are not limited to the voluntary declaration of the geographical origin of a product, the possible presence of allergens resulting from cross-contamination or the absence of certain allergens such as gluten ('gluten-free' claims), or information on dietary preferences such as vegetarianism or veganism.<sup>311</sup> Additional legal acts can be implemented to set requirements for such claims, which has happened, for example, with Implementing Regulations setting a maximum limit of 20ppm in gluten, for products bearing the claim gluten-free,<sup>312</sup> or with the introduction of requirements for the declaration of the country of origin of the primary ingredient of a food, if that origin is different from the origin of the finished good that is provided on a voluntary basis<sup>313</sup>. The FIC regulation does not provide a general closed list of topics, elements or even wordings for voluntary declarations can be made, so unless there are other laws regulating these topics and as long as they comply with the general requirements for the provision of voluntary information, they can be made.

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<sup>308</sup> Ibid art 14

<sup>309</sup> Ibid art 36 para 1

<sup>310</sup> Ibid art 36 para 2

<sup>311</sup> Ibid art 36 para 2

<sup>312</sup> Commission Implementing Regulation (EU) No 828/2014 of 30 July 2014 on the requirements for the provision of information to consumers on the absence or reduced presence of gluten in food [2014] OJ L228 [https://eur-lex.europa.eu/eli/reg\\_impl/2014/828/oj](https://eur-lex.europa.eu/eli/reg_impl/2014/828/oj), accessed 18 November 2024.

<sup>313</sup> Commission Implementing Regulation (EU) 2018/775 of 28 May 2018 laying down rules for the application of Article 26(3) of Regulation (EU) No 1169/2011 as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food [2018] OJ L131 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02018R0775-20190609>, accessed 18 November 2024.

## **Application to Influencer commercial practices**

Food influencers acting as sellers would likely fall under the definition of an FBO and, thus, would be fully responsible for the correct provision and compliance of food information, if the product was sold under their name or under the name of a company that they own. Food information would need to be provided with appropriate means both on a physical label, attached to the product, upon delivery, as well as online before the consumer makes a purchase. Influencers selling food products of other FBOs would still be liable to provide accurate information to consumers on the platform where the products would be sold, but the FBO would be responsible for supplying such information to the influencer in the first place, thus limiting the latter's responsibility. However, FIC provides that operators across the supply chain cannot alter the food information if this results in a non-conformity taking into account the general FIC principles, like the prohibition to mislead consumers.<sup>314</sup> Operators who have reason to believe that food information provided to them is not compliant are not to market the affected products.<sup>315</sup> It is additionally provided that FBOs need to communicate food information downstream in the supply chain to other FBOs, in order for all to be able to comply with their obligations.<sup>316</sup>

Food information used in advertising needs to be compliant with the requirements set in FIC, especially considering the prohibition for misleading consumers, as well as the requirement to support any voluntary information (such as claims) with scientific data. FBOs working with influencers to advertise their products ultimately need to ensure that the message of an advertisement, whether it concerns information or the overall presentation or representation of the food, complies with the requirements established in FIC. Elements of mandatory information would not normally be required in advertising material (specific cases where certain claims are made might require information to accompany the claims such as nutrition or health claims, as provided in chapter 3.5.), but would need to be provided prior to the consumer making a purchase;

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<sup>314</sup> Ibid art 8 para 4

<sup>315</sup> Ibid para 3

<sup>316</sup> Ibid para 8

the consumer could click on an advertisement and be led to an online marketplace, where the food information would indeed be required.

### 3.5. Nutrition and Health Claims Regulation (NHCR)

The NHCR<sup>317</sup> establishes a harmonized framework for the regulation of nutrition and health claims, aiming to ensure a high level of protection for consumers' interests and the functioning of the internal market.<sup>318</sup> It applies to all such claims made as part of any communication of commercial nature, including the labels or overall presentation of the food, as well as advertising, for pre-packed or non-prepacked foods sold to consumers or establishments such as hospitals, mass catering, restaurants etc.<sup>319</sup>

The term 'nutrition claim' encompasses any explicit and implicit message that attributes nutritional benefits to a food, namely because it contains or lacks energy, nutrients or other substances, which could be presented as having a nutritional effect.<sup>320</sup> In turn, 'health claims' are communications that attribute a connection between the consumption or not of a food or one of its ingredients with a health benefit.<sup>321</sup> Health benefits can include positive effects, in addition to the reduction of risks for certain human symptoms or diseases.<sup>322</sup>

As a general rule, nutrition and health claims can only be used if they comply with the requirements set in NHCR. Therefore, they must not be misleading, untrue or vague; they should not undermine the value of a balanced diet or attempt to influence an over-consumption of the food they are used for; they should not create confusion about the nutritional fitness of other foods that do not bear such claims; and, lastly, they should not cause or exploit consumers'

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<sup>317</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [2006] OJ L404/9 (consolidated version as of 13 December 2014) <https://eur-lex.europa.eu/eli/reg/2006/1924/2014-12-13> accessed 24 November 2024.

<sup>318</sup> Ibid art 1 para 1

<sup>319</sup> Ibid art 1 para 2

<sup>320</sup> Ibid art 2 paras 3, 4

<sup>321</sup> Ibid art 2 para 5

<sup>322</sup> Ibid para 7

fears.<sup>323</sup> Claims need to be supported by scientific data, with FBOs (as defined in FIC) being responsible for their substantiation.<sup>324</sup>

Nutrition and health claims, whenever they are made, need to be clear for the average consumer, so that the relation of the attributed benefit to the consumption of the food, as prepared and expected to be consumed, can be understood.<sup>325</sup> Foods bearing these claims must be of a portion size that is adequate for producing the claimed effect, and, of course, contain the nutrient of substance in question in a form that is functional to the human body, and in enough quantities for the delivery of the attributed benefit.<sup>326</sup> When the claim of the absence or the low content of a certain substance or nutrient is made, that absence need to be adequate for achieving the attributed benefit.<sup>327</sup> Lastly, except when nutrition and health claims are made as part of generic advertising, the provision of a nutrition information declaration, as per the requirements of FIC, is mandatory.<sup>328</sup> If for example a claim is made for reduced content of fat, then fat content and its unit of measurement must be provided.

The NHCR establishes a positive list of permitted nutrition claims,<sup>329</sup> which is provided in the Annex to the regulation.<sup>330</sup> Only nutrition claims listed in the Annex can be used in commercial communications. The list incorporates the general rules and provides specific conditions for the use of nutrition claims when applicable. For example, claiming that a food is a "*source of protein*" - or similar communications that the consumer would understand as such - can only be made on the condition that 12% of the food's energy value comes from protein.<sup>331</sup> In this case, the obligation for nutrition information declaration would apply, as described above. Another noteworthy example is the lack of authorization (absence of such terms from the list) for the use of a claim

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<sup>323</sup> Ibid art 3

<sup>324</sup> Ibid art 6

<sup>325</sup> Ibid art 5 para paras 2, 3

<sup>326</sup> Ibid para 1, (b) (i), (c), (d)

<sup>327</sup> Ibid (b) (ii)

<sup>328</sup> Ibid art 7

<sup>329</sup> Ibid art 8 para 1

<sup>330</sup> ibid Annex

<sup>331</sup> Ibid

equivalent to "*high energy*" or "*source of energy*", meaning that they are not allowed to be used, regardless of how common terms like "*energy drink*" or "*energy bar*" are in commercial communications. When it comes to comparative nutrition claims, they can only be made when foods of the same category and of equal quantities are being compared, and the difference in nutrition value or nutrient content must be stated clearly.<sup>332</sup> The comparison must also be made against products that, because of their composition, cannot have a nutrition claim.<sup>333</sup>

Regarding health claims, the regulation establishes an authorization procedure, according to which the European Commission can approve or reject the addition of a health claim, complying with the general and specific requirements, to a positive list. Only health claims on the list are permitted to be used.<sup>334</sup> Whenever a health claim is communicated to consumers, a statement emphasizing the importance of a balanced diet, the quantity of the food necessary to achieve the health benefit, and a statement warning against adverse effects from over-consumption when there are such risks, need to be provided on the food label, or, in its absence, in the advertising.<sup>335</sup> General references to the health benefits of foods are allowed if accompanied by an approved health claim.<sup>336</sup> This is, for example, the case of the word "healthy", which can only be used on foods that have an authorized health claim. Claims that human health could be negatively impacted if consumers do not ingest a food or quantifying weight loss or a rate that can be achieved are explicitly prohibited.<sup>337</sup> The same applies to opinions or endorsements from medical, nutrition or other professionals that act outside of the scope of a formal national association, following national health policy.<sup>338</sup>

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<sup>332</sup> Ibid art 9

<sup>333</sup> Ibid

<sup>334</sup> Ibid art 10 para 1

<sup>335</sup> Ibid para 2

<sup>336</sup> Ibid para 3

<sup>337</sup> Ibid. art 12 (a) (b)

<sup>338</sup> Ibid (c), art 11

The NHCR divides health claims in two categories and establishes specific requirements. The first category includes “*reduction of disease risk claims and claims referring to children’s development and health*” and the second one all other health claims that do not fall under the first category.<sup>339</sup> Claims in the first category can be made if they have been included in the list of authorized health claims.<sup>340</sup> When referring to a disease risk reduction claim, an additional statement must be provided with the label or commercial message indicating that the disease mentioned in the claim has several risk factors, and acting on one might not necessarily be effective in actually reducing the risk.<sup>341</sup> Other claims that fall in the second category must again be on the authorized list, and can refer to the function of a nutrient or substance in the body or to psychological/ mental effects, to weight-control, including the reduction of the sense of hunger and increase of satiety, etc.<sup>342</sup> Importantly, the wording of health claims is specific to the application and final authorization.<sup>343</sup> In practice, this means that authorized health claim phrasings are prescribed and cannot be modified at will for use in commercial communications.

The regulation establishes a public database called ‘the Register’.<sup>344</sup> The full content of the register includes the approved nutrition claims and the conditions for their use, or any restrictions imposed, the list of approved health claims and the conditions for their use, and lastly the rejected health claims and the reasons behind the negative decision. This way, operators can access and be informed over the permissibility of nutrition and health claims. As an example, the health claim “*Consumption of beta-glucans from oats or barley as part of a meal contributes to the reduction of the blood glucose rise after that meal*” is approved and can be used only for “*food which contains at least 4 g of beta-glucans from oats or barley for each 30 g of available carbohydrates in a quantified portion as part of the meal*”, and a mandatory statement needs to be

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<sup>339</sup> Ibid art 13, 14

<sup>340</sup> Ibid art 14 para 1

<sup>341</sup> Ibid para 2

<sup>342</sup> Ibid art 13 para 1 (a)-(c)

<sup>343</sup> Ibid art 15 para 3 (f)

<sup>344</sup> Ibid art 20 paras 1, 3

provided that “*the beneficial effect is obtained by consuming the beta-glucans from oats or barley as part of the meal.*”.<sup>345</sup> An example of a rejected claim is that ascorbic acid is “*soothing for the mouth and throat*”, and it was rejected as unsubstantiated by the scientific data provided by the applicant.<sup>346</sup>

### **Application to Influencer commercial practices**

As part of the voluntary food information, nutrition and health claims, aside from their specific standards and requirements, fall under the general obligations of FIC. When examining the aspect of responsibility, as defined in the two regulations, FIC clearly assigns it to the FBO. The NHCR does not explicitly single out the responsible actor for the claims, but rather focuses on the claims and commercial communications themselves. Though the importance of good cooperation between FBOs and influencers advertising food products for ensuring that commercial messages remain compliant is clear, with FBOs being the main responsible party for food information, the NHCR can have specific application to broader influencer commercial practices. As an example, influencers whose personal brand and social media content is based on their professional identity as an individual doctor, dietitian etc. are explicitly prohibited to make health claims.

Food influencers are called to ensure that any nutrition or health claims used in their advertising activities comply with the requirements set in the NHCR. One important point of the regulation is the prohibition of general claims in the absence of an authorized claim; influencers cannot claim a food is “healthy”, when a food does not bear an authorized health claim. General statements about nutrition and health in advertising are thus specifically regulated, to ensure that consumers are protected from misleading claims. Another example is the use of

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<sup>345</sup> European Commission, 'EU Register of Health Claims: POL-HC-6331' (European Commission, 2024) <https://ec.europa.eu/food/food-feed-portal/screen/health-claims/eu-register/details/POL-HC-6331> accessed 24 November 2024.

<sup>346</sup> European Commission, 'EU Register of Health Claims: POL-HC-6648' (European Commission, 2024) <https://ec.europa.eu/food/food-feed-portal/screen/health-claims/eu-register/details/POL-HC-6648> accessed 24 November 2024.

terms attributing “high energy” to foods, underlining further that any such commercial communications must be formulated consciously, purposefully and require a well-informed background. Though this might be easier for short ads or written claims (e.g. TV ads, short posts), longer content such as podcasts or vlogs, where influencers speak often unscripted about a topic could prove more challenging.

## Chapter 4. National laws of some Member States

### 4.1. France

France has been the first EU Member State to introduce a specific general legal framework for the regulation of influencers nationally, with the Influencers Act coming into effect June 2023.<sup>347</sup> The Act establishes certain general requirements around influencer activities, as well as the prohibition of some practices and provides important clarifications relating to the legal scope and responsibilities across different actors when engaging in commercial influence activity. It sets clear legal definitions, starting from the term “*commercial influence activity*” as:

*“Individuals or legal entities who, for a fee, use their reputation among their audience to communicate to the public, electronically, content aimed at promoting, directly or indirectly, goods, services or any cause, are carrying out the activity of commercial influence by electronic means.”*<sup>348</sup>

Based on this definition, an ‘influencer’ is the natural or legal person conducting compensated commercial influence activities, while an ‘influencer agent’ is the entity that represents influencers with the aim to bring forth opportunities for paid promotions of goods or services.<sup>349</sup> All actors, including influencers, influencer agents and advertisers and their agents, are legally required to form written contracts that include the clear identification of the parties and the rights, obligations and tasks to be performed, as well as the compensation received for the services to be provided.<sup>350</sup> Such contracts are explicitly put under French Consumer Law when the activity is directed towards consumers of the territory.<sup>351</sup> Actors in such contracts are jointly and severally

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<sup>347</sup> Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux [2023] JORF n°0133, texte n° 1 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185> accessed 1 December 2024.

<sup>348</sup> Ibid art 1

<sup>349</sup> Ibid art 7 para I

<sup>350</sup> Ibid art 8 para I

<sup>351</sup> Ibid

liable for any damages to third parties, be it consumers or other entities, when exercising commercial influence.<sup>352</sup> Notably, influencers whose compensation, whether monetary or otherwise, is below a certain threshold are exempt from the obligation to form contracts, however the specific amount is to be defined through a decree.<sup>353</sup>

Influencers based outside of the EU or European Economic Area ('EEA'), but whose commercial practices target the French audience, are required to have a designated legal representative in the EU and are bound by the same obligations set in the Act.<sup>354</sup> Legal representatives are accountable to ensure compliance of the formed contracts, as well as cooperate with authorities when the need arises.<sup>355</sup> Additionally, in order to ensure that non-EU/ non-EEA influencers are able to meet compensation obligations when burdened with liability charges, they are required to contract civil liability insurances with EU-based insurance companies.<sup>356</sup> This obligation applies even if the commercial content reaches French consumers incidentally.<sup>357</sup>

The prohibitions elaborated by the Act include promotions of plastic surgery and cosmetic procedures, alternative or holistic medicine techniques presenting as equivalent to conventional medicine, tobacco and other nicotine products, non-domestic animals, financial products involving digital assets such as cryptocurrency and, lastly, sports betting and other forms of gambling unless the media provides access control for adults only.<sup>358</sup> Breaching of these prohibitions can result to a fine of up to 300.000 Euros and 2 years of imprisonment.<sup>359</sup>

Influencer commercial content must always be disclosed as such, in a explicit, clear and easily identifiable manner, with the indications "advertising"

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<sup>352</sup> Ibid para III

<sup>353</sup> Ibid para II

<sup>354</sup> Ibid art 9 para I

<sup>355</sup> Ibid

<sup>356</sup> Ibid para II

<sup>357</sup> Ibid

<sup>358</sup> Ibid. art 4

<sup>359</sup> Ibid

or “commercial collaboration”, whether in writing or in another format appropriate for type of media used.<sup>360</sup> Omission of the disclosure is considered a misleading practice according to Consumer Law, and the penalties are the same as in the prohibited practices above.<sup>361</sup> Additional specific disclosure requirements apply for edited/ altered photographs or videos and artificial-intelligence-generated content, which must be accompanied by the phrases “*retouched image*” or “*virtual image*”.

The Act provides for an important legal clarification on the responsibility of influencers when engaging in drop-shipping practices. When an influencer’s commercial activity only covers the marketing of a product, with no participation in the processing of orders and final shipping to the final consumer and which is instead carried out by a separate entity acting as the supplier, the influencer is responsible for maintaining accurate information on the identity of the supplier, In addition, he/she is responsible for ensuring product availability and compliance with applicable laws, specifically provisions against counterfeit products.<sup>362</sup>

Influencer content relating to food is also explicitly mentioned in the Act. Specifically, some EU and national laws are listed as directly applicable to commercial communications by influencers, namely the NHCR, the French Public Health Code, the Consumer Health Code, etc.<sup>363</sup> One example of the parallel application of other national laws concerns the advertising of drinks with added sugar, which is subject to additional specific requirements.<sup>364</sup> Food advertising could also fall under the prohibitions of the Act, specifically under the point of presenting alternative treatment such as a specific diet plan (e.g. veganism, raw food eating, etc.) as having special therapeutic properties. Health claims made

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<sup>360</sup> Ibid art 5 para I

<sup>361</sup> Ibid

<sup>362</sup> Ibid art 6

<sup>363</sup> Ibid art 3

<sup>364</sup> Code de la santé publique, art L2133-1 (France) [https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000041466290/2022-02-11](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041466290/2022-02-11), accessed 1 December 2024.

by influencers, lacking a legal or scientific base, are specifically targeted for action by the local consumer protection authority.<sup>365</sup>

Lastly, the French Influencers Act initially aimed to set certain requirements for social media and intermediary platforms, amending existing other laws where applicable. Online platforms would be required to cooperate with national authorities, specifically in providing necessary information in relation to the rights and responsibilities set in the Act, in assisting with the training of influencers as to their responsibilities in order to prevent violations of law and lastly to create an environment where breaches of law can be reported by the platform users.<sup>366</sup> These clauses were however repealed due to conflicts with EU law, specifically the DSA.<sup>367</sup>

The Act has been a subject of controversy, both for influencer stakeholders due to the perceived strictness of the sanctions for infringement, as well as from the EU due to concerns that it was not harmonized with the single market rules.<sup>368</sup> As a response to the concerns from the industry, the consumer protection authority developed a non-legally binding guidance document<sup>369</sup>, aimed to train influencers and raise awareness about their responsibilities stemming from the application of the Act. The French legislator, in turn, in response to the European Commission's concerns, proceeded to reform the Act in order to better align it with EU law, through an ordinance issued in November

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<sup>365</sup> European Consumer Centre France, 'Influencers: Obligations and Responsibilities in Europe' (ECC France, 8 May 2024) <https://www.europe-consommateurs.eu/en/shopping-internet/influencers.html>, accessed 1 December 2024.

<sup>366</sup> Ibid (n.347) art 15 para I.

<sup>367</sup> LOI n° 2024-364 du 22 avril 2024 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière d'économie, de finances, de transition écologique, de droit pénal, de droit social et en matière agricole [2024] JORF n°0095, texte n° 1, art 3 <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000049454332/2024-04-24> accessed 1 December 2024.

<sup>368</sup> Dreyfus, 'Review of the Effectiveness of the French Law n° 2023-451 of 9 June 2023 Regulating Influencers After Its First Year of Implementation' (Dreyfus, 1 October 2024) <https://www.dreyfus.fr/en/2024/10/01/review-of-the-effectiveness-of-the-french-law-n-2023-451-of-9-june-2023-regulating-influencers-after-its-first-year-of-implementation/>, accessed 1 December 2024.

<sup>369</sup> Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique, Guide de bonne conduite : Influenceurs et créateurs de contenus (December 2023) [https://www.economie.gouv.fr/files/files/2023/Guide\\_bonne\\_conduite\\_influenceurs\\_cr\\_eateurs\\_contenus.pdf](https://www.economie.gouv.fr/files/files/2023/Guide_bonne_conduite_influenceurs_cr_eateurs_contenus.pdf), accessed 1 December 2024.

2024, pending ratification within 3 months.<sup>370</sup> The main novelties brought in include:

- A higher flexibility for the until then “closed” list of disclosure terms such as ‘advertisement’ or ‘retouched image’, so that they can be replaced by other equivalent terms, which better adjust to the nature of the content and media used by the influencers as long as they are clear;<sup>371</sup> and
- The clarification of how the rules for legal representation for foreign influencers that target French consumers will apply, with the implementation of a future decree.<sup>372</sup>

The changes aim to ensure better alignment of the Act with EU laws.

Despite these reactions, in a study carried out by Statista in December 2023, some months after the implementation of the Act in June 2023, almost half the consumers completely agreed that the Act had a positive impact, while only 9% of the creators and advertisers respectively completely disagreed that the Act had a positive impact (negative or no impact).<sup>373</sup>

## 4.2. Spain

In Spain, until recently influencers were regulated through general national advertising laws, and via some specific updates introduced in 2022 to

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<sup>370</sup> Ordonnance n° 2024-978 du 6 novembre 2024 modifiant la loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux [2024] JORF n°0254, texte n° 1 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000050456412>, accessed 1 December 2024.

<sup>371</sup> Ibid art 4

<sup>372</sup> Ibid art 9

<sup>373</sup> Statista, 'Perceived Positive Impact of the Influencer Law in France as of December 2023' (Statista, 2023) <https://www.statista.com/statistics/1456362/influencer-law-positive-impact-perception-france/>, accessed 1 December 2024.

the existing Unfair Competition Law<sup>374</sup>, by means of a royal decree<sup>375</sup>. The changes sought to better align the Law with the UCPD, introducing into national law the general requirement for transparency and disclosure of the commercial nature of information through social networks when they promote goods and services.<sup>376</sup>

In 2024, however, a more direct approach to influencer regulation was implemented, with Royal Decree 444/2024, amending the General Law on Audiovisual Communication.<sup>377</sup> The latter had introduced certain obligations for 'users of special relevance' using "video sharing services provided by online platforms".<sup>378</sup> The term video sharing services was thought to include social media platforms, as it includes all user-generated photographic or video content for which the platform has no editorial participation and can be used for commercial purposes to target consumers.<sup>379</sup> The term 'users of special relevance' ('USR'), includes those that simultaneously meet the following conditions<sup>380</sup>:

- The user generates significant income from the service.

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<sup>374</sup> Ley Orgánica 3/1991, de 10 de enero, de Competencia Desleal (Spain) [1991] BOE-A-1991-628 <https://www.boe.es/buscar/act.php?id=BOE-A-1991-628>, accessed 2 December 2024.

<sup>375</sup> Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes (Spain) [2021] BOE-A-2021-17910 [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2021-17910](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-17910), accessed 2 December 2024.

<sup>376</sup> Ibid, Article 84. Amendment to Law 3/1991, of January 10, on Unfair Competition.

<sup>377</sup> Real Decreto 444/2024, de 30 de abril, por el que se regulan los requisitos a efectos de ser considerado usuario de especial relevancia de los servicios de intercambio de vídeos a través de plataforma, en desarrollo del artículo 94 de la Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual (Spain) [2024] BOE-A-2024-8716 <https://www.boe.es/buscar/act.php?id=BOE-A-2024-8716> accessed 2 December 2024.

<sup>378</sup> Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual (Spain) [2022] BOE-A-2022-11311 art 94 <https://www.boe.es/buscar/act.php?id=BOE-A-2022-11311>, accessed 2 December 2024.

<sup>379</sup> Ibid art 2 para 13

<sup>380</sup> Ibid art 94 para 2

- The user owns editorial management of the content.
- The service reaches a significant portion of the public.
- The service aims to inform, entertain and educate through the sharing of audiovisual content.
- The service is offered through platforms established in Spain.

The main obligations provided for such users, which are characterized as audiovisual communication service providers, include their self-registry to a national register<sup>381</sup>, with clear responsibility for ensuring their content complies with the law<sup>382</sup>. Explicit mention is made to the use of in-platform tools for disclosure of the commercial nature of published content.<sup>383</sup> Additionally, the adoption and implementation of codes of conduct for the self-regulation and co-regulation of the sector are to be encouraged.<sup>384</sup>

The Royal Decree 444/2024 aimed to provide clear requirements for the identification of users of special relevance. Though the stated intent of the term 'user of special relevance' is to include actors such as 'vloggers', 'influencers' and 'content creators' meeting the qualification requirements<sup>385</sup>, no specific legal definitions are provided for such actors. Firstly, as a significant income a threshold of 300,000 Euros is set, provided that it comes exclusively from the provision of video sharing services through one or several platforms.<sup>386</sup> The income can include both monetary payments, as well as the provision of products, services or other benefits.<sup>387</sup> Then, concerning the outreach of the content and its potential for impact to the public, the thresholds of 1 million followers for a single post or 2 million followers overall, from several posts or through several platforms, are set.<sup>388</sup> The number of followers is to be accounted per calendar year.<sup>389</sup> An additional condition for users to qualify as a user of

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<sup>381</sup> Ibid para 4

<sup>382</sup> Ibid art 1

<sup>383</sup> Ibid

<sup>384</sup> Ibid art 5

<sup>385</sup> Ibid (n. 377) II

<sup>386</sup> Ibid art 3 para 1

<sup>387</sup> Ibid para 2

<sup>388</sup> Ibid art 4

<sup>389</sup> Ibid

special relevance is set, requiring the publication or sharing of at least 24 posts per year.<sup>390</sup>

Influencers qualifying as USRs, are responsible to ensure that their content abides by the general principles governing audiovisual content, including the prohibition of promoting violence, crimes, discrimination, and the protection of minors according to the requirements set by the law.<sup>391</sup> Additionally, they are subject to additional obligations stemming from other subject-matter-specific laws, mainly advertising laws, like for example the prohibition for the advertising of tobacco and gambling.<sup>392</sup> Violation of these principles or of the obligation for disclosure can result in fines from 10,000 Euros and up to 1,5 million Euros, depending on the severity of the infringement and the financial size of the influencer's activities.<sup>393</sup>

The Spanish "Influencer Law" has been criticized because, by definition, it targets only influencers with a very big follower base, the mega-influencers.<sup>394</sup> According to Kolsquare, the law would affect roughly only 74 mega-influencers who have more than 2 million followers on *Instagram*<sup>395</sup>, when according to data from 2022, there were approximately 900 mega-influencers and 9,100 influencers with more than 100,000 followers.<sup>396</sup>

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<sup>390</sup> Ibid

<sup>391</sup> Ibid (n. 378) art 4, 89

<sup>392</sup> La Moncloa, 'Influencers: el Gobierno regula los contenidos y la publicidad' (10 May 2024) <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/transformacion-digital-y-funcion-publica/paginas/2024/070524-influencers-regulacion-contenidos-publicidad.aspx>, accessed 2 December 2024.

<sup>393</sup> Conesa Legal, 'Nueva Ley para Influencers en España: Un Análisis Completo' (2024) <https://www.conesalegal.com/info/nueva-ley-para-influencers-en-espa%C3%B1a-un-an%C3%A1lisis-completo>, accessed 2 December 2024.

<sup>394</sup> Kolsquare, 'Influencer Marketing in Spain 2024: Low Prices and New Regulations to Define the Market' (15 March 2024) <https://www.kolsquare.com/en/blog/influencer-marketing-in-spain-2024-low-prices-and-new-regulations-to-define-the-market>, accessed 2 December 2024.

<sup>395</sup> Ibid

<sup>396</sup> Kolsquare, 'Influencer Marketing in Spain, 2022' (1 June 2022) <https://www.kolsquare.com/en/blog/influencer-marketing-in-spain-2022>, accessed 2 December 2024.

### 4.3. Italy

As summarized by E. Varese (2023), in Italy, the general legal framework for marketing activities and advertising consists of Legislative Decrees No. 206/2005, No. 145/2007 and the Code of Self-Discipline, which establish the general requirements of transparency, truthfulness and accuracy, including the disclosure of the nature of commercial communications, as well as the prohibition of misleading messages or the omission of important information.<sup>397</sup> Another important law that is particularly relevant to influencer marketing is the Code of Audiovisual Media Services<sup>398</sup> ('TUSMA'), which sets general requirements for audiovisual services, including video sharing services.<sup>399</sup> This is a similar approach to the Spanish example.

The main general principles for communications of commercial nature established by TUSMA are the need for transparency so that consumers can easily and readily identify commercial messages, and the prohibition of messages that undermine human dignity or that involve discrimination, practices dangerous to health or the environment, and crimes.<sup>400</sup> Additionally, it imposes the prohibition for the advertising of tobacco, the immoderate consumption alcohol, gambling and prescribed medicines.<sup>401</sup> Also, specific requirements are set for online shopping, sponsorships and product placement.<sup>402</sup>

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<sup>397</sup> Elena Varese, 'Changes to Italy Advertising Law: New Rules Regarding Influencers and Charitable Contributions' (DLA Piper, 30 May 2024) <https://mse.dlapiper.com/post/102j8t3/changes-to-italy-advertising-law-new-rules-regarding-influencers-and-charitable>, accessed 3 December 2024.

<sup>398</sup> Decreto legislativo 8 novembre 2021, n. 208, Attuazione della direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri, concernente il testo unico per la fornitura di servizi di media audiovisivi in considerazione dell'evoluzione delle realtà del mercato, (Italy) [2024] <https://www.normattiva.it/esporta/attoCompleto?atto.dataPubblicazioneGazzetta=2021-12-10&atto.codiceRedazionale=21G00231>, accessed 3 December 2024

<sup>399</sup> Ibid art 3 para 1 (h)

<sup>400</sup> Ibid art 43 para 1

<sup>401</sup> Ibid

<sup>402</sup> Ibid art 46, 47, 48

Following a big local scandal where the influencer Chiara Ferragni falsely claimed that part of the sales of a product she had advertised and co-branded would be donated to charity, the Italian Communications Authority ('AGCOM') deemed appropriate to elaborate specific rules for influencers.<sup>403</sup> This was done through the publication of Guidelines<sup>404</sup> on the application of TUSMA to influencer commercial practices, including definitions and clarifications of the responsibilities deriving from the existing law.<sup>405</sup>

Annex A to the Guidelines<sup>406</sup> provides the definition and application requirements for influencers. The term 'influencer' encompasses other terms such as "vlogger" or "content creator" of individuals with editorial ownership who create and publish content in social media platforms.<sup>407</sup> Another aspect of the definition is exercising an activity similar to that of conventional audiovisual media providers such as television (e.g. advertising), for the generation of income, and with the purpose for the content to reach Italian consumers, often in the Italian language, which has the potential to have a significant impact on consumer choices.<sup>408</sup> Moreover, influencers are subject to the Guidelines and, therefore, to the requirements of TUSMA if they have

- 1 million or more followers in one or several social media where they exercise their activity;

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<sup>403</sup> BBC News, 'Italian influencers to be bound by tighter rules' (BBC News, 2 December 2024) <https://www.bbc.com/news/world-europe-68004438>, accessed 3 December 2024.

<sup>404</sup> Autorità per le Garanzie nelle Comunicazioni, 'Delibera n. 7/24/CONS: Linee-guida volte a garantire il rispetto delle disposizioni del Testo Unico da parte degli influencer e istituzione di un apposito Tavolo tecnico' (10 January 2024) <https://www.agcom.it/sites/default/files/migration/delibera/Delibera%207-24-CONS.pdf>, accessed 3 December 2024.

<sup>405</sup> Fabiana Bisceglia and Donata Cordone, 'Italian Communications Authority guidelines for influencers' (Portolano Cavallo, 30 January 2024) <https://portolano.it/en/newsletter/portolano-cavallo-inform-digital-ip/italian-communications-authority-guidelines-influencers->, accessed 3 December 2024.

<sup>406</sup> Autorità per le Garanzie nelle Comunicazioni, 'Linee-guida volte a garantire il rispetto delle disposizioni del Testo Unico da parte degli influencer e istituzione di un apposito tavolo tecnico' (Allegato A delibera n. 7/24/CONS, 16 January 2024) <https://www.agcom.it/sites/default/files/migration/attachment/Allegato%2016-1-2024.pdf>, accessed 2 December 2024.

<sup>407</sup> Ibid para 1

<sup>408</sup> Ibid para 2

- at least 24 publications of commercial nature; and, lastly,
- an engagement rate (metric for users' interaction with the content such as likes, comments, views, re-posts, etc.) of 2% or more in one of the social media platforms and within a period of 6 months.<sup>409</sup>

These thresholds can be subject to modification in the future by AGCOM.<sup>410</sup>

The Guidelines explicitly provide which articles of TUSMA apply to influencers<sup>411</sup>, with their violation potentially resulting in fines ranging from 10,000 Euros up to 250,000 Euros for issues with advertising, or of higher amounts whenever the protection of minors is at stake.<sup>412</sup> Regarding disclosure, the Guidelines indicate that influencers should use the in-platform tools.<sup>413</sup> Influencers not meeting the criteria to qualify as an audiovisual service provider, are not completely exempt from the requirements of the law, but are subject to less stringent obligations, namely with regard to the requirements of commercial communications and targeting minors.<sup>414</sup> Lastly, influencer agents do not fall under the scope of the Guidelines, though the Authority reserves itself the right to make changes to that.<sup>415</sup>

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<sup>409</sup> Ibid para 5

<sup>410</sup> Ibid para 22

<sup>411</sup> Ibid para 8

<sup>412</sup> Ibid (n. 398) art 67

<sup>413</sup> Ibid (n. 406) para 9

<sup>414</sup> Ibid para 5 (ii)

<sup>415</sup> Ibid para 21

## Discussion

*"How do food influencers use social media for marketing purposes, and what factors contribute to the success of food influencer marketing?"*

Food influencers have a prominent place in the world of social media. The visual and interactive nature of platforms like Instagram and Tik Tok, as well as the fact that content there is generally short and easy to consume by the audiences are all factors contributing to the platforms' suitability for food advertising. In these platforms, influencers can deliver commercial messages through combining storytelling with visual appeal. Food influencers often specialize on specific subject matters, in an effort to build their own signature brand and online persona identity. Such specializations can range from restaurant reviews to original recipes or the promotion of lifestyle choices like veganism and keto diets. The influence they can have on consumer choices has been demonstrated in various studies.

The success of influencer marketing can be better understood in the context of the virtual relationship they have with their followers, with several social and psychological mechanisms at play, as described earlier in the thesis, such as trust transfer, parasocial relationships, and last but not least, the authority bias. Food influencers often position themselves as experts in their subject matter whether it is nutrition or lifestyle, creating a sense of credibility to their followers. The specialization over a certain topic can further magnify how authentic followers perceived the influencers online persona, which can contribute to feelings of identification or similarity in beliefs or interests. The role of parasocial relationships is particularly important in food influencer marketing. Through these one-sided emotional connections, consumers in the influencers' audiences are more likely to perceive recommendations or advice provided by the influencer as genuine, rather than commercial.

The commercial messages in influencer content is based on several - at times creative - strategies, ranging from product reviews and storytelling to interactive content like quizzes, questionnaires, giveaways or the use of

exclusive promotional codes. Interactive methods lead to greater engagement, and help to strengthen the trust transfer and parasocial relationship effects, mixing personal messages to commercial ones and entertainment or educational information with commercial messages and advertising. The use of visual media, especially when presenting food products as healthy, plays an important role in creating appeal and influencing consumer choices.

Interestingly, the effectiveness of food influencer marketing is not always directly related to the size of the influencer's audience. As confirmed by studies, micro-influencers, despite having smaller follower bases, can often achieve comparable or greater impact than macro-influencers in affecting consumer choices. This can be explained by their usually higher engagement and stronger parasocial relationships favored by the feelings of similarity followers can have, which is less likely for big influencers that are more comparable to traditional celebrities. The engagement metric therefore is a more accurate predictor of the level of influence social media marketing can have. This is an indicator that companies leveraging higher engagement influencers rather than the ones with a wider reach would have better success in the influencing of consumer choices. This is additionally supported by how social media algorithms work, prioritizing content that the user is already interested in. Content from influencers aligned with the interests of the follower is likely to be more successful.

This raises one additional point and that is the level of alignment between the influencer and the brands they collaborate with. Working with companies that are not coherent with the online identity of the influencer can affect how authentic and credible they are perceived by their followers. This would be the same for brands, as choosing to work with influencers that do not resonate with the key messages is likely to result in lower success rates for marketing campaigns.

*“What risks do consumers face with food influencer marketing?”*

Food influencer marketing is widespread on social media, and data shows that it will keep growing in the years to come. The main risks it poses for consumers mostly stem from the social and psychological mechanisms in play, like the trust transfer and authority bias, as it places them in a vulnerable position compared to the influencer. Additional factors increasing the risks are the way algorithms function, as well the overall access to information. Influencers usually have access to information that consumers do not, like, for example, in pricing or product characteristics. The same applies to consumers having access to critical contextual information about the nature of social media posts and the influencers’ motives. This makes consumers heavily rely on the influencers’ honesty, though they might not always act in a transparent manner.

Studies, such as the European Commission’s 2023 research sweep, have confirmed that influencers frequently -whether knowingly or not- fail to clearly disclose the commercial nature of their content. Practices like using ambiguous terms (e.g. “collaboration”) or attempting to hide disclosure statement in less visible places can prevent consumers from fully understanding the nature of the content they are engaging with. In turn, this increases the risk of consumers being misled into making purchase decisions based on what they perceive to be genuine recommendations rather than advertising and paid promotions.

Though there is literature supporting the positive potential for food influencers to impact public behavior, especially when thinking about promoting healthy eating habits or sustainable food choices, there are certain innate risks. Food influencers often make unsubstantiated claims about the benefits or properties of products they advertise in an effort to increase the products’ appeal. Some well-known cases, such as the “Liver King” or the Australian influencer who falsely attributed her cancer recovery to her adopting a plant-based diet, show how such practices can be harmful to consumers and public health. Claims or advice from food influencers that are often self-positioned as nutrition or lifestyle experts, despite lacking formal qualifications, can result in dangerous misinformation.

Research, such as Groenen's 2024 study on food supplements showed that, while consumers perceive the formal legally authorized claims as more credible, the free-style claims made by influencers in their content can be more impactful, leading to higher purchase intention. This can drive influencers to rely on such practices. The misalignment between the claims' credibility and the behavior of consumers further demonstrates that influencer marketing can be effective despite the lack of scientific or legal foundation. Such practices of misinformation can result in consumers adopting unhealthy habits, like the overconsumption of certain foods or supplements. Lastly, as discussed earlier, though influencers with large follower bases have by definition a wider outreach, smaller scale influencers can have greater engagement rates. This underlines the need for risk mitigating approaches that address food influencer marketing practices independently of the audience size.

The negative impact of misinformation can be magnified by the phenomenon known as "echo chamber", created by social media algorithms. This phenomenon causes the isolation of social media users through their exclusion from content that is not relevant to their already confirmed interests and the prioritization and pushing of content that is similar with the users' interests, in order to increase engagement. This can result in users not being presented with diverse content that includes opposing views, reducing their ability for critical thinking. For example, a consumer interested in weight-loss or vegan-themed content, might be continuously fed with similar posts, reinforcing biases and reducing exposure to other dietary perspectives.

The risks mentioned above underline the need for the regulation of the influencer marketing sector, including both general legislation as well as sector-specific laws in areas like food, cosmetic products etc. A robust legal framework should aim to protect consumers, especially vulnerable groups, from misinformation, and to ensure transparency in influencer marketing regardless of their audience size. Additional areas should be the mitigation of the effects of the echo chambers, and the increase of the accountability social media platforms have. One suggestion would be the implementation of in-platform disclaimers

and warning statements when topics like nutrition and health are brought up, similarly to how they were implemented to tackle COVID-19 misinformation.

*"In the absence of a legal definition for the terms 'influencer' and 'food influencer' at an EU level, how can these terms be legally defined?"*

At an EU level, there is no legal definition provided for the terms 'influencer' and, consequently, 'food influencer'. Due to the complexity of the sector and how relatively recent it is, a clear definition would be key to the regulation of influencers. According to the current legal framework of EU Consumer Law, and as suggested in the European Commission's Influencer Legal Hub, influencer marketing can fall under the definition a 'trader' or a 'seller', with the first one being more suitable for general use in various advertising and marketing practices, while the second one refers only to the direct sale of products and services (formation of contracts). The term 'seller' is semantically included in the term 'trader', as it describes one of the many activities a trader could exercise.

The piece of legislation that is most relevant for the definition and regulation of influencers is the UCPD, which can be used to elaborate a definition which is apt for the regulation of influencers. In the UCPD, influencers can be characterized as 'traders' if they engage in commercial practices as part of their trade, business or profession. For influencer practices, this could include advertising, promoting and selling goods through online platforms. Additional clarity on the application of the term is provided by relevant case law (*Kamenova* case, as examined earlier in the thesis), in the form of additional criteria for determining whether an influencer is in fact a trader.

The case law criteria could be summarized as the acting in an organized manner to conduct profit-oriented activities that are frequent, and there is some form of imbalance of power resulting from the influencer having more information than the consumer. Even though the criteria do provide some clarity on the application of the UCPD's term, which is additionally elaborated in the

Influencer Legal Hub, the criteria remain somewhat subjective and up to interpretation. Elements such as the frequency, number of posts or a threshold for the generation of income are not specified. The criteria thus are not intended for professional influencers in order to assist them with self-identification, but rather for courts. Notably, in the case law where the criteria were provided, the citizen selling goods online did not qualify as a trader. The lack of clarity could potentially lead to difficulties in influencers meeting their legal obligations, but additionally contributes to the lack of harmonization among EU Member States.

For food influencers, specifically, there is the additional technical layer of the food sector that needs to be accounted for. These individuals through their use of food-related content, such as recipes, diet plans, and reviews as a medium to engage with audiences and promote products or services, need to comply with additional laws. As a clear term for 'food influencer' was not identified in literature during the research for this thesis, a definition is proposed with the purpose of assisting with the research conducted. It builds on the principles of the UCPD, taking into account the common practices that food influencers employ:

*A natural or legal person who leverages social media platforms to promote, advertise or sell own-branded or third-party branded food products, services relating to food, and/or digital content relating to food (e.g. diet plans or cooking lessons), or makes use of food information to grow an audience and monetize the platform, and who falls under the legal definition of 'trader', as laid down in the UCPD.*

*"What are the Consumer Protection Laws that apply to food influencers, and what are the main resulting general obligations?"*

Food influencer commercial activities in the EU are regulated by a complex regulatory framework, comprised of several Consumer Laws. These laws collectively establish general principles, rights and obligations in order to ensure fair practices, transparency, and to ultimately protect consumers' rights, as

summarized in Table 1. They address several aspects relevant to influencer activities, and at all three stages of commercial transactions, starting with pre-contractual information up to post-contractual guarantees.

One of the central requirements for influencers is the obligation to provide clear and transparent disclosure about the commercial nature of their activities, including sponsored and promotional content. The UCPD explicitly prohibits hidden marketing and sets the requirement for disclosures to be visible, clear, and understandable to the average consumer. Ambiguous practices such as unclear hashtags (e.g., “#partner”) or attempts to hide disclosures in lengthy captions would not satisfy these requirements. The obligation for disclosure also explicitly applies to messages presented as product reviews or personal opinions, where influencers are legally required to inform consumers if the content presented is part of an advertisement activity.

In addition to transparency, influencers acting as sellers are required to provide clear pre-contractual information for goods or services. This includes clear and accurate descriptions of the item on sale, pricing, delivery details, and consumer rights, such as withdrawal periods. The CRD emphasizes the need for accessible and complete information, in order to address the power imbalance between traders and consumers. For food influencers, this practically means providing accurate descriptions of products, whether it is a cooking lesson, a diet plan, or a physical good like a kitchen appliance or package of food.

The post-contractual obligations set mainly by the CSGD and DCD establish that goods and digital services must meet both subjective and objective criteria of quality. For example, a food influencer selling a blender must ensure it performs as advertised and meets industry standards. Similarly, digital content, such as the access to a personalized diet application, must deliver all the expected features like updates or additional materials. If a non-conformity is identified, consumers have the right to remedies, including the repair, replacement, or refund, with the costs burdening the influencer if at fault.

Social media platforms, in turn, as intermediary services in the context of DSA, play a complementary role in protecting consumers by providing the

necessary in-platform tools needed for disclosure tags by influencers or for reporting illegal content. Additionally, they need to verify the identities of traders exercising their activity through their platforms, contributing to the traceability in trade. Influencers are required to cooperate with these platforms, ensuring that their content complies with EU laws. This creates an additional layer of accountability, particularly in addressing issues like false health claims or non-compliant advertising practices.

By examining the laws of Chapter 2, certain weak points arise. Firstly, none of them are specific to influencer marketing practices, so their application depends firstly on the influencer being identified as a trader or a seller, which as discussed earlier can present challenges. Specifically, regarding the requirements set by the different laws, there is some level of overlapping, with some topics like transparency being mentioned in several of them. This could make hard for small-scale influencers, without legal resources, to navigate through this legislation. The Influencer Legal Hub was an important step towards clearer and user-friendly tools and sources of information, but it does not make up for the gaps the laws can have, like the subjectiveness of the definition criteria for 'traders'.

Self-regulatory organizations are important stakeholders in ensuring compliance in influencer practices through the creation of guidelines, standards and training tools that adjust to the needs of the industry. Their voluntary nature, however, limits their enforcement power, and final impact. Formal collaboration between SROs and regulatory bodies could strengthen their role in promoting compliance.

<b>Law</b>	<b>Main Obligations</b>	<b>Actor</b>	<b>Main stage of application</b>
<b>Unfair Commercial Practices Directive (UCPD)</b>	Prohibition of unfair commercial practices, misleading actions, omissions and aggressive practices. Mandates transparency in advertising, prohibits hidden marketing.	Trader	All stages: pre-contractual, contractual, post-contractual
<b>Consumer Rights Directive (CRD)</b>	Mandates clear pre-contractual information, including product characteristics, trader identity, pricing, and consumer rights. 14-day withdrawal period.	Trader	Pre-contractual, and post-contractual
<b>Unfair Contract Terms Directive (UCTD)</b>	Ensures contract terms are fair, transparent, and do not create imbalances at the detriment of the consumer.	Seller	Contractual
<b>Consumer Sales and Guarantees Directive (CSGD)</b>	Goods must conform to the contract, and need to provide remedies like repair, replacement, or refund for non-conforming goods.	Seller	Post-contractual
<b>Digital Content Directive (DCD)</b>	Digital content and services must conform to the contract, providing remedies for non-conformance.	Trader	Pre-contractual, and post-contractual
<b>Digital Services Act (DSA)</b>	Obligations on intermediary platforms to ensure user safety, including transparency in advertising and traceability of traders.	Intermediary Service	Non-contractual. Use of digital services

*Table 1 EU Consumer Laws for Influencers: Summary Table*

*"What are the key Food Laws that apply to food influencers, and what are the main resulting food-specific obligations?"*

Food influencers operating in the EU are subject to several sector-specific obligations from relevant food laws. These regulations aim to ensure the protection of public health and of consumers' interests, as well as the enforcement of fair information practices for food in the internal market, by harmonizing standards across Member States.

The fundamental obligations that apply result from the GFL, which establishes the main principles for food safety, transparency, and accountability. While influencers who only advertise food products are unlikely to be considered food business operators (FBOs) under the law, those directly selling food products would fall within this definition. FBOs are the responsible parties to ensure food safety, maintain traceability, and cooperate transparently with authorities in situations involving food safety risks, such as product recalls. While these obligations are manageable for traditional food businesses, influencers operating independently might struggle to implement robust safety and traceability mechanisms, particularly in cross-border sales or drop-shipping models.

Another key regulation is the FIC, which regulates the provision of both mandatory and voluntary food information to consumers. Food information can include the labeling, advertising, and any other forms of product representation, be it physical or digital. Influencers directly selling food products to consumers would qualify as FBOs and would be directly responsible to supply them with all mandatory information—such as ingredients, allergen declarations and nutrition information. Advertising communications, in turn, must comply with the prohibition for misleading practices and the requirements for the provision of voluntary information, such as claims. In the context of the FIC, the FBOs remain responsible for the food information in advertising. Practically, this means that for cases where an influencer advertises or promotes a product on behalf of an

FBO, the responsibility for adherence to the legal requirements would fall on the FBO. Influencers would still be expected to abide by the general principles of transparency and accuracy.

The NHCR clarifies the requirements for the use of nutrition and health claims as part of voluntary food information. This applies both to product labelling or online information, and advertising communications. The regulation establishes positive lists for both types of claims, and only authorized claims can be used, often under specific conditions. Requirements are additionally set for more generic messages that can be used in food advertising and marketing. A food cannot be described as "healthy", for example, unless the claim is accompanied by an authorized health claim. This requirement increases the responsibility influencers have in ensuring compliance, particularly when discussing food products in unscripted formats like podcasts or live videos. Additionally, the regulation prohibits the use of nutrition and health claims by professionals outside formal associations. This is particularly important for influencers who build their personal brand based on projected expertise such as that of a nutritionist or a doctor. This is an important safeguard against authority bias. Another important point appears when considering the general requirement of the UCPD for claims to be factually right and backed by appropriate evidence. When it comes to nutrition and health claims, substantiation would need to follow the same principles set out in the NHCR. In this sense, the NHCR applies more directly to commercial messages, despite the influencers not qualifying as an FBO.

One common theme in chapter 3 and the examining of the food laws has been the interplay of responsibility between the influencer acting as an advertiser and that of the FBO. While the latter remains the primary actor responsible for ensuring compliance with food safety and information laws, influencers have an active role in the representation of food products accurately and responsibly. Thus, close and honest collaboration between the food brands and the influencers is essential to ensure compliance. Food influencers, apart from the complex general requirements of Consumer Law, would need to ensure

they abide by the requirements of Food Law, which could be challenging for influencers. FBOs can provide that piece of expertise when collaborating with influencers. Notably, no specific guidelines, training material or similar documents providing insights for food influencer marketing compliance was identified in the literature research for this thesis, including in the Influencer Legal Hub. The creation of sector-specific requirements could be one solution towards strengthening compliance.

<b>Law</b>	<b>Key Obligations</b>	<b>Applicability to Influencers</b>	<b>Key Challenges</b>
<b>General Food Law (GFL)</b>	Food safety, traceability, transparency, and overall compliance	Applies to influencers selling food directly, as FBOs. Advertising influencers must avoid misleading practices but are not primarily responsible under GFL.	Ensuring traceability and food safety in non-traditional business models like drop-shipping.
<b>Food Information to Consumers (FIC)</b>	Provision of mandatory food information. Overall compliance, mandatory and voluntary info.	Influencers selling food are responsible for providing accurate food information. Advertising influencers must ensure compliance with fair information practices and voluntary info. requirements.	Balancing FBO and influencer responsibilities for advertising compliance. Addressing unscripted content.
<b>Nutrition and Health Claims Regulation (NHCR)</b>	Ensure compliance in the use of nutrition and health claims.	Influencers cannot make unauthorized claims (e.g., "healthy"). Claims must align with the NHCR and include mandatory supporting information when applicable.	Ensuring compliance in spontaneous or unscripted formats like podcasts and live videos.

*Table 2 Food Laws for Food influencers: Summary table*

*“How are EU Member States approaching the regulation of influencers and to what extent is their approach consistent?”*

The examination of the paradigms of France, Spain, and Italy revealed that Member States are following somewhat divergent approaches to the regulation of influencers. While all three countries have implemented laws on the subject, these regulations and guidelines remain quite new (years 2023-2024), and their effectiveness is yet to be fully assessed. For instance, France attempted to legally define the term ‘influencer’, but this effort encountered criticism from the European Commission, leading to a revision to limit its scope to activities exclusively carried out within French territory. In contrast, Spain has refrained from introducing a definition, using the term ‘user of special relevance’, whereas Italy has included one in a soft law document (i.e. Guidelines).

At the EU level, influencer activities are primarily addressed through various consumer protection laws, most notably the Unfair Commercial Practices Directive (UCPD), as highlighted in the European Commission’s Influencer Legal Hub. Interestingly, both Spain and Italy have chosen a different path, by relying on the national laws that transposed the Audiovisual Media Services Directive (AVMSD)<sup>416</sup>. Though it includes “video-sharing services”, the AVMSD, was mainly intended to provide harmonized requirements for the regulation of more traditional and large media services, such as television and radio, by setting provisions on topics such as licensing standards and prohibitions of a more social character, like the prohibition of discriminatory messages. By applying these requirements to mega-influencers, Spain and Italy effectively equate them with traditional media providers. This approach, however, only targets mega-influencers with over 1 million followers, and is based on specific financial criteria, leaving out smaller-scale influencers.

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<sup>416</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), consolidated version [2010] OJ L 95 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>, accessed 3 December 2024.

The use of the AVMSD as a regulatory framework has its limitations. Equalizing all influencers under the same obligations as large media providers would likely not be feasible due to their size being disproportionate. Also, as discussed earlier in the thesis, the follower count is not directly equivalent to an influencer's impact on consumers. Research referenced in Chapter 1 of the thesis demonstrated that micro-influencers can often have greater impact on consumer choices, through closer parasocial relationships with their followers. Additionally, while the AVMSD promotes transparency, it does not establish clear legal requirements for practical implementation. This lack of clarity either forces Member States to create local guidelines or leaves gaps in enforcement. Self-regulatory organizations can attempt to bridge these gaps by aligning industry stakeholders, but their effectiveness would never be equivalent to that of formal legislation.

France's dedicated influencer law provides an alternative approach. By implementing closed terms for influencer disclosures, France has taken steps to create a more robust framework. However, after receiving EU criticism, France must expand its scope to include equivalent terms. The French law also explicitly addresses sector-specific issues, such as referencing the Nutrition and Health Claims Regulation (NHCR) for food-related content, whereas Spanish and Italian laws do not directly address such topics. While Spanish and Italian regulations include general principles, such as restrictions on advertising to children or prohibitions against advertising tobacco and gambling, their laws lack the explicit sectoral focus seen in France.

Across all three Member States, the definitions of influencers mostly align with the UCPD's criteria for defining a 'trader'. These include factors such as the monetization of content, the frequency of publications, and the overall purpose of the activities. However, there is misalignment on their scope, which can create a complex regulatory environment, particularly given the cross-border nature of influencer content. For example, a French influencer's content could easily reach consumers in Belgium due to the shared language. This would require the influencer to be aware of and abide by Belgian law, even if they were unaware

of this reach. Social media algorithms can often amplify content beyond intended territories, further complicating compliance.

To address these complexities, certain solutions could be suggested. The EU could promote mutual recognition agreements, where an influencer's compliance with their home country's laws serves as a baseline standard across all Member States. Additionally, social media platforms could also play a role by creating and promoting geo-tagging features that notify influencers of relevant local regulations when their content crosses borders.

An additional layer of complexity arises from the broad technical requirements influencers must meet. For example, beyond the general rules of the UCPD, influencers are often required to adhere to specific regulations tied to their sector they specialize in, such as food. This demands a level of expertise that smaller-scale influencers might struggle to achieve. One suggestion to assist would be the creation of more user-friendly frameworks, such as that of the European Commission's Influencer Legal Hub, which could include sector-specific guidance and localized summaries for the different Member States, including language requirements. Standardized EU-wide disclosure templates would also help reduce confusion and ensure equal protection of EU consumers, especially for cases where social media content crosses borders.

The EU has an important role to play in the harmonization of these divergent approaches. Introducing a dedicated directive on influencer marketing would be key in ensuring a unified approach to the definitions, obligations and practical implementation of the requirements for influencers and influencer marketing, in order to reduce fragmentation. The application of tiered thresholds that make some form of distinguishment between micro- and mega-influencers, could help make obligations more proportionate and still address the concerns Member States have on the financial size of influencer activities. Also, giving incentives for training and certification programs could further support influencers in navigating the legal framework. Lastly, social media platforms could incorporate compliance checks into their interfaces for professionals,

guiding influencers into meeting their obligations when publishing commercial content.

While each Member State brings unique strengths to the table, a unified EU approach would be vital to help streamline the regulatory environment in the single market, reduce ambiguity, and empower influencers to operate responsibly across borders.

	<b>France</b>	<b>Spain</b>	<b>Italy</b>
<b>Legal definition of influencer</b>	Yes: Includes “individuals or entities” performing “commercial influence activities.”	No: Indirectly inferred under “users of special relevance” (USR).	Yes: Defined as individuals with editorial ownership performing commercial activities
<b>Thresholds for Inclusion</b>	Exemptions for compensation below a threshold (specific amount TBD by decree).	1M followers per post or 2M overall, €300K annual income, 24 posts/year.	1M+ followers, 24+ posts, 2%+ engagement in 6 months.
<b>Specific Obligations</b>	Written contracts, transparency, disclosure (“advertising” or equivalent).	Self-registry in national register, in-platform disclosure tools.	Transparency, use of in-platform disclosure tools, compliance with TUSMA.
<b>Penalties for Non-Compliance</b>	Up to €300K fine and 2 years imprisonment for major violations.	Fines from €10K to €1.5M depending on violation severity.	Fines from €10K to €250K; higher for violations involving minors.
<b>Foreign Influencers</b>	Must appoint an EU representative, maintain civil liability insurance.	No specific mention of foreign influencers.	Influencers targeting Italy must comply with TUSMA requirements.
<b>Disclosure Requirements</b>	Must be clear and identifiable (e.g., “advertising,” “retouched image”).	In-platform tools for disclosure; vague on specifics.	In-platform tools; narrower for those outside audiovisual service scope.
<b>Criticism</b>	Strict sanctions, potential misalignment with EU laws.	Targets only mega-influencers, excludes micro-influencers.	Focus on influencers with significant reach; influencer agents excluded from scope.

*Table 3 Influencer laws of some Member States: Summary Table*

## Conclusion & Final Recommendations

The research and analysis realized in the thesis shows that the current EU legal framework is characterized by a robust commitment to the protection of consumers' rights. However, while it is comprehensive and succeeds in approaching the topic of the regulation of food influencers from different angles and at different stages of commercial transactions by applying existing laws, it faces certain challenges in its ability to target and address the unique and complex field of influencer marketing in the food sector.

The consumer and food laws examined collectively establish and emphasize throughout different legal texts the importance of transparency, the prohibition of misleading practices, and the need to ensure the safety and integrity of foods. The application of these principles to the modern advertising medium that social media constitutes can have its limitations. One of the main weaknesses of the current framework is the lack of a harmonized, clear and practically applicable definition for the term 'influencer' or 'food influencer'. Even though the terms "trader" and "seller" can be applied to influencer practices, this requires a case-by-case interpretation, which is not constructive to the streamlining and enforcement of the laws. Additionally, the framework consists of many different laws that span across different disciplines such as consumer and food, which can make it difficult for influencers lacking legal specialization or support to be clear on their responsibilities. This is particularly important when thinking of the international reach social media platforms have. Without a clear, unified definition, the application of existing laws can become inconsistent and potentially ineffective.

The approaches that France, Spain, and Italy took can provide additional insights on the gaps and potential good practices, as well as what needs to be avoided. France has been the first country in the EU to adopt a law dedicated specifically to the regulation of influencers, creating one of the first legal definitions and establishing a clear practically applicable threshold for the characterization and self-identification of social media users as influencers bound by the obligations of the law. To date, the threshold has not been set, but it will

be based on income size. The requirement for written contracts additionally strengthens the traceability, clarity and accountability in the sector, providing a paper-trail that is aligned with the requirements set in EU Directives, like for example the need for intermediary platforms to maintain the information of traders. One of the drawbacks of the French law was its initial rigidity when it comes to disclosures, but it will be adapted to permit more flexibility. Additionally, the law received criticism as it was initially touching on points that overlapped with the DSA, and after criticism from the Commission some parts were repealed. Lastly, the French law had specific mentions of the application of food safety laws and of the NHCR. As such, it is beneficial both to the influencers having one source-of-truth as well as in the later enforcement of the law by the authorities and courts.

In turn, Spain has not attempted to legally define the term 'influencer' and follows a different approach, classifying mega-influencers as audiovisual service providers and subjecting them to similar obligations as traditional broadcast media. This approach, though appropriate for addressing large-scale influencers, fails in being applicable to smaller-scale influencers who are more in numbers and can have greater consumer engagement. France's efforts to clearly define influencers and enforce transparency requirements stand out as good practices that could be applied to the future creation of an EU-wide law. However, it remains to be seen how the laws will evolve- for example if France sets the threshold too high, small-scale influencers might be excluded from the scope.

Thinking about the food sector specifically, the general transparency requirements established by the UCPD and other laws can be difficult to enforce in the dynamic and informal context of social media, with added complexity when applying sector-specific laws. The complexity of definition and self-identification for the term 'influencer' gains additional challenges when considering the sector specific practices (e.g. diet plans, advertising, direct selling) and the introduction of the term FBO. Though a legal definition for 'food influencer' could prove helpful, the matter could be addressed similarly to the French approach,

providing a definition for 'influencer' and then, addressing sector-specific topics with mentions to the laws. Then, a dedicated guideline for food influencers would greatly assist, providing practical support mechanisms for influencers.

In comparing the risks identified in the thesis and the legal framework analyzed, the majority of them are addressed by the current framework. This includes the need for transparency and disclosure, the prohibition of misinformation, misleading practices or omissions, and aggressive practices, as well as the establishing of pre-contractual, contractual and post-contractual rights for consumers. One question however arises as to how effective the enforcement of these laws can be, when there are millions of users on social media that could act as influencers, creating an immense amount and size of content online, and also to what extent consumer protection authorities investigating infringements are aware of sector specific laws, like food, cosmetics.

Possible solutions could be the education of both influencers and the public. Also, the importance of the role the social media platforms play is underlined, as they need to keep providing effective tools for disclosure, reporting and removal of illegal content, as well as to control dangerous practices like misleading and harmful for the public health claims. A possible future implementation of artificial intelligence (AI) tools could potentially be of great help in the review, identification and removal of illegal content, being able to go through a volume of content that the current resources of EU Member States, enforcing the laws, do not permit.

## Limitations

The list of laws analyzed in the thesis is not exhaustive. Specific subject-matter laws such as Advertising laws were not examined, as the focus was on determining the main laws and ensuing responsibilities from Consumer and Food law areas. The conclusions are limited to the scope of the laws examined.

Additionally, the examples of the approaches of the three Member States were focused on laws and guidelines specific to the topic of influencers. Other laws transposed by the main EU Directives were not examined. Also, the sample size of three countries is not representative of the state in the EU as a whole, as there are many countries that were not part of the scope. Conclusions therefore are not to be generalized.

Lastly, the regulation of food influencers is a current topic subject to ongoing changes. For example, the changes to the French law are expected to happen in the period of late 2024 to beginning of 2025, which coincides with the end of the research phase of the thesis. The area requires active monitoring and further research.

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