

Regulating Finfluencers

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Abstract

The accessibility of investment advice on social media platforms significantly increased in recent years. Finance influencers and content creators, so-called Finfluencers, provide their audience with unpaid or paid financial advice on social media, featuring investment strategies relating to meme stocks, contracts for difference trading, or cryptocurrencies. This article examines the practices and business models of Finfluencers as well as how EU law, three national jurisdictions, and five platforms regulate their activities. The underlying objectives are to understand the activities and regulation of Finfluencers and critically analyse whether the current framework sufficiently protects consumers.

Keywords

Finfluencers, Unfair Commercial Practices, Financial Regulation, Platform Governance, Consumer Law

1. Introduction

Social media content featuring investment strategies relating to meme stocks, contracts for difference (CFD) trading, or cryptocurrencies surged recently, with social media platforms catalysing this phenomenon. Finfluencers disseminate such content claiming that retail investors can outperform conventional investments. However, recent cases concerning online finance content sparked controversy and showed how vulnerable consumers are.

A recent study by the UK Financial Conduct Authority (FCA) supports the widespread concern that many retail investors lack basic financial literacy skills. In particular, the findings showed that younger investors are taking very high risks that are objectively unsuitable in their financial circumstances.¹ In the FCA study, 59% of respondents stated that their future

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would be fundamentally adversely affected in case of a significant investment loss. Furthermore, 38% of respondents could not list a single reason why they invested in their top three investment positions, with 78% of all respondents claiming that they have a firm reliance ‘on gut instinct and rules of thumb’. The study’s findings exemplify the trend toward gamification of finance, show how inexperienced and vulnerable many retail investors are, and reveal the potential harms of financial advice on social media.

Financial regulators worldwide, including the European Securities and Markets Authority (ESMA),² the German BaFin,³ the Luxembourg CSSF,⁴ and the UK Financial Conduct Authority,⁵ stepped up their enforcement and warned consumers about misleading financial advice online and potential risks. The increase of (general) influencer marketing has caused the European Parliament to set up an inquiry, finding that vulnerable consumer groups are particularly adversely affected by hidden marketing on social media.⁶

Existing literature on Finfluencers is thin. No academic literature exists examining their practices, business models, or how EU law, national law, and platforms regulate their

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¹ UK Financial Conduct Authority (FCA), ‘FCA warns that younger investors are taking on big financial risks’ (FCA 23 March 2021) <<https://www.fca.org.uk/news/press-releases/fca-warns-younger-investors-are-taking-big-financial-risks>> last accessed 24 February 2022.

² European Securities and Markets Authority (ESMA), ‘ESMA’s Statement on Investment Recommendations on Social Media (ESMA 70-154-2780)’ (European Securities and Markets Authority 28 October 2021) <https://www.esma.europa.eu/sites/default/files/library/esma70-154-2780_esmas_statement_on_investment_recommendations_on_social_media.pdf> last accessed 26 February 2022.

³ The German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) also recently published a guidance for consumers, see BaFin, ‘Anlagetipps in sozialen Medien: Vorsicht ist oberstes Gebot’ (BaFin 2022) <<https://www.bafin.de/dok/17339696>> last accessed 26 February 2022.

⁴ The Commission de Surveillance du Secteur Financier (CSSF) even created an online portal called ‘lëtzfin’ to educate consumers about financial affairs. The portal informs consumers about Finfluencers and refers them to the ESMA guidance, see lëtzfin, ‘faire confiance aux influenceurs peut coûter cher’ (lëtzfin 2022) <<https://www.letzfin.lu/faire-confiance-aux-influenceurs-peut-couter-cher/>> last accessed 26 February 2022.

⁵ The UK Financial Conduct Authority (FCA) already published a guidance on the applicable rules and their enforcement approach in 2015. See FCA, ‘Social media and customer communications: The FCA’s supervisory approach to financial promotions in social media’ (FCA 15 March 2022) <<https://www.fca.org.uk/publication/finalised-guidance/fg15-04.pdf>> last accessed 26 February 2022.

⁶ European Parliament Policy Department for Economic, Scientific, and Quality of Life Policies (ed), ‘Study Requested by the IMCO committee: The impact of influencers on advertising and consumer protection in the Single Market’ (European Parliament 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)> last accessed 1 March 2022, pages 10, 27, 50-51.

activities. Nonetheless, legal scholarship clarified that consumer protection rules cover general influencer marketing activities.⁷ Additional rules apply to Finfluencers than regular influencers because they advertise financial products, even when Finfluencers discuss their investment strategies or decisions as they might affect their audience's behaviour. It is a complex area of law to navigate from a legal viewpoint because rules on unfair commercial practices and financial regulation apply in addition to consumer and media rules. In addition, social media platforms have guidelines that shape and govern the activities of Finfluencers on social media. Platforms also have a legal duty to remove illegal content. The question, therefore, arises which legal rules apply to the activities of Finfluencers and how platforms govern them.

The present paper proceeds as follows. It first categorises Finfluencer activities based on evidence and case law (Section 2). This Section outlines the practices and corresponding incentives of Finfluencers, including their financial incentives, revenue sources, conflicts of interest, and potential harms. Section 3 elucidates the rules that apply to the previously categorised Finfluencer activities, recent regulatory responses, and the legal responsibilities of social media platforms. It examines the rules and case law on the European Union level and the national requirements in Germany, Luxembourg, and the United Kingdom. Section 4 investigates how five social media platforms, Facebook, Instagram, YouTube, Twitter, and TikTok, shape and govern Finfluencer activities via their terms of service. It will be interesting to see whether it differs from the applicable legal rules, for instance, whether platforms decide to 'gold-plate' the underlying legal rules. Section 5 provides concluding remarks.

2. Defining the Practices and Business Models of Finfluencers

Finfluencers deploy several business models, including influencing their audience by disseminating sponsored content or creating original content for sharing knowledge. Therefore, for the purpose of the present article, the term Finfluencers refers to influencers and content creators because there is significant overlap. The paper divides Finfluencer

⁷ See, e.g., Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) 8(2) *Journal of European Consumer and Market Law* 64; Felix Pflücke, 'Making Influencers Honest: The Role of Social Media Platforms in Regulating Disclosures' in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020).

activities into four categories based on regulatory guidelines and case law,⁸ focusing on financial incentives, revenue sources, conflicts of interest, and potential consumer harms.

Category 1: Finfluencers discuss their well-intentioned investment strategies and decisions on social media.⁹ The audience of Finfluencers benefits from ‘free’ content, and Finfluencers generate revenue according to clicks via social media platforms, for example, the TikTok Creator Fund or YouTube AdSense. A conflict of interest likely exists because Finfluencers generate revenue by the number of views. Finfluencers’ finance content might also not provide the complete picture of potential risks, thus potentially misleading viewers. Viewers that follow the advice of Finfluencers and invest their (life) savings without financial literacy or independent advice and research tailored to their financial situation might end up with a significant financial loss.¹⁰ The harm in case consumers lose their investment is not limited to the financial side; there are potentially also non-financial implications that are more difficult to measure, for instance, psychological detriment or adverse effects on well-being.¹¹

Category 2: Finfluencers might have bad intentions when sharing their strategies or recent investment decisions online, with meme stocks, contracts for difference trading, and cryptocurrencies gaining particular attention. Evidence emerged that Finfluencers advertised

⁸ The categories overlap with general influencer marketing activities: (1) online marketing by brands; (2) videos about own products; (3) editorial videos about own products; (4) advertorial vlogs; (5) commercial breaks within videos; (6) product placements; (7) sponsorship (no control by brands); (8) giveaways (free items or discounts); (9) affiliate links. *ibid* (Pflücke) 309-311 (Table 12.1). Naturally, these categories need to be adapted to each scenario, see, e.g., Giovanni De Gregorio and Catalina Goanta, ‘The Influencer Republic: Monetizing Political Speech on Social Media’ (2022) 23(2) German Law Journal 206ff.

⁹ Cathie Armour, ‘Regulatory risk and influencer engagement for company directors’ (Australian Securities & Investment Commission November 2021) <<https://asic.gov.au/about-asic/news-centre/articles/regulatory-risk-and-finfluencer-engagement-for-company-directors/>> last accessed 2 March 2022, Section ‘Unlicensed Advice’.

¹⁰ The European Securities and Markets Authority published a statement highlighting the risks for retail investors that base their investment decisions exclusively on social media content. European Securities and Markets Authority, ‘ESMA Highlights Risks to Retail Investors of Social Media Driven Share Trading (ESMA70-155-11809)’ (European Securities and Markets Authority 17 February 2021) <https://www.esma.europa.eu/sites/default/files/library/esma70-155-11809_episodes_of_very_high_volatility_in_trading_of_certain_stocks_0.pdf> last accessed 1 April 2022. See also the findings of the UK FCA study on financial literacy and vulnerability (n 1).

¹¹ For a general overview of potential consumer harms, see Organisation for Economic Co-operation and Development (OECD), ‘Measuring consumer detriment and the impact of consumer policy’ (OECD 9 April 2020) <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2019\)13/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2019)13/FINAL&docLanguage=En)> last accessed 3 April 2022.

these assets for their own benefit, going beyond advertising revenue.¹² For instance, they owned these assets and tried to influence the market. In several cases, they were even involved in setting up ‘pump-and-dump’ crypto scams: Finfluencers artificially inflated the asset value by disseminating misleading statements.¹³ A conflict of interest exists in either scenario because the aim is to nudge viewers to buy these assets. Potential financial harms include a total loss of the consumers’ invested capital, mainly because Finfluencers share their advice with bad intentions and the generally very high risk and volatility of such financial assets;¹⁴ this is again accompanied by non-financial harms.¹⁵

Category 3: Finfluencers advertise their own products, such as one-on-one coaching sessions, online courses, or books. Finfluencers promise that consumers will yield higher future returns after purchasing their services or products. This category likely overlaps with the first one. In particular, consumers might be impressed by the – be it accurate or not – past performance of Finfluencers. The underlying objective of Finfluencers is to advertise their products and consequently generate revenue.¹⁶ A conflict of interest exists because Finfluencers advertise their own products and are thus naturally biased. Viewers that purchase these services or products might be at risk because Finfluencers might not be trained

¹² ‘Fraud in Connection with the Purchase or Sale of a Security’ in James D. Cox, Robert W. Hillman, Donald C. Langevoort, and Ann M. Lipton, *Securities Regulation: Cases and Materials* (Wolters Kluwer Law & Business 2021) 712-714. The authors discuss the case of market manipulation by social media users concerning meme stocks.

¹³ See, for instance, Shaen Corbet, Yang Hou, Yang Hu, and Les Oxley, ‘The Danger of Cryptocurrency Pump-and-Dumps: Analysing the Development of Research & Regulation’ in Shaen Corbet (eds), *Understanding cryptocurrency fraud: The challenges and headwinds to regulate digital currencies* (De Gruyter 2022). Alexander Sajnovits, ‘GameStop im Lichte der MAR: Meme-Trading, soziale Medien und Handelsbeschränkungen durch Broker’ 50(5) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 804. This activity was also observed by the Australian Securities & Investment Commission, Armour (n 9) Section ‘Market Misconduct’.

¹⁴ The ESMA has stepped in to prohibit ‘the marketing, distribution or sale of binary options to retail investors’ and further regulate the ‘marketing, distribution or sale of CFDs to retail investors’, European Securities and Markets Authority, ‘ESMA Highlights Risks to Retail Investors of Social Media Driven Share Trading (ESMA70-155-11809)’ (European Securities and Markets Authority 17 February 2021) <https://www.esma.europa.eu/sites/default/files/library/esma71-99-973_press_release_product_intervention_euoj_publication.pdf> last accessed 1 April 2022.

¹⁵ OECD (n 11).

¹⁶ Dutch Authority for the Financial Markets (AFM), ‘The pitfalls of “finfluencing”: Exploratory study by the AFM into investor protection requirements relating to social media posts’ (AFM December 2021) <<https://www.afm.nl/~/profmedia/files/publicaties/2021/pitfalls-of-finfluencing.pdf?la=en>> last accessed 3 March 2022, page 7 Sections 3.2.2 ‘Courses and training’ and 3.2.3 ‘Self-authored books or reports’.

investment professionals and the financial products might not suit consumers' risk profiles;¹⁷ this is, once again, accompanied by non-financial harms.¹⁸

Category 4: Finfluencers collaborate with third parties and advertise their products in return for a commission on sales. An example is affiliate links where Finfluencers get a commission in case their viewers sign up for an online broker. Advertising third-party products also include giveaways via affiliate links, for example, free stocks or a credit on retail investment platforms. The Dutch Authority for the Financial Markets (AFM) has warned of such practices, mainly because several Finfluencers also referred their viewers to unlicensed broker platforms.¹⁹ Additional evidence emerged that some Finfluencers received a commission based on how much money consumers invested with these broker platforms. This commission-based system led to a significant increase in advertisements for high-risk financial products, such as contracts for difference (CFD) trading, allowing investors to work with leverage.²⁰ The financial risk for consumers is very high: some studies suggest that 74-89% of retail investors lose money when trading CFDs.²¹ Finfluencers receive a commission for advertising third-party products, and there is thus a conflict of interest and a very high risk of financial harm for consumers. As in the previous categories, this is accompanied by non-financial harms.²²

It follows that there are several financial incentives why Finfluencers share their content on social media platforms, and, in nearly all cases, they have a conflict of interest. Potential harms for consumers are financial and non-financial in almost all Finfluencer categories.

¹⁷ ESMA (n 2 and 10).

¹⁸ OECD (n 11).

¹⁹ AFM (n 16) pages 10-12 Sections 4.4 'Working together with unlicensed parties' and 4.5 'Referral fees for bringing in clients'.

²⁰ AFM (n 16) page 10 Section 4.3 'Recommending risky products'. One of the UK Financial Conduct Authority investigations recently ended up in the High Court, which will be examined further below: *Financial Conduct Authority v 24hr Trading Academy Ltd & Anor* [2021] EWHC 648 (Ch) (25 March 2021).

²¹ European Securities and Markets Authority (ESMA), 'Additional information on the agreed product intervention measures relating to contracts for differences and binary options (ESMA35-43-1000)' (ESMA 27 March 2018) <https://www.esma.europa.eu/sites/default/files/library/esma35-43-1000_additional_information_on_the_agreed_product_intervention_measures_relating_to_contract_s_for_differences_and_binary_options.pdf> last accessed 22 February 2022 page 2. For an article examining 'the probability of success and why most retail investors lose money', see for example Paul Barnes, 'The use of contracts for difference ("CFD") spread bets and binary options ("forbin") to trade foreign exchange ("forex") commodities, and stocks and shares in volatile financial markets' (Munich Personal RePEc Archive 28 January 2021) <<https://mpra.ub.uni-muenchen.de/105743/>> last accessed 21 February 2022, pages 4, 14ff.

²² OECD (n 11).

Finfluencers likely combine their content creation activities, making it even more challenging for regulators, platforms, and consumers to distinguish between valuable and legal practices and potentially harmful and illegal practices. The above analysis also shows that platforms benefit in each case because of the generated web traffic.

Table 1 Practices and Business Models of Finfluencers

Category	Practice	Financial Incentive	Revenue Source	Conflict of Interest	Potential Harm
1	Sharing investment advice and strategies	Income generated by views	Social media platforms	Likely	Potentially financial and non-financial
2	Practice of <i>category 1</i> but with market manipulation component (e.g. 'pump-and-dump' scheme)	Increase value of own assets or financial reward by third-party	Own assets, third-party, social media platforms	Yes	Financial and non-financial
3	Promotion of Finfluencer's service or product (e.g. investment course)	Selling own service or product	Viewers, social media platforms	Yes	Financial and non-financial
4	Advertising third-party product (e.g. affiliate link for brokerage account)	Commission-based	Third-party, social media platforms	Yes	Financial and non-financial

3. Mapping the Legal Framework

Finfluencers are subject to several legal requirements regardless of whether they share sponsored content. Equally, social media platforms have a legal responsibility to ensure that viewers are adequately protected. This part of the paper focuses on the rules at the European Union level and the national laws in Germany, Luxembourg, and the UK. Germany and Luxembourg, as current EU Member States, and the United Kingdom, as a former EU Member State, are of particular interest because of their highly developed financial markets and easy access of retail investors to financial services. This Section only examines the rules that apply to the four outlined Finfluencer categories, the most relevant focus on unfair commercial practices, market abuse, and platform responsibility.

3.1. Unfair Commercial Practices and Finfluencers

Finfluencer activities might fall within the scope of the national rules transposing the Unfair Commercial Practices Directive 2005/29/EC.²³ The rules protect consumers from misleading and aggressive marketing and ensure that consumers make informed choices. The Directive is a maximum harmonisation instrument, which means that the Member States had no discretion when implementing the instrument.²⁴ Since Germany,²⁵ Luxembourg,²⁶ and the

²³ Directive (EC) 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (hereafter 'Unfair Commercial Practices Directive', hereafter UCPD) [2005] OJ L149/22 (consolidated text as amended by Directive (EU) 2019/2161). The European Commission has recently published a guidance on the Directive, including a section specifically addressing influencer marketing: 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 C526/1, Section 4.2.6.

²⁴ Article 4 of Directive 2005/29/EC, also Recital 12.

²⁵ Germany transposed the Unfair Commercial Practices Directive with the Act Against Unfair Competition (*Gesetz gegen den Unlauteren Wettbewerb*, hereafter UWG).

²⁶ Loi du 29 avril 2009 relative aux pratiques commerciales déloyales et modifiant – la loi modifiée du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative; – la loi modifiée du 28 décembre 1988 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales et modifiant l'article 4 de la loi du 2 juillet 1935 portant réglementation des conditions d'obtention du titre et du brevet de maîtrise dans l'exercice des métiers; – la loi modifiée du 16 avril 2003 concernant la protection des consommateurs en matière de contrats à distance; – la loi modifiée du 18 décembre 2006 sur les services financiers à distance (Journal officiel du Grand-Duché de Luxembourg, Mémorial A – n° 88 du 30 avril 2009). The Code de la consommation contains the rules since 2011.

United Kingdom²⁷ implemented the UCPD, the same rules apply in all three jurisdictions despite the UK's withdrawal from the EU.²⁸ Nonetheless, it is worth examining the national practices and cases, as the Directive allows for national codes of conduct and leaves enforcement actions to Member States authorities.

The Unfair Commercial Practices Directive's scope is quite broad as the instrument applies to '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 or on behalf of the trader'.²⁹ Commercial practices include commercial communications, i.e., advertising and marketing.³⁰ Finfluencer activities might fall within the Directive's scope and must comply with the legal requirements of the national rules transposing the instrument.

The Directive's general test in Article 5³¹ covers misleading practices (Articles 6 and 7)³² and aggressive practices (Articles 8 and 9).³³ In addition, the Directive contains an Annex that lists thirty-one unfair practices, i.e., it provides no judicial discretion ('black-list' character).³⁴ Of particular relevance for Finfluencers is that 'hidden advertisement' (Section 11 of the Annex)³⁵

²⁷ Consumer Protection from Unfair Trading Regulations 2008 (hereafter CPR 2008). Article 10 of Directive 2005/29/EC allows for code of conducts on the national level. Concerning social media platforms, for instance, the UK transposed it with the Committee of Advertising Practice (CAP) Code.

²⁸ See for instance, the clarification by the House of Commons, Lorraine Conway, *Brexit: UK consumer protection law* (House of Commons Briefing Paper Number 9126 21 May 2021) <<https://researchbriefings.files.parliament.uk/documents/CBP-9126/CBP-9126.pdf>> last accessed 16 April 2022.

²⁹ Article 2(b) of Directive 2005/29/EC. Pflücke (n 7) 302-304.

³⁰ Article 2(d) of Directive 2005/29/EC. *ibid*.

³¹ Transposed by § 3 of the German Act Against Unfair Competition (UWG); Article L. 122-1 of the Luxembourg Consumer Code (Code de la consommation); Section 3 of the Consumer Protection from Unfair Trading Regulations 2008.

³² Transposed by §§ 5 and 5a of the German Act Against Unfair Competition (UWG); Articles L. 122-2 and L. 122-3 of the Luxembourg Consumer Code (Code de la consommation) ; Sections 5 and 6 of the Consumer Protection from Unfair Trading Regulations 2008. Finfluencers might be liable under the national rules implementing Article 7(2) of the Directive in case the 'trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.'

³³ Transposed by § 4a of the German Act Against Unfair Competition (UWG); Articles L. 122-5 and L. 122-6 of the Luxembourg Consumer Code (Code de la consommation); Section 7 the Consumer Protection from Unfair Trading Regulations 2008.

³⁴ See for instance, Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2013) 239-242.

³⁵ Section 11 of Annex I of Directive 2005/29/EC: 'Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.' The CJEU clarified that 'payment' includes where the 'trader provides consideration with an asset value for that publication' which includes

and ‘misrepresenting that one acts as a consumer’ (Section 22 of the Annex) are always prohibited.³⁶

Enforcing compliance with the national rules implementing the Directive falls within the competence of the Member States.³⁷ Several social media content creators ended up in court because they failed to disclose sponsored content, partly because the line between when and how disclosure is required is sometimes blurry. A disclosure is required when the commercial intent is not evident from the context. For example, online marketing by brands or social media influencers making a video about their product require no disclosure because the commercial intent is evident to the consumer.³⁸ On the other hand, product placements, affiliate links, or giveaways of sponsored items require disclosure because the consumer cannot know that it is a commercial communication.³⁹ Thus, (financial) influencers need to label posts as sponsored if they gain a financial benefit, for instance, by receiving a discount

‘images protected by copyright on which are visible the commercial premises and products which it offers for sale.’, see Case C-371/20 *Peek & Cloppenburg KG* [2021] ECLI:EU:C:2021:674, paragraph 49, and the commentary by Joasia Luzak and Catalina Goanta, ‘#Paidpartnership Means More than Money Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg’ (2022) 11(5) *Journal of Consumer and Market Law* 188. The provision is transposed by Point 11 of the Annex to § 3(3) of the German Act Against Unfair Competition (UWG); Article L. 122-4 Point 11 of the Luxembourg Consumer Code (Code de la consommation); Schedule 1 Paragraph 11 of the Consumer Protection from Unfair Trading Regulations 2008.

³⁶ Section 22 of Annex I of Directive 2005/29/EC: ‘Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.’ The provision is transposed by Point 23 of the Annex to § 3(3) of the German Act Against Unfair Competition (UWG); Article L. 122-4 Point 11 of the Luxembourg Consumer Code (Code de la consommation); Schedule 1 Paragraph 22 of the Consumer Protection from Unfair Trading Regulations 2008.

³⁷ Article 11 of Directive 2005/29/EC. Germany, Luxembourg, and the UK have public and private enforcement mechanisms. However, the rules on hidden marketing are primarily enforced in the United Kingdom by the Competition and Markets Authority or the Advertising Standard Authority (ASA). Despite leaving the enforcement to the Member States, the EU Consumer Protection Cooperation Regulation connects national authorities and allows for a united enforcement response. The UK’s withdrawal from the EU means that it is not part of this network. Stephanie Law and Vincent Richard (eds), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) Chapters 5, 6, and 7. Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1. For an example of the application of the Regulation, see, for instance, European Commission, ‘Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities’ (European Commission 9 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048> last accessed 12 February 2022.

³⁸ Pflücke (n 7) 309-311.

³⁹ *ibid.*

on products.⁴⁰ Also, how the commercial intent is declared is sometimes unclear. German courts were particularly active in applying and interpreting the rules. Social media influencers must label sponsored posts as advertisements, for instance, by using the hashtag ‘#Werbung’ or ‘#Anzeige’ at the beginning of their post and not simply use the hashtag ad (‘#ad’) at the end of a post.⁴¹ Tagging the brand with a hashtag or an ‘@’ sign⁴² or tagging the brand in the picture is insufficient.⁴³ Similarly, the UK Advertising Standards Authority ruled that simply thanking a brand in a video for ‘making this possible’ is insufficient.⁴⁴

There is also some criticism levelled against the Unfair Commercial Practices Directive’s rules on influencer marketing, particularly concerning its scope and substance. For example, courts need to establish that influencers are ‘acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader’.⁴⁵ The scope of the rules is thus confined to traders and excludes consumers. In response, there has been a discussion on developing and introducing a general duty to trade fairly.⁴⁶ Earlier criticism concerning the rules on penalties and enforcement practices has been addressed recently. Directive 2019/2161/EU harmonised the rules on penalties regarding unfair commercial practices, allowing for fines of up to 4% of the trader’s annual turnover.⁴⁷ Changes for the enforcement were introduced in the New Deal for Consumer by enacting rules on collective redress.⁴⁸

It follows that the unfair commercial practices rules on marketing only apply to traders. In case influencers fall within the personal scope of the rules, they must disclose any hidden marketing, for instance, when advertising third-party services and products (influencer activities category 4). It excludes, however, content that features influencers’ own services

⁴⁰ LG Köln, 17.03.2020 – 31 O 352/18 SH I.

⁴¹ The Landgericht (LG) Hannover first accepted it as a valid disclosure but it was not upheld by the Oberlandesgericht (OLG) Celle. It was an unfair commercial practice under § 5a par. 6 of the Act Against Unfair Competition (UWG). LG Hannover, 08.03.2017 – 23 O 5/17, BeckRS 2017, 121715; OLG Celle, 08.06.2017 – 13 U 53/17, NJW-RR 2018, 42.

⁴² LG Hagen, 13.09.2017 – 23 O 30/17, NJW-RR 2018, 170.

⁴³ LG Berlin, 24.05.2018 – 52 O 101/18, MMR 2018, 543. The German Federal Court (BGH) confirmed that using tap tags is insufficient to disclose paid sponsorships, BGH NJW 2021, 3450.

⁴⁴ Advertising Standards Authority (ASA) Adjudication against Mondelez (UK) Ltd, 26 November 2014. It breached Sections 2.1 and 2.4 of the Committee of Advertising Practice (CAP) Code. Pflücke (n 7) 305-307.

⁴⁵ Article 2(b) of Directive 2005/29/EC. Riefa and Clausen (n 7) 66.

⁴⁶ *ibid* 73.

⁴⁷ Article 13(3) of Directive 2005/29/EC (after the update through Directive 2019/2161/EU).

⁴⁸ *ibid*.

and products because the commercial intent is clear to consumers (category 3). In addition to labelling marketing communications, they must ensure that their disclosures comply with the outlined formal requirements. Otherwise, they might breach the national rules transposing the Unfair Commercial Practices Directive. Sharing investment advice and strategies (category 1) and manipulation practices (category 2) fall outside the scope of the unfair commercial practices framework.

3.2 Financial Law and Finfluencers

Finfluencer activities also fall within the scope of financial law, including the EU Market Abuse Regulation.⁴⁹ The Regulation requires that Finfluencers comply with the information and formal requirements in case they ‘produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy’.⁵⁰ Authors of such content must take reasonable care to present it objectively and disclose any interests or conflicts of interest.⁵¹ However, fundamental rights protect Finfluencers when disseminating such information ‘for the purpose of journalism or other form of expression in the media’, for instance, by the freedom of the press and freedom of expression.⁵² Courts must interpret the rules in light of these fundamental rights unless Finfluencers derive ‘an advantage or profits from the disclosure or the dissemination of the information in questions’⁵³ or ‘the disclosure or the dissemination is made with the intention of misleading the market’.⁵⁴ The ESMA guidance also states that ‘claiming something is not an investment recommendation and/or someone is not an expert’ is not a valid defence.⁵⁵

⁴⁹ Regulation (EU) 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (hereafter ‘EU Market Abuse Regulation’) [2014] OJ L173/1 (consolidated version of 1 January 2022). The Regulation is still in force in the UK via the Market Abuse (Amendment) (EU Exit) Regulations 2019 (Section 8 ff). The ESMA has recently published a guidance on the application of the EU Market Abuse Regulation, see European Securities and Markets Authority, ‘ESMA Addresses Investment Recommendations Made On Social Media Platforms October’ (ESMA 28 October 2021) <<https://www.esma.europa.eu/press-news/esma-news/esma-addresses-investment-recommendations-made-social-media-platforms>> last accessed 3 April 2022.

⁵⁰ Article 20 of Regulation (EU) 596/2014.

⁵¹ *ibid.*

⁵² Article 21 of Regulation (EU) 596/2014.

⁵³ Article 21(a) of Regulation (EU) 596/2014.

⁵⁴ Article 21(b) of Regulation (EU) 596/2014.

⁵⁵ ESMA (n 2 and 49).

Additional information and formal requirements apply under the Commission Delegated Regulation 2016/958,⁵⁶ which apply to anyone that produces investment recommendations or suggesting an investment strategy. Authors must clearly and prominently disclose their name and job title;⁵⁷ in case they work under contract for a credit institution or investment firm they must disclose the name⁵⁸ and the competent supervisory authority.⁵⁹ They are also under a general duty to present recommendations objectively,⁶⁰ which includes that ‘facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information’ and the ‘date and time when the production of the recommendation was completed’.⁶¹ In case recommendations are presented in a format where the information cannot be easily included, producers of such recommendations must ensure that it ‘can be directly and easily accessed by the persons receiving the recommendation free of charge.’⁶² Another general requirement is to disclose any interests or conflicts of interest.⁶³ Authors must also state the date and time when they first disseminate recommendations and comply with disclosure requirements in case they disseminate third-party recommendations,⁶⁴ summaries or extracts of recommendations,⁶⁵ and substantially altered recommendations.⁶⁶ A Finfluencer could also fall within the category of experts in case he or she ‘repeatedly proposes investment decision in respect of financial instruments’ and ‘presents himself as having financial expertise or experience’ or ‘puts forward his recommendation in such a way that other persons would reasonably believe he has financial expertise or experience’.⁶⁷ Additional requirements would apply to them under Articles 4 and 6, for example, disclosure

⁵⁶ Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest (hereafter ‘EU Delegated Regulation on Market Abuse’) [2016] OJ L160/15. The Regulation is still in force in the UK via the Market Abuse (Amendment) (EU Exit) Regulations 2019 (Section 18).

⁵⁷ Article 2(1) of the Commission Delegated Regulation (EU) 2016/958.

⁵⁸ Article 2(1)(b) of the Commission Delegated Regulation (EU) 2016/958.

⁵⁹ Article 2(2) of the Commission Delegated Regulation (EU) 2016/958.

⁶⁰ Article 3 of the Commission Delegated Regulation (EU) 2016/958.

⁶¹ Article 3(1)(a) and (e) of the Commission Delegated Regulation (EU) 2016/958.

⁶² Article 3(2) of the Commission Delegated Regulation (EU) 2016/958.

⁶³ Article 5 of the Commission Delegated Regulation (EU) 2016/958.

⁶⁴ Article 8 of the Commission Delegated Regulation (EU) 2016/958.

⁶⁵ Article 9 of the Commission Delegated Regulation (EU) 2016/958.

⁶⁶ Article 10 of the Commission Delegated Regulation (EU) 2016/958.

⁶⁷ Article 1(a) of the Commission Delegated Regulation (EU) 2016/958.

of ‘a summary of any basis of valuation or methodology’⁶⁸ or whether he or she ‘owns a net long or short position exceeding the threshold of 0.5% of the total issued share capital of the issuer’.⁶⁹ In addition, certain financial products, for example, CFDs require ‘a firm specific standardised risk warning’ and must not include ‘incentives by a CFD provider’.⁷⁰

There is uncertainty about whether the two European Union instruments cover crypto assets or not. Unlike in the United States, crypto assets are not considered commodities by EU regulators.⁷¹ However, the European Commission has already put forward a proposal for an EU Regulation to change this.⁷² Nonetheless, Finfluencer activities concerning both conventional and crypto assets could be subject to national law, including criminal sanctions in case of fraudulent activities.⁷³

Several national rules govern Finfluencer activities, significantly shaped by EU Directives.⁷⁴ In the case of Germany, recommendations relating to financial products fall into three categories: investment brokerage (*Anlagevermittlung*), investment advice (*Anlageberatung*), and investment recommendation (*Anlageempfehlung*). To classify an activity as investment brokerage, there must be a brokerage element, e.g., the Finfluencers refer the consumer upon request to a third-party financial service provider.⁷⁵ The difference between investment advice and recommendation is that the former requires an individual recommendation to the consumer, including assessing the financial circumstances and that the distribution is more

⁶⁸ Article 4(1)(b) of the Commission Delegated Regulation (EU) 2016/958.

⁶⁹ Article 6(1)(a) of the Commission Delegated Regulation (EU) 2016/958.

⁷⁰ Decision (EU) 2018/796, see European Securities and Markets Authority, ‘Statement of ESMA on the application of product intervention measures under Article 40 and 42 of Regulation (EU) No. 600/2014 (1) (MiFIR) by CFD providers (ESMA35-36-1743)’ (ESMA 11 July 2019) <https://www.esma.europa.eu/sites/default/files/library/esma35-36-1743-statement_product_intervention.pdf> last accessed 12 April 2022. The ESMA also introduced restrictions for binary options (Decision (EU) 2018/795).

⁷¹ Ralph Rirsch and Stefan Tomanek, ‘Crypto-assets: Commodities under European financial markets law?’ (2019) 2(3) Journal of Financial Compliance 199; Jonathan Pock, ‘Crypto-asset market manipulation and insider trading: Trans-Atlantic status quo and European Commission MiCA proposal’ (Stanford Law School Transatlantic Technology Law Forum 2022) <<https://law.stanford.edu/projects/crypto-asset-market-manipulation-and-insider-trading-trans-atlantic-status-quo-and-european-commission-mica-proposal/>> last accessed 16 April 2022.

⁷² Proposal for a Regulation of 24 September 2020 on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 [2020] COM 593 final.

⁷³ For Germany, see, e.g., Thomas Richter, *Die Strafbarkeit der Marktmanipulation unter dem europäischen Marktmissbrauchsregime* (Nomos 2022), especially Parts E and F.

⁷⁴ The rules were substantially harmonised by EU Directives, including the Directive (EU) 2014/65 of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (consolidated on 28 February 2022).

⁷⁵ § 1 Paragraph 1a S. 2 Nr. 1 of the Governance Banking Act (Kreditwesengesetz, hereafter KWG).

than just via the media.⁷⁶ In contrast, the latter is more general, such as sharing an investment strategy with a broader audience online.⁷⁷ Offering investment brokerage or advice is subject to an authorisation scheme by the German BaFin;⁷⁸ sharing an investment recommendation is subject to the above-outlined information and formal requirements under EU law. Almost identical rules apply in Luxembourg⁷⁹ and the United Kingdom.⁸⁰ Lastly, additional rules apply to financial service providers under the national rules implementing the MiFID II Directive⁸¹ when they advertise financial products,⁸² which raises the question of why lower standards apply to Finfluencers.

Regarding the enforcement, the EU Market Abuse Regulation requires that Member States designate a single competent authority,⁸³ and that they have to liaise with the ESMA under the rules of the Regulation.⁸⁴ In Germany it is the BaFin, in Luxembourg the CSSF, and in the UK the FCA. The ESMA reports that in 2019 alone, the competent national authorities imposed 279 administrative sanctions and 60 criminal sanctions for breaches of the EU Market Abuse Regulation 596/2014.⁸⁵

⁷⁶ § 1 Paragraph 1a S. 2 Nr. 1a of the Governance Banking Act (KWG).

⁷⁷ Article 3(1)(35) of the EU Market Abuse Regulation (EU) 596/2014 (in German Marktmissbrauchsverordnung, hereafter MMVO).

⁷⁸ § 32 Paragraph 1 of the Governance Banking Act (KWG).

⁷⁹ Articles 1(6h) and 1(30) in connection with Annex I Point 11, Annex II Section A Point 5, Section B, and Section C Point 5; Article 2 of the Loi du 5 avril 1993 relative au secteur financier (updated on 1 January 2022).

⁸⁰ Sections 19 and 21 of the Financial Services and Markets Act 2000 and Articles 25 and 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. A recent case is *Financial Conduct Authority v 24hr Trading Academy Ltd & Anor* [2021] EWHC 648 (Ch) (25 March 2021). The case concerned a 'trading academy' that provided trading signals to consumers via WhatsApp and charged them for this. The case ultimately ended up in the High Court and the practice was found to be unauthorised investment advice. In addition, consumers were referred to broker platforms for a commission, which falls within the category of financial promotions.

⁸¹ Directive (EU) 2014/65 of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance ('MiFID II') [2014] OJ L173/349.

⁸² See for example Martin Brenncke, 'The Legal Framework for Financial Advertising: Curbing Behavioural Exploitation' (2018) 19(4) European Business Organization Law Review 853.

⁸³ Article 22 Article 21 of Regulation (EU) 596/2014. There is, however, a debate about how fragmented the approach is and an argument for reform, see, e.g., Andrea Perrone, 'EU Market Abuse Regulation: The Puzzle of Enforcement' (2020) 21 European Business Organization Law Review 379.

⁸⁴ Articles 24 and 25 of Regulation (EU) 596/2014.

⁸⁵ European Securities and Markets Authority, 'Report: Administrative and criminal sanctions and other administrative measures imposed under the Market Abuse Regulation in 2019' (ESMA 16 December 2020, ESMA70-156-3537) <https://www.esma.europa.eu/sites/default/files/library/esma70-156-3537_annual_report_on_mar_administrative_and_criminal_sanctions_2020.pdf> last accessed 15 April 2022.

Finfluencers must comply with all outlined requirements when providing finance content on social media (Finfluencer categories 1 to 4), with additional rules in place in case they are considered experts under the Commission Delegated Regulation (EU) 2016/958. These requirements are very technical, and Finfluencers might face administrative and criminal sanctions if they fail to comply. As pointed out above, individual advice to retail investors, such as one-on-one coaching, is reserved exclusively for registered financial advisers that comply with local laws (parts of category 3 of Finfluencer activities). Moreover, Finfluencers that hold assets and try to manipulate the market in their favour breach Article 10(1) of the EU Market Abuse Regulation 594/2014 and commit fraud (category 2 of Finfluencer activities).

3.3 Legal Responsibility of Social Media Platforms

All social media platforms have content moderation policies and enforcement procedures because attracting advertisers is their primary business model.⁸⁶ In the EU and the UK, the E-Commerce Directive significantly shaped and harmonised the responsibility of social media platforms.⁸⁷ Articles 14 and 15 of the Directive provide that social media providers are under no general duty to actively monitor content on their platform.⁸⁸ The Directive is a minimum harmonisation instrument,⁸⁹ but Member States cannot enact stricter rules by imposing a general duty for intermediaries to monitor their platforms for illegal content.⁹⁰ Nonetheless, social media providers have a legal responsibility to protect consumers from misleading or harmful content.

Whether platforms must actively monitor content on their website was addressed in the *Glawischnig-Piesczek* case.⁹¹ This case concerned the intermediary liability of Facebook for failing to delete a defamatory post by a user. Facebook initially failed to delete an allegedly

⁸⁶ See, e.g., Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018) 34ff. Gillespie notes that reassuring advertisers is thus fundamental (e.g. on 11 and 35).

⁸⁷ Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter 'E-Commerce Directive', hereafter ECD) [2000] OJ L178/1.

⁸⁸ Lopez-Tarruella, 'A European Community Regulatory Framework for Electronic Commerce' (2001) 38(6) Common Market Law Review 1356-1357; Andrej Savin, *EU Internet Law* (2nd edn, Edward Elgar Publishing 2017) 45-49. The rules are still effective in the UK via the The Electronic Commerce (EC Directive) Regulations 2002.

⁸⁹ Article 3 of Directive (EC) 2000/31.

⁹⁰ Articles 14 and 15 of Directive (EC) 2000/31.

⁹¹ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821.

defamatory post upon the request of an Austrian user, Ms Eva Glawischnig-Piesczek. Ms Glawischnig-Piesczek obtained an injunction from Vienna's Commercial Court (*Handelsgericht*), and, eventually, Facebook removed the defamatory post. However, according to the claimant, there were two shortcomings. The first shortcoming was that access to the original post was only disabled for Austrian Facebook users and the second was that similar posts by other users were still visible. The consequence was that similar posts were still available on Facebook in Austria, and users outside of Austria could still view, share, and comment on the initially reported defamatory post. Vienna's Higher Regional Court (*Oberlandesgericht*) referred the question on the scope of the national rules implementing the E-Commerce Directive to the Austrian Supreme Court (*Oberster Gerichtshof*), which requested the Court of Justice of the European Union to provide a preliminary reference on the provision at stake. The CJEU has provided no strict geographical limitation of the Directive's provisions in its judgment, and the consequence is that content containing identical or equivalent content must be removed or disabled worldwide by platforms.⁹² This case has thus further defined online platforms' legal requirements concerning removing illegal content. It established that platforms could be under a duty to actively monitor content worldwide in specific circumstances: to remove content declared illegal by a court, including identical or similar content.⁹³

Platforms must also ensure that their users comply with the Audiovisual Media Services Directive (EU) 2018/1808.⁹⁴ The Directive contains a duty for social media platforms to ensure

⁹² *ibid* paragraph 53.

⁹³ See, for instance, Tobias Lutzi 'Liability for Internet Activities in EU Private International Law' in *Private International Law Online: Internet Regulation and Civil Liability in the EU* (Oxford University Press 2020); Aleksandra Kuczerawy and Clara Rauegger, 'Court of Justice Injunctions to remove illegal online content under the eCommerce Directive: *Glawischnig-Piesczek*' (2020) 57(5) *Common Market Law Review* 1495.

⁹⁴ Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2010] OJ L95/1. The old rules under Directive (EU) 2010/13 do not apply to social media platforms like YouTube (Recitals 23, 24, and 58 of Directive (EU) 2010/13). Directive (EU) 2010/13 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) [2010] OJ L95/1. See, e.g., Madeleine de Cock Buning, 'Life after the European Audiovisual Media Services Directive: social media influencers through the looking-glass in Goanta and Ranchordas (n 7) 48-50; Maria Lillà Montagnani and Alina Yordanova Trapova, 'Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market' (2018) 26(4) *International Journal of Law and Information Technology* 294.

that users disclose commercial communications and comply with certain safeguards, such as not infringing fundamental rights or advertising certain products such as tobacco.⁹⁵ However, the Directive has no specific rules for advertising financial products online.

It is also worth adding that content moderation procedures must comply with constitutional safeguards, such as freedom of expression.⁹⁶ Compliance with fundamental rights is particularly relevant in light of the adopted Digital Services Act,⁹⁷ which has been accompanied by an academic discussion on ‘injecting democratic values in online content moderation’ procedures.⁹⁸ Concerning the substantive rules on content moderation, the DSA will not impose an active duty to police content on the platform:⁹⁹ it will only require that social media platforms take down harmful or illegal content once they obtain knowledge of it.¹⁰⁰ The DSA will, nonetheless, significantly harmonise the EU’s Single Market rules¹⁰¹ and allow the European Commission to monitor and enforce platforms’ compliance with these rules.¹⁰² The DSA will even impose an audit requirement on large platforms¹⁰³ and, in case of non-compliance, even grant the Commission the power to impose significant fines tied to the

⁹⁵ Article 9(1) of Directive (EU) 2018/1808. de Cock Buning (ibid) 62-63.

⁹⁶ See for instance, Giancarlo F. Frosio, ‘Why keep a dog and bark yourself? From intermediary liability to responsibility’ (2018) 26(1) *International Journal of Law and Information Technology* 1; Niva Elkin-Koren and Maayan Perel, ‘Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law’ in Giancarlo F. Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020). See also, Case C-401/19 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:297. This is particularly important in light of algorithmic content moderation, see, e.g., Robert Gorwa, Reuben Binns, and Christian Katzenbach, ‘Algorithmic content moderation: Technical and political challenges in the automation of platform governance’ (2020) 7(1) *Big Data & Society* 1.

⁹⁷ 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 L277/1. The rules will apply from 17 February 2024 (Article 93).

⁹⁸ Giovanni De Gregorio, ‘Democratising online content moderation: A constitutional framework’ (2020) 36 *Computer Law and Security Review* 105374. For a more detailed overview see, e.g., Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 67ff.

⁹⁹ See, the discussion on the legislative process concerning Chapter 2 of the Proposal for a Regulation of 15 December 2020 on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2020] COM 825 final (hereafter DSA), discussed in Mark D. Cole, Christina Etteldorf, and Carsten Ullrich, *Updating the Rules for Online Content Dissemination: Legislative Options of the European Union and the Digital Services Act Proposal* (Nomos 2021).

¹⁰⁰ Article 5 of Regulation (EU) 2022/2065.

¹⁰¹ For a national example, see, e.g., the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz, short NetzDG) of 2017.

¹⁰² The Commission would even get the power to conduct on-site investigations, Article 54 of the proposed DSA Regulation.

¹⁰³ Article 28 of the proposed DSA Regulation.

global turnover of social media platforms.¹⁰⁴ It is worth emphasising that the UK will not adopt the DSA, and the UK Parliament still discusses the Online Safety Bill at the time of writing.¹⁰⁵

Consequently, platforms are currently not under an obligation to actively monitor content on their website, but they are required to act if they become aware of any illegal activity. They also must remove content declared illegal by a court, including identical or similar content, from their platform. This obligation raises several practical questions, for example, what falls within the category of ‘similar illegal content’, and it will be interesting to see how platforms, regulators, and courts interpret this legal duty.

4. Platform Governance Through Private Regulation

In the previous two Sections, the paper examined the practices and business models of Finfluencers and how EU and national law regulates them. The present Section examines how platforms regulate Finfluencer activities via their terms of service. All social media platforms have norms that govern and shape the behaviour of their users, which is the primary business model of social media platforms. The five largest social media platforms, Facebook, Instagram, YouTube, Twitter, and TikTok, form part of this case study. The following analysis substantively compares their practices and terms of service for Germany, Luxembourg, and the United Kingdom.

4.1 Facebook

The first platform under scrutiny is Facebook, which Meta Platforms Incorporated owns. Facebook has several guidelines, and the most relevant for Finfluencers are the Terms of Service,¹⁰⁶ Community Standards,¹⁰⁷ and Advertising Policies.¹⁰⁸

¹⁰⁴ Articles 57-59 of the proposed DSA Regulation.

¹⁰⁵ UK Draft Online Safety Bill of 12 May 2021 (CCSCS0421458742, CP 405).

¹⁰⁶ Facebook Inc, ‘Terms of Service’ (Facebook Inc 4 January 2022) <<https://www.facebook.com/terms.php?ref=pf#other-terms-policies>> last accessed 30 May 2022.

¹⁰⁷ Facebook Inc, ‘Facebook Community Standards: The Facebook Community Standards outline what is and isn’t allowed on Facebook.’ (Facebook Inc 2022) <<https://transparency.fb.com/en-gb/policies/community-standards/?source=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards>> last accessed 30 May 2022.

¹⁰⁸ Facebook Inc, ‘Advertising Policies’ (Facebook 2022) <<https://www.facebook.com/policies/ads/>> last accessed 30 May 2022.

The starting point of Facebook's Terms of Service is that disseminating content contrary to its terms is prohibited and anything 'unlawful, misleading, discriminatory or fraudulent'.¹⁰⁹ Specific guidelines outline prohibited practices, in the case of Finfluencers, the Community Standards and Advertising Policies.

Facebook's Meta Business Help Centre provides a detailed description of when, but not how, to disclose sponsored content.¹¹⁰ Facebook requires no disclosure for 'a share for a share' nor 'promoting your own products'. Posts containing paid placements, paid posts created and shared by third parties featuring influencers, paid to post content without any role in creating it, and receiving or giving away free products from third parties require a label. Facebook's guidelines reflect all the previously outlined legal requirements governing mandatory disclosures concerning the third and fourth categories of Finfluencer activities.¹¹¹ However, the guidelines do not provide country-specific guidelines, especially how to label sponsored content. Facebook merely requires a label, including via Facebook's disclosure tool.

The Community Standards prohibit any investment or financial scams, including 'investment scams with promise of high rates of return'.¹¹² The Advertising Policies go even further by prohibiting ads that promote 'financial products and services that are frequently associated with misleading or deceptive promotional practices', including initial coin offerings, binary options, and CFDs.¹¹³ In addition, promotions of credit cards, loans, insurance services, or any other financial services must comply with the respective information and formal requirements.¹¹⁴ The latter reflects the regulatory requirements in Article 23(3) of the MiFID

¹⁰⁹ Facebook Inc, 'Terms of Service: 3.2 What you can share and do on Meta Products' (Facebook Inc 2022) <<https://www.facebook.com/terms.php?ref=pf> last accessed 30 May 2022> last accessed 30 May 2022.

¹¹⁰ Facebook Inc, 'Meta Business Help Centre' (Facebook Inc 2022) <<https://www.facebook.com/business/help/150067102332664>> last accessed 30 May 2022.

¹¹¹ See Section 3.1 of the present article.

¹¹² Facebook Community Standards (n 108) Section 'Fraud and deception'.

¹¹³ Facebook Inc, 'Advertising Policies: 27. Prohibited financial products and services' (Facebook Inc 2022)

<https://www.facebook.com/policies/ads/prohibited_content/prohibited_financial_products_and_services/> last accessed 30 May 2022: 'Ads must not promote financial products and services that are frequently associated with misleading or deceptive promotional practices. Not allowed: X Initial coin offerings X Binary options X Contract for difference trading.'

¹¹⁴ Facebook Inc, 'Advertising Policies: 7. Financial and insurance products and services' (Facebook Inc 2022) <https://www.facebook.com/policies/ads/restricted_content/financial_services/> last accessed 30 May 2022: 'Ads promoting credit card applications or financial services with accredited institutions must clearly provide sufficient disclosure regarding associated fees, including APR percentages, transaction fees, interest rates and the physical address of the entity offering the product within the ad's landing page. Ads promoting credit cards, loans or insurance services must be targeted

II Directive (EU) 2014/65 in connection with Article 44 of the MiFID II Delegated Regulation (EU) 2017/565.¹¹⁵ Facebook is thus aware of the regulatory framework and decided to ‘gold-plate’ parts of the legal requirements under category 1 and 2 of Finfluencer activities.¹¹⁶

Meta has also created a so-called ‘Transparency Center’, which lists all content moderation policies, enforcement practices, and oversight procedures, including the Oversight Board’s decisions.¹¹⁷ According to Meta, their content moderation process is guided by the principles ‘remove, reduce, inform’. In other words, Meta first removes content that breaches its guidelines, then reduces the distribution of similar content and informs its users about the decision.¹¹⁸ Scholars have, however, criticised that internal regulations are not made public.¹¹⁹

Overall, Facebook decided not to enact stricter hidden marketing rules but went beyond the legal requirements by prohibiting ads on specific financial products. It is also worth noting that there were no differences between the platform rules in Germany, Luxembourg, and the United Kingdom.

4.2 Instagram

Meta Platforms Incorporated also owns Instagram and provides the exact terms of service just adapted to the platform. It is, therefore, not examined once again.

to people aged 18 or above. Ads promoting credit cards, loans or insurance services must not directly request the input of a person's financial information, including credit card information.’

¹¹⁵ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2017] OJ L87/1. See, e.g., Brenncke (n 82) 854ff.

¹¹⁶ See Section 3.2 of the present article.

¹¹⁷ Meta Platforms Inc, ‘Transparency Center’ (Meta Platform Inc 2022) <<https://transparency.fb.com/de-de/>> last accessed 14 March 2022.

¹¹⁸ *ibid.*

¹¹⁹ For example, see Catherine Bouko, Pieter Van Ostaeyen, and Pierre Voué, ‘Facebook’s policies against extremism: Ten years of struggle for more transparency’ (2021) 26(9) *First Monday* 1.

4.3 YouTube

YouTube, which Alphabet (formerly Google) owns, is a video and streaming platform. YouTube's Terms of Service,¹²⁰ Community Guidelines,¹²¹ and Advertising Policies¹²² govern the platform, but only the last one addresses Finfluencer activities.

YouTube's Advertising Policy states that creators and brands must be aware and abide by local laws that govern 'paid product placement, sponsorships & endorsements'; they must also inform YouTube prior to uploading the content.¹²³ YouTube also provides that they will inform users about sponsored content at the beginning of the video, but it might not be sufficient depending on local laws (Finfluencer categories 3 and 4).

Another section of YouTube's Advertising Policies deals with financial services, which only provides that creators must comply with local laws and refer to a non-exhaustive list of country-specific rules. For the EU and the UK, YouTube cites Article 9 of the Audiovisual Media Service Directive.¹²⁴ Country-specific rules for Germany,¹²⁵ Luxembourg,¹²⁶ and the UK¹²⁷ do not apply to Finfluencer activities (Finfluencer categories 1 and 2).

¹²⁰ Google Ireland Limited trading as YouTube, 'Terms of Service' (YouTube 5 January 2022) <<https://www.youtube.com/static?template=terms>> last accessed 28 May 2022.

¹²¹ YouTube, 'Rules and Policies: Community Guidelines' (YouTube 2022) <<https://www.youtube.com/intl/en/howyoutubeworks/policies/community-guidelines/#community-guidelines>> last accessed 29 May 2022. It does contain a 'sale of illegal or regulated goods or services policies' section, but it does not address financial products.

¹²² YouTube, 'Advertising Policies Help' (YouTube 2022) <<https://support.google.com/adspolicy/answer/6008942>> last accessed 29 May 2022.

¹²³ YouTube, 'Add paid product placements, sponsorships & endorsements' (YouTube January 2021) <<https://support.google.com/youtube/answer/154235?hl=en#zippy=%2Cwhere-not-to-include-paid-product-placements-sponsorships-endorsements%2Cwhat-do-we-mean-when-we-talk-about-paid-product-placements-sponsorships-endorsements%2Cdo-i-need-to-tell-youtube-if-a-video-has-a-paid-product-placement-endorsement-or-other-commercial-relationship%2Cwhat-happens-when-i-check-the-my-video-contains-paid-promotion-like-a-product-placement-sponsorship-or-endorsement-box%2Cwill-youtube-still-run-ads-against-these-videos%2Cdo-i-need-to-tell-anyone-else-about-any-commercial-relationship-connected-to-my-video%2Cis-there-a-feature-that-can-help-me-inform-viewers-about-paid-promotion-in-my-videos%2Cdoes-this-mean-i-can-burn-video-ads-pre-rolls-mid-rolls-and-post-rolls-into-my-videos%2Ccan-i-use-a-title-card-beforeafter-the-video-with-the-marketers-or-sponsors-brand-name-product-info>> last accessed 28 May 2022.

¹²⁴ YouTube, 'Legal Requirements' (YouTube 2022) <<https://support.google.com/adspolicy/answer/6023676#zippy=%2CTroubleshooter-local-legal-requirements%2CAudiovisual-media-services-directive>> last accessed 29 May 2022.

¹²⁵ *ibid* Section 'Legal Requirements: Germany'. YouTube states that the following items cannot be advertised according to local laws: 'HIV test kits; Radar detection products; Scientology; Secret paternity tests'.

¹²⁶ *ibid* Section 'Legal Requirements: Luxembourg'. YouTube states that the following item cannot be advertised according to local laws: 'Radar detection products'.

¹²⁷ *ibid* Section 'Legal Requirements: United Kingdom'. YouTube states that the following items cannot be advertised according to local laws: certain teeth whitening products and secret paternity tests.

YouTube thus provides little guidance for creators and also decided not to ‘gold-plate’ any legal requirements. The platform rules are also the same for Finfluencers in the three jurisdictions under examination.

4.4 TikTok

TikTok has terms of service that exclusively apply to the European Economic Area, the United Kingdom, and Switzerland. These terms outline several banned practices or require authorisation by the platform.¹²⁸

TikTok requires consent for ‘any commercial or unauthorized purpose, including communicating or facilitating any commercial advertisement or solicitation or spamming’.¹²⁹ Any activities that create a conflict of interest or undermine their service, including skill reviews, are also banned.¹³⁰ TikTok’s terms provide a general clause prohibiting user activities that ‘either intentionally, recklessly or negligently upload, transmit, distribute, store or otherwise make available: any material which does or may infringe applicable laws’.¹³¹ Finally, pyramid schemes or any other prohibited solicitation are strictly forbidden.¹³²

TikTok’s Community Guidelines also ban many practices, including ‘Ponzi, multi-level marketing, or pyramid schemes; Content that promotes investment schemes with promise of high returns, fixed betting, or any other types of scams.’¹³³

TikTok’s Terms of Service and Community Guidelines govern certain forms of Finfluencer activities on their platform but have not addressed all previously defined categories of Finfluencer activities. In particular, TikTok provides no guidance on online marketing (Finfluencer categories 3 and 4). However, they require permission for any commercial activities. Regarding the Finfluencers’ legal requirements under financial law, TikTok bans

¹²⁸ TikTok Inc, ‘Terms of Service (If you are a user having your residence in the EEA, the United Kingdom or Switzerland) Last updated: July 2020’ (TikTok Inc 2022) <<https://www.tiktok.com/legal/terms-of-service#terms-eea>> last accessed 27 May 2022.

¹²⁹ Section 7 paragraph 5 of TikTok’s Terms of Service.

¹³⁰ Section 7 paragraph 13 of TikTok’s Terms of Service.

¹³¹ Section 7 paragraph 14(1) of TikTok’s Terms of Service.

¹³² Section 5 paragraph 14 of TikTok’s Terms of Service.

¹³³ TikTok Inc, ‘Community Guidelines’ (TikTok Inc 2022) <<https://www.tiktok.com/community-guidelines?lang=en>> last accessed 27 March 2022, Section ‘Frauds and scams’. This Section also states that: ‘We do not permit anyone to exploit our platform to take advantage of the trust of users and bring about financial or personal harm. We remove content that deceives people in order to gain an unlawful financial or personal advantage, including schemes to defraud individuals or steal assets.’

illegal practices, such as Ponzi schemes, but does not provide further guidance (Finfluencer categories 1 and 2).

4.5 Twitter

The Twitter Rules contain Twitter's primary set of rules for its platform.¹³⁴ It contains a section on 'illegal or certain regulated goods or services', but financial products or scams are not explicitly listed here.¹³⁵ Twitter's Terms of Service¹³⁶ and Platform Use Guidelines provide further content rules¹³⁷ but do not address hidden marketing or ads on financial products.¹³⁸

However, the Twitter Ads Policies address in detail which financial products can be advertised on their platform depending on the jurisdiction and product.¹³⁹ Twitter has a total global ban policy, including binary options,¹⁴⁰ and a non-exhaustive list of restricted practices, including investment advice, opportunities, and offers to increase wealth for many financial products.¹⁴¹ The list of restricted advertisements also extends to crypto assets. However, Twitter decided that they could be marketed in, for instance, Germany and the UK, 'subject

¹³⁴ Twitter Inc, 'The Twitter Rules' (Twitter Inc 2022) <<https://help.twitter.com/en/rules-and-policies/twitter-rules>> last accessed 27 May 2022.

¹³⁵ Twitter Inc, 'Illegal or certain regulated goods or services' (Twitter Inc April 2019) <<https://help.twitter.com/en/rules-and-policies/regulated-goods-services>> last accessed 27 May 2022.

¹³⁶ Twitter Inc, 'Twitter Terms of Service: If you live in the European Union, EFTA States, or the United Kingdom' (Twitter Inc 2022) <<https://twitter.com/en/tos#intlTerms>> last accessed 27 May 2022, both sections of the Terms of Service that are effective until and from 10 June 2022.

¹³⁷ Twitter Inc, 'Platform Use Guidelines' (Twitter Inc 2022) <<https://help.twitter.com/en/rules-and-policies>> last accessed 27 May 2022.

¹³⁸ Twitter did, however, include a clause that users must make sure that they comply with all applicable laws and regulations. Twitter Inc, 'Guidelines for Promotions on Twitter' (Twitter Inc 2022) <<https://help.twitter.com/en/rules-and-policies/twitter-contest-rules>> last accessed 27 May 2022.

¹³⁹ Twitter Inc, 'Twitter Ads policies' (Twitter Inc 2022) <<https://business.twitter.com/en/help/ads-policies.html>> last accessed 27 May 2022. It is worth mentioning that Twitter included a statement that 'advertisers in the UK should be aware of additional marketing regulations that may apply. Further information that may be found useful is available in the CAP Code and the resources provided by the Advertising Standards Authority.' The statement also provided hyperlinks to the CAP Code and the ASA website, but such a provision does not exist for Germany or Luxembourg.

¹⁴⁰ Twitter Inc, 'Financial products and services' (Twitter Inc 2022) <<https://business.twitter.com/en/help/ads-policies/ads-content-policies/financial-services.html>> last accessed 27 May 2022: 'Prohibited globally - The advertising of the following is prohibited globally: Payday loans, cash loans, and P2P*; Cryptocurrency initial coin offerings (ICOs), Initial exchange offering (IEO), Initial decentralised exchange offering (IDExO); Decentralised crypto borrowing / lending, DeFi insurance, DApps, Decentralised exchanges; Cryptocurrency mining; Binary options; Bail bonds; *Indonesia permits P2P lending. Refer to the country specific policy below.'

¹⁴¹ *ibid.*

to local laws’ and prior authorisation from Twitter.¹⁴² Finfluencers advertising financial products and services must also ‘provide necessary disclosures, balanced information of risks and benefits, and all information that must be provided to the investor; Be clearly identified as financial services; Indicate the nature and specific type of financial service’. Another requirement is an advertisement restriction for these products in certain jurisdictions, including Germany and the UK but not Luxembourg.¹⁴³

It follows that Twitter has taken a nuanced approach to account for local laws for ads on financial products marketing (Finfluencer categories 1 and 2). They also decided to ‘gold-plate’ specific rules and not allow for any financial products or services advertisements in Luxembourg. Despite the partly stricter standards, Twitter failed to provide any guidance on hidden marketing (Finfluencer categories 3 and 4). Twitter merely provides that creators and brands must comply with applicable regulations, providing a hyperlink to the US Federal Trade Commission guidelines and that commercial content must contain the ‘#ad’.¹⁴⁴

5. Concluding Remarks

This article explored the practices and business models of Finfluencers and how regulators and platforms govern their activities. The present paper divided the practices and business models into four categories based on existing evidence and case law. Each category examined the financial incentives, revenue sources, conflicts of interest, and potential harms. Not only the Finfluencers benefitted in each case, but naturally, the social media platforms hosting the content. The paper then demonstrated that the legal framework governing Finfluencers is complex. Rules on unfair commercial practices, financial law, media law, and platform governance apply to Finfluencer activities. There is further complexity because rules exist on the EU and national level, case law by the CJEU and national courts, and administrative decisions by the ESMA and national regulators. Several shortcomings in the rules were also

¹⁴² *ibid.* Luxembourg was not mentioned.

¹⁴³ *ibid.* Twitter also provides that certain services are subject an authorisation scheme by the UK Financial Conduct Authority and that the promotion of certain products is prohibited, including crypto derivatives.

¹⁴⁴ Twitter Inc, ‘About rules and best practices with account behaviors’ (Twitter Inc 2022) <<https://help.twitter.com/en/rules-and-policies/twitter-rules-and-best-practices>> last accessed 27 May 2022, Section ‘Paid partnership’. In the German version they referred to ‘#ad’, ‘#Anzeige’ and ‘#Werbung’. Twitter Inc, ‘Über Regeln und Best Practices für Account-Verhalten’ (Twitter Inc 2022) <<https://help.twitter.com/de/rules-and-policies/twitter-rules-and-best-practices>> last accessed 27 May 2022, Section ‘Kostenpflichtige Partnerschaft’.

detected, for instance, legal duties concerning unfair commercial practices only apply to Finfluencers considered traders or the EU Market Abuse Regulation includes additional information duties that only apply to experts. Legislators should refrain from drawing such a distinction considering the significant harm consumers can sustain from obtaining incorrect financial information online and the difficulty for consumers to distinguish between trader or consumer/non-expert and expert Finfluencers. In addition, the decentral enforcement approach means that standards may differ between Member States. At this stage, it is still unclear whether national regulators are sufficiently protecting consumers because there is no data on the enforcement of the existing rules. Following the doctrinal analysis, the paper critically examined how platforms govern Finfluencer activities. Some platforms included almost all underlying legal rules in their community guidelines or even decided to ‘gold-plate’, while others barely addressed it. Unlike the Unfair Commercial Practices Directive and EU Market Abuse Regulation, platforms had no separate standards for trader or consumer/expert or non-expert Finfluencers. Reasons why platforms decided to ‘gold-plate’ certain rules are not apparent. For instance, one platform banned users from advertising financial products in Luxembourg. This confirms the claim of Tarleton Gillespie that content moderation ‘is not an ancillary aspect of what platforms do’ but ‘essential, definitional, constitutional’.¹⁴⁵ The discussion on platform governance also touched on the idea of democratising platform rules, including the option to allow users to hide content on financial products. This feature would, for example, help users suffering from gambling addictions, which, as shown in a UK Financial Conduct Authority study, would protect them from the gamification of financial products. Several points were also left uncharted in this paper, including the role of advertisers. Contracts between brands and Finfluencers are not public and likely contain a non-disclosure clause. Further research is thus needed to examine the roles and legal responsibilities of all participants in the advertising supply chain.

¹⁴⁵ Gillespie (n 86) 21.