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Contents:

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General Structure: Table of Contents (will not be included in final chapter)

1. Introduction

2. Legal Framework and Developments

2.1 The Unfair Commercial Practices Directive and Influencer Marketing

2.2 Recent Cases in Germany and the United Kingdom

3. Research Methodology

3.1 Gathering Data from the Standard Terms

3.2 Selected Provisions for the Empirical Study

4. Empirical Investigation

4.1 Substantive Comparison

4.2 Findings

4.3 Discussion and Implications

5. Conclusion

Abstract

This chapter examines the rules applicable to influencer marketing, and whether the five selected social media platforms themselves comply with the relevant legal obligations. The first part elucidates the laws governing hidden marketing in Germany and the United Kingdom, in particular the implementing laws and associated case law under the Unfair Commercial Practices Directive. It then compares and assesses the platforms' standard terms by deploying an empirical legal approach, namely content analysis. It is revealed that some platforms comply almost entirely with the determined rules, while others do not address disclosures at all. The chapter argues that platform governance through private regulation is suitable to address some of the concerns of hidden influencer marketing, but that a multifaceted approach is necessary, building upon the wealth of policy options considered by European and national regulators.

1. INTRODUCTION

Influencer marketing is an essential advertising strategy for brands that want to promote their goods and services using social media. Influencers present and endorse those goods and services on their channels in exchange for free products, discounts for their followers, and so on. Different forms of sponsorship exist such as product placement, reviews, or giveaways. Influencers may include this in their regular content, making it difficult for consumers to determine whether it is a true endorsement or not. Over time, influencers build a bond with their audience and ultimately gain their trust. What is striking is that brands rely upon the trust that followers place in influencers in order to promote and sell their goods and services. However, at the same time, consumers are the ones who need to be aware about whether content is sponsored by brands or not. Otherwise, they might be misled by perceiving an advertisement as an endorsement.

From a legal point of view, it is not easy to be a social media influencer. They need to comply with both the standard terms of social media platforms and the applicable legal obligations. A hotchpotch of rules applies to their business practices. In particular, recent jurisprudence in Germany and the United Kingdom exemplify the new challenges regulators are faced with. This has also been supported by empirical evidence: a recent Princeton University study revealed that influencers mostly do not disclose their relationship with brands.¹ The findings suggest that not all influencers seem to be aware that they need to disclose hidden marketing. This ultimately creates new challenges as consumers need to be adequately protected from misleading advertisements, yet consumer authorities have a difficult time monitoring the activity of the hundreds of thousands of influencers in their own jurisdictions. The question therefore arises whether in order to achieve a feasible level of consumer protection, platform governance through private regulation is suitable to address the issue of non-compliance amongst influencers. Consequently, it is of interest to explore whether the platforms' standard terms themselves comply with the rules on disclosure.

This chapter examines the applicable European and national rules (Germany and United Kingdom), compares the standard contract terms of five leading social media outlets (YouTube, Facebook, Instagram, Snapchat, and Pinterest), and ultimately assesses whether they comply with the legal obligations governing disclosures of different forms of hidden marketing. This empirical approach is necessary to provide further insights to complement the existing discussion on the regulation of social media influencers, which is primarily doctrinal.²

Section 2 defines the legal framework and addresses recent developments on disclosures at the European Union level, focussing on Germany and the United Kingdom. The empirical methodology used in this paper is outlined in section 3. The chapter then moves on and substantively compares and empirically investigates whether the standard terms of the chosen platforms comply with the selected rules governing disclosures. Finally, section 5 offers some concluding remarks and reflects upon the challenges of how to adequately regulate influencer marketing.

¹ Arunesh Mathur, Arvind Narayanan, and Mashini Chetty, 'Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest' (2018) (2) *Proceedings of the ACM on Human-Computer Interaction* 119.

² cf Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) 8(2) *Journal of European Consumer and Market Law* 64. Gönenç Gürkaynak, Ç. Olgu Kama, and Burcu Ergün, 'Navigating the Uncharted Risks of Covert Advertising in Influencer Marketing' (2018) 39(1) *Business Law Review* 17. Laura Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' (2018) 59(3) *William and Mary Law Review* 1123.

2. LEGAL FRAMEWORK AND DEVELOPMENTS

Some influencers may have the impression that they are only required to comply with the community guidelines of online platforms. From a legal point of view, community guidelines are standard contract terms which create their own legal order, binding influencers and consumers alike.³ These community guidelines regulate the behaviour of all social media users in great detail. The scope is very broad and ranges from prohibited content to data protection. Research into standard contract terms suggests that consumers barely read the fine print.⁴ This is not surprising, considering the length and complexity of such terms. Platforms have not only created their own platform rules, but they also enforce them within their jurisdiction.⁵ Content moderation is one way to ensure that all users abide by the rules of online platforms. Algorithms and so-called content moderators decide which content should be visible on the platform. Algorithms can already detect a variety of prohibited content, but it is still mostly content moderators that review reported posts that contain anything from hate speech to misinformation.⁶ A wide range of sanctions are deployed, where users can be temporarily banned or permanently blocked. This new legal paradigm is of significant academic interest, as platforms take on the role of the legislature, judiciary, and executive. Applicable legal standards can under no circumstances be set aside by those standard terms – at least not within the European Union.

Disclosures of hidden marketing fall within the material scope of national rules implementing the Unfair Commercial Practices Directive (UCPD).⁷ The UCPD is a maximum harmonisation instrument and Member States are left without much room for regulatory experimentation. It is nonetheless worth exploring the implementation process of the Directive as well as recent cases in Germany and the United Kingdom. The New Deal for Consumers is not taken into account for the doctrinal analysis as the rules are not applicable yet.⁸ Nonetheless, this regulatory proposal is considered in the policy recommendations later on in the chapter (section 4.3).

2.1 The Unfair Commercial Practices Directive and Influencer Marketing

One goal of the Unfair Commercial Practices Directive is to protect consumers from misleading and aggressive marketing. The Directive aims to ensure that consumers make informed choices. Practices that are unfair and distort competition are listed within the instrument, allowing consumers, as well as other stakeholders, to take action.

The UCPD is the result of an ambitious effort to fully harmonise unfair commercial practices in business-to-consumers (B2C) transactions within the European Union. The debate and harmonisation process began long before the social media industry was created, namely with the enactment of the EC Treaty. It worth noting that the Preamble of the Treaty already

³ See 'Community Guidelines, or the Sound of No' in Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018).

⁴ Florencia Marotta-Wurgler et al., 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *The Journal of Legal Studies* 31-32.

⁵ See Davd S Evans, 'Governing Bad Behavior by Users of Multi-Sided Platforms' (2012) 27 *Berkeley Technology Law Journal* 1201. Tarleton Gillespie, 'Platforms Are Not Intermediaries' (2018) 2 *Georgetown Law Technology Review* 198-200.

⁶ 'The Human Labor of Moderation' in Tarleton Gillespie (n 3).

⁷ Directive 2005/29/EC of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market.

⁸ Commission, 'A New Deal for Consumers' (Communication) COM (2018) 183 final.

enshrined the principle of fairness in competition.⁹ Decades of debate and regulation led to the 2001 Green Paper on EU Consumer Protection.¹⁰ It was reported in the Green Paper that the number of different legal obligations in the Member States are negatively affecting businesses and consumers alike.¹¹ A Communication document followed in 2002¹² before the first proposal for a Directive was published by the European Commission in 2003.¹³ The final proposal was adopted under Article 95 EC (now Article 114 TFEU) by the Council on 11 May 2005.¹⁴ Unsurprisingly, the adoption was controversial. Italy, Lithuania, Luxemburg, Portugal, Spain, and the United Kingdom heavily criticised the Directive. Denmark and Sweden even voted against the final draft because of the shift from minimum to maximum harmonisation in consumer law,¹⁵ which was in sharp contrast to the Commission's strategy. The underlying reason to prefer maximum harmonisation is founded on the idea of market integration. The Directive marked this shift and maximum harmonisation was chosen to 'considerably increase legal certainty for both consumers and business'.¹⁶ As a result, Member States are barred from diverging from the level of protection under the Directive (Article 4). This was the concern of Sweden and Denmark. Both countries already provided for a higher level of protection and had to lower their standards.¹⁷ Crucially, Member States are not permitted to adopt or have in place stricter rules than those provided in maximum harmonisation Directives 'even in order to achieve a higher level of consumer protection'.¹⁸ Furthermore, Article 1 of the Directive clarifies this: 'the purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws'.¹⁹ But limited regulatory competition, including that some countries must ultimately lower their standards, must be weighed against legal certainty.²⁰

The nucleus of the Directive is to be found in Article 5(1), which prohibits unfair commercial practices. Unfair commercial practices are defined as an act 'contrary to the requirements of professional diligence' (Article 5(2)(a)) which 'materially distorts or is likely to materially distort the economic behaviour [...] of the average consumers' (Article 5(2)(b)). The general test of unfairness in Article 5(4) is divided into two categories: misleading (Article 6 and 7) and aggressive (Article 8 and 9) practices. The prohibited practices are further defined in Annex I ('black list') of the Directive. Thirty-one practices are listed that are under 'all circumstances considered unfair'; twenty-three misleading and eight aggressive practices.²¹ Section 11 of

⁹ See Hans-W. Micklitz et al., *European Consumer Law* (2nd edn, Intersentia) 70-76. Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2013) 238-239.

¹⁰ Commission, 'Green Paper on European Union Consumer Protection' COM (2001) 531 final, 2 October 2001.

¹¹ *Ibid* p. 9-10.

¹² Commission, 'Follow-up Communication to the Green Paper on EU Consumer Protection' COM (2002) 289 final.

¹³ Commission, 'Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC' (the Unfair Commercial Practices Directive) COM (2003) 356 final.

¹⁴ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

¹⁵ Micklitz (n 9) 76.

¹⁶ Recital 12 Directive 2005/29/EC.

¹⁷ Weatherill (n 9) 242.

¹⁸ Joined Cases C-261/07 and 299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV* (CFI, 23 April 2009) para 52.

¹⁹ Article 1 Directive 2005/29/EC.

²⁰ The exceptions to full harmonisation have not been applicable since 12 June 2013 (Article 3(5) and (6)).

²¹ Weatherill (n 9) 239-242.

Annex I is of particular interest with regard to disclosures. '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'. Equally section 22 of Annex I is a relevant and prohibited unfair commercial practice. '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 two sections of Annex I are further explored in section 3.2 of this chapter.

The material scope of Directive 2005/29 on unfair business-to-consumer commercial practices in the internal market is horizontal and non-sectoral in scope. All commercial practices that take place before, during, and after a B2C transaction fall within the scope of the Directive (Article 3(1)).²² Furthermore, non-EU businesses are required to comply with the Directive, for example where misleading advertising is targeted at consumers within the EU and the practice harms the collective interests of EU consumers.²³ The Directive regulates unfair business practices, harmonises the rules governing disclosures, and covers 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.²⁴ Only interests which are of an economic nature are covered,²⁵ excluding practices concerning health and safety,²⁶ or 'taste and decency'.²⁷ A trader is defined under Article 2(b) as '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.' This definition subsequently includes traders who act 'in the name of or on behalf of another trader.' The CJEU further defined this as to include 'any gainful activity and does not exclude from its scope either bodies pursuing a task of public interest or those which are governed by public law.'²⁸ This is of significant interest when assessing the liability of social media influencers and brands as both are held liable under the UCPD. Member States were obliged to apply the rules under the Directive by 12 December 2007 (Article 19).

Germany implemented the Unfair Commercial Practices Directive in 2008. The German Government chose to amend the Act against Unfair Competition (*Gesetz gegen den Unlauteren Wettbewerb* (UWG)). The implementation process not only sparked criticism, but even ended up in the Court of Justice, which first ruled that Germany did not implement the Directive in time.²⁹ Moreover, it was determined in a later case that some rules were not correctly implemented.³⁰ The United Kingdom implemented the Unfair Commercial Practices Directive in 2008 with the Consumer Protection from Unfair Trading Regulations 2008 (CPR 2008).³¹ This instrument came into force on 26 May 2008. In addition, the Directive allows for the use of codes of conduct for industries under Article 10. This provision requires that traders comply with codes of conduct, which are defined as 'an agreement or set of rules not imposed

²² See also Recital 13 Directive 2005/29/EC.

²³ Article 6(1) of the Rome II Regulation No 846/2007.

²⁴ Article 2 (d) Directive 2005/29/EC.

²⁵ Recital 4 and Article 1 Directive 2005/29/EC.

²⁶ Recital 9 and Article 3 (1) Directive 2005/29/EC.

²⁷ Recital 7 Directive 2005/29/EC.

²⁸ Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (CFI, 3 October 2013) para. 32.

²⁹ Case C-326/08 *Commission v Germany* (20 March 2009).

³⁰ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschafts mbH* (CFI, 14 January 2010).

³¹ The Consumer Protection from Unfair Trading Regulations 2008 of 8 May 2008.

by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors' (Article 2(f)). One example where rules on disclosures can be found is the Committee of Advertising Practice (CAP) Code in the United Kingdom.³²

The enforcement of the Directive is left to the Member States according to Article 11: 'Member States shall ensure adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.' Consequent penalties are laid down by the Member States.³³ It is important to note that Directive 2009/22 and Regulation 2006/2004 complement the UCPD, as the former instrument allows for cross-border claims and the latter for further collaboration amongst the national enforcement authorities.³⁴

2.2 Recent Cases in Germany and the United Kingdom

There is a high volume of case law on social media advertising in both jurisdictions which deserves attention. The German and UK courts have recently focused on technical aspects of disclosures – with interesting results.

A prominent German influencer with more than one million followers published a paid promotion on Instagram for a German chemist's shop. The social media post provided that the latter would offer a forty percent discount to all its customers on the following day. Below the post, the influencer used six hashtags of which the second one was '#ad'. The case ended up in the Regional Court (*Landgericht*) of Hannover, as the claimant believed that the hashtag used was not sufficient to classify it as a commercial communication. The court in Hannover ruled in favour of the influencer, concluding that the commercial intent is obvious from the context.³⁵ In the appeal, the Higher Regional Court (*Oberlandesgericht*) in Celle came to a different conclusion.³⁶ The Court ruled in June 2017 that using the hashtag ad ('#ad') is not sufficient to declare that the content is a paid promotion: it needs to be labelled as an advertisement (*Werbung* or *Anzeige*). Furthermore, the Court ruled that it was not obvious from the social media post that it was a commercial communication. The commercial intent was not obvious from the circumstances, as the influencer used a picture in the same way as in any other post that had not been sponsored. Furthermore, several emojis were used to make it look informal. Therefore, it was held that the practice constituted an unfair commercial practice under § 5a par. 6 UWG. Similarly, the Regional Court (*Landgericht*) in Hagen ruled in September 2017 that tagging the brand with '@' or '#' is not a sufficient disclosure.³⁷ In this case, an influencer included a link in the Instagram picture and tagged the brand with the two mentioned characters in the comment section. The complexity of the matter was further exemplified by a decision of the Regional Court (*Landgericht*) in Berlin in May 2018 to the effect that tagging the brand in the Instagram picture itself is not sufficient.³⁸ In all cases it was ruled that commercial communications must be clear as such according to

³² See section 2 CAP Code.

³³ Article 13 Directive 2005/29/EC.

³⁴ See Weatherill (n 9) Chapter 10 and 247-248.

³⁵ LG Hannover, 08.03.2017 - 23 O 5/17.

³⁶ OLG Celle, 08.06.2017 - 13 U 53/17.

³⁷ LG Hagen, 13.09.2017 - 23 O 30/17.

³⁸ LG Berlin, 24.05.2018 - 52 O 101/18

§ 6 para. 1 no. 1 TMG and § 58 RStV, as they otherwise constitute an unfair commercial practice under § 5a par. 6 UWG.

Similar developments have occurred in the United Kingdom. One prominent example is the infamous Oreo Case in 2014. The UK Advertising Standards Authority (ASA) opened proceedings against Mondelez UK Ltd,³⁹ where various British social media celebrities participated in an Oreo eating challenge. The influencers were paid, provided with the cookies, and instructed on how to carry out the challenge. Subsequently, the challenge went viral – as did the legal proceedings afterwards. The main legal issue was that the initiated challenge was not identifiable as a marketing communication. Mondelez instructed the influencers to declare it as sponsored content. Some influencers thanked Mondelez in the video for ‘making this possible’ while others stated that the video was created with Oreo.⁴⁰ This is a clear violation of the Committee of Advertising Practice (CAP) Code which requires ads to be obviously identifiable as marketing communications. Crucially, the commercial intent of the Oreo eating challenge was not identifiable, which breached sections 2.1 and 2.4 of the CAP Code. Following the investigation by the Advertising Standards Authority, the Competition and Markets Authority (CMA) initiated study on online review and endorsements in 2015.⁴¹ As a result of the findings, the CMA raised concerns about commercial practices in the social media sector. The authority has found that various brands may be paying for advertorials and sponsored content but do not ensure that the commercial intent is identifiable to consumers.⁴² Ultimately, the Competition and Markets Authority recommends that the brands, platforms, and influencers should ensure that commercial practices are identifiable as such. The CMA refers to the guidance document by the Advertising Standards Authority that can be used by the stakeholders.⁴³ Further cases against influencers and brands were opened such as against Wahoo Fitness (UK) Ltd in March 2018.⁴⁴ The Advertising Standards Authority confirmed that the labels ‘thanks to Wahoo Fitness for the products used in this video’ and ‘thanks to our sponsors’ did not suffice to declare it as an advertisement. The issue was that the label was not sufficient and it was also insufficiently prominent in the video. As a consequence, the ASA ruled that the labelling was in breach of the CAP Code.

3. RESEARCH METHODOLOGY

The following discussion will scrutinise the standard terms in order to determine the levels of compliance amongst social media platforms. As indicated above, this is necessary because the behaviour of influencers is highly affected by it. Measuring compliance of the standard terms with the applicable rules will be achieved by means of a qualitative approach, more specifically content analysis. Content analysis is generally used to explore texts (e.g. cases, reports, or legislation) or generated texts (e.g. interviews or surveys)⁴⁵ and is commonly deployed to

³⁹ Advertising Standards Authority (ASA) Adjudication against Mondelez (UK) Ltd, 26 November 2014.

⁴⁰ Ibid Response.

⁴¹ Competition and Market Authority (CMA), ‘Online reviews and endorsements: report on the CMA’s call for information’ (19 June 2015) CMA41.

⁴² Ibid 39-40

⁴³ Updated version: Advertising Standard Authority, ‘An Influencer’s Guide to making clear that ads are ads’ (28 September 2018).

⁴⁴ Advertising Standards Authority (ASA) Adjudication against Wahoo Fitness (UK) Ltd, 7 March 2018.

⁴⁵ See Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

extract data from standard terms.⁴⁶ Like many other techniques in empirical legal research, this technique is borrowed from the social sciences.⁴⁷

The scope of the inquiry will be limited to five major platforms and two jurisdictions. This approach allows for the assessment of whether the standard terms of the five chosen platforms comply with the identified legal rules on disclosures.⁴⁸ Crucially, the methodology allows for empirical insights into levels of compliance amongst platforms. The data and variable selection process is outlined further below.

Before embarking upon a more detailed elaboration of the methodology of this study, it is worthwhile to address some of its limitations. First and foremost, the scope of the study is limited to the case law and implementing rules concerning disclosures of sponsorship under the Unfair Commercial Practices Directive. It does not consider other consumer rules such as on the protection of minors or data protection. Another limitation is the relatively small sample size. Not all EU Member States are examined, in terms of rules applicable to disclosures and in terms of standard terms provided by the platforms. Furthermore, only a selection of social media platforms is examined. The five selected platforms represent the most commonly used ones, but there certainly are more platforms available to consumers.

3.1 Gathering Data from the Standard Terms

It is common for empirical scientists use existing datasets for their studies.⁴⁹ However, no dataset or study on whether platforms comply with the rules concerning disclosures existed at the time of writing. The data was collected by picking the most frequently used social media platforms and scrutinising their standard terms. It is worth noting that the standard contract terms include community guidelines, advertising policies, and FAQs. All data was collected in the first week of January 2019 and stored as evidence: relevant passages are included in this part of the chapter. Legal provisions that govern disclosures are selected and the standard terms are examined by using a compliance scale. The scale is used to measure the different levels of compliance with the applicable legal obligations. The first category is compliance: the platform fully complies with the identified legal obligation. The second category is silence: the platform is silent on the matter, which is legal, but is not desired from the perspective of an influencer. The third category is non-compliance: the platform does not comply with the underlying legal rules, which is a grey area. It means that influencers would have to break the law to upload content to the platform. To conclude the analysis, the findings are presented in

⁴⁶ See Florencia Marotta-Wurgler, 'Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements' (2008) 5(3) *Journal of Empirical Legal Studies* 447. Marco Loos and Joasia Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 63. Rowena Vasquez-Sosas, 'The Language of Agreement: A Content Analysis of Employment Contracts' (2017) 12(2) *Journal of Humanities and Social Science* 2279.

⁴⁷ See Christoph Engel, 'Behavioral Law and Economics: Empirical Methods' in Eyal Zamir and Doron Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2014). Frans Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' (2015) 11(2) *Utrecht Law Review* 19. Gijs van Dijck et al., 'Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions' (2018) 2 *Erasmus Law Review* 105.

⁴⁸ See Steve Meili, 'Consumer Protection' in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

⁴⁹ See Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63. Jeffrey J Rachlinski, 'Does Empirical Legal Studies Shed More Heat than Light? The case of Civil Damage Awards' (2016) 29(4) *Ratio Juris* 556. Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) *Tilburg Law Review* 34.

the form of text and tables. This approach allows for a comparison between the platforms and can pave the way towards tracking future amendments of standard terms.

3.2 Selected Provisions for the Empirical Study

The primary focus of this part of the chapter is the empirical examination of standard terms. This examination requires that certain legal scenarios are considered. Domestic legislation, case law, academic literature, as well as publications and guidelines of the regulatory bodies, in Germany the *Medienanstalt* and in the UK the Advertising Standards Authority, were consulted to provide a list of possible legal scenarios. While it is not claimed that the list is exhaustive, it took into account the aforementioned sources, as well as the selected terms of social media platforms. Overall, nine different scenarios were taken into account for the empirical examination. The legal sources are provided in the footnotes (see footnotes 54-62). However, the two aforementioned blacklisted practices are omitted as they apply to all scenarios.⁵⁰

The Unfair Commercial Practices Directive is clear about hidden marketing. The blacklist of unfair commercial practices (Annex) explicitly prohibits two practices that are nonetheless common among influencers. Section 11 Annex I bans '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 (advertorial)'. Section 22 Annex I is equally relevant. '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.' Influencers who do not declare that a post is paid for by a third party or who falsely create the impression that they are consumers can be held liable under the implementing measures of the UCPD.⁵¹ If the practice falls outside the scope of the blacklist, it could be classified as a misleading omission (Article 7(2)) which is likely to distort the transactional decision of the average consumer. In case it falls outside of the scope of Article 7, it is assessed whether the practice infringed professional diligence (Article 5(2)) in a way that is likely to distort the transactional decision of the average consumer. One of the three steps must be fulfilled to establish liability. Similar rules that concern disclosure of commercial communications can be found in the E-Commerce Directive⁵² and the Audiovisual Media Services Directive.⁵³

The first scenario is online marketing conducted directly by brands. Most brands have their own social media profiles and want to update their customers on new products or discounts. The commercial intent is clear to average consumers and brands do not have to declare that their posts are ads.⁵⁴

Influencers may also have their own products that they feature on their social media channels. The commercial intent is clear as the brand advertised is owned by the influencer.⁵⁵ The same applies in the third scenario, where influencers post reviews or editorials on their own products. The exception is where the review is too positive, which requires a disclosure.⁵⁶

⁵⁰ No. 11 and 23 Annex to §3(3) UWG; s. 11 and 22 Schedule 1 CPR 2008.

⁵¹ Ibid.

⁵² Article 6(a) Directive 200/31/EC.

⁵³ Articles 9(1) (a) and (b) and 19(1) Directive 2010/13/EU.

⁵⁴ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1 and 2.3 CAP Code.

⁵⁵ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1 and 2.3 CAP Code.

⁵⁶ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

The fourth scenario is advertorial vlogs by influencers. Brands use influencers to create sponsored webisodes or other content. These partnerships have the intention to convey a hidden brand message to consumers. The commercial intent is not clear to viewers and it is required that such content be labelled as advertisement.⁵⁷ This is to ensure that consumers can understand whether it is paid sponsorship or an objective review.

In the fifth scenario, influencers include commercial breaks within their videos and pictures. This scenario requires that influencers label it as sponsored content: the commercial intent is not clear to viewers, as it moves from regular to sponsored content.⁵⁸

The sixth scenario is product placement. Brands provide influencers with products to be displayed on their blog, vlog, or picture. While influencers do not directly endorse products as such, consumers perceive that influencers bought it out of their own pocket. Average viewers are not aware that this is a commercial communication and influencers are therefore required to disclose the commercial intent of such posts to their viewers.⁵⁹

The seventh scenario is sponsorship without control. Brands pay, either in money or in gifts, influencers to create content and have no control over the content. Notwithstanding this lack of control, the content needs to be labelled as a commercial communication.⁶⁰ In the United Kingdom, such forms of sponsorship do not count as advertising under the CAP Code, but under the CPR 2008, which is within the jurisdiction of the Competition and Markets Authority.

Another scenario is where brands provide influencers with free items or discounts to be given to the followers of the latter. Influencers are obliged to label these as advertisements.⁶¹

The ninth and final scenario to be considered is the use of affiliate links. Affiliate links are typically included in the description box or in the video or picture itself. They refer viewers to online stores where products featured in the content can be purchased. Including such a link does not mean that there is any form of direct sponsorship from brands. Instead, anyone can create such an affiliate link. When someone clicks the link and purchases a product, the person creating the link gets a share of the profit. Such affiliate links must be disclosed as advertisement, as they create revenue for influencers who display them.⁶² Viewers might otherwise believe that it is an objective review of a product when it is not.

⁵⁷ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

⁵⁸ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

⁵⁹ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, § 7(7) RStV, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

⁶⁰ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008.

⁶¹ See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

⁶² See § 5 para. 6 UWG, § 6 (1) para. 1 TMG, and § 58 RStV; regulation 6 (1) CPR 2008 and 2.1, 2.3, and 2.4 CAP Code.

Table 1 Overview of Selected Provisions

<i>Legal requirements by type of influencer activity and country</i>	<i>Germany</i>	<i>United Kingdom</i>
Online marketing by brands	Not required	Not required
Videos about own product	Not required	Not required
Editorial videos about own products	Not required	Not required
Advertorial vlogs	Required	Required
Commercial breaks within videos	Required	Required
Product placements	Required	Required
Sponsorship (no control)	Required	Required
Giveaways (free items or discounts)	Required	Required
Affiliate Links	Required	Required

Note: The legal requirements are defined in-depth in this section. Required means that influencers need to disclose it as advertisement. Not required means that no disclosure is necessary.

4. EMPIRICAL INVESTIGATION

It is certainly not easy to be a social media influencer. They need to abide both by the platforms' community guidelines and by applicable legal rules of the jurisdiction where content is offered. Consequently, community guidelines must not be in conflict with legal obligations. Otherwise platforms would force influencers to break the law. Platforms should not only be in full compliance but ideally support influencers to navigate through the hotchpotch of regulation.

As mentioned earlier, a recent Princeton University study has revealed that merely 10 percent of YouTube videos and 7 percent of Pinterest posts included a form of written disclosure concerning affiliate links.⁶³ In this study, half a million YouTube videos and 2.1 million Pinterest pins were examined. Out of this selected sample, 3,472 YouTube videos and 18,237 Pinterest pins included affiliate links. The findings in terms of disclosure of advertising are alarming. As a result, the question arises whether this lack of disclosure is also reflected in social media platforms' standard terms.

This section builds upon the previous doctrinal examination and compares the terms of five major social media platforms. It first explores the relevant standard terms before they are empirically scrutinised. Additional observations are also addressed.

4.1 Substantive Comparison

The standard terms of five major online platforms are examined and compared on how they govern disclosures by social media influencers. These terms, also referred to as community guidelines, contractually bind influencers. One could argue that this creates a new, pluralistic legal dimension.

It is observed that the selected standard terms do not differ in content between Germany and the United Kingdom. The terms are thus jointly examined below.

YouTube is one of the leading online streaming services. The platform is used to share videos ranging from reviews, pranks, and vlogs to more serious content. YouTube's terms consist of a YouTube Help FAQ section, which includes a specific Ad Policy section dealing with disclosures. The Ad Policy provides that content creators are responsible for complying with applicable rules. YouTube has the ambition to make disclosures as simple as possible; one can disclose sponsorship with one mouse click right before the content is uploaded. Two buttons are provided. The first states 'This video contains paid promotion such as paid product placement, sponsorships or endorsement.' Once the first box is ticked, a second box appears.

⁶³ Mathur, Narayanan, and Chetty (n 1).

‘Help me to inform viewers of paid promotion by adding a disclosure to this video. Additional disclosures for this video may be required under applicable laws.’ The first box discloses it to YouTube as an ad, so they can adapt their own ads before, during, or next to the video. The question arises why it is possible to disclose it to YouTube and not to the audience. One possible explanation is that influencers prefer to have their own disclosures, e.g. in the video or the description box. Additional national regulations may apply and disclosures by YouTube to consumers might not be sufficient. However, one can question this approach. One disclosure too much certainly does no harm – at least not to consumers.

Facebook and Instagram are examined jointly as they are one company and use the same terms. Facebook is used by social media influencers to reach out to their fans with blog posts, images, and videos, whilst Instagram is used to share pictures and videos. The Facebook and Instagram policy on disclosures is fairly elaborate. It provides the applicable community guidelines as well as whether disclosures are required. Marketing strategies that are allowed under the applicable legal obligations are restricted by the community guidelines of Facebook and Instagram. One example is that the community guidelines do not allow ads to be displayed within the video. This is presumably the case because it would otherwise negatively impact the business model of Facebook and Instagram: both platforms provide advertisement independently from influencers, including clips or banners within or next to videos.

Snapchat is a multimedia messaging app used to share pictures, videos, and text messages. It provides two instruments: the terms of service and the advertising policies. The former does not deal with disclosures. Snapchat outlines the rules on disclosure in the latter instrument in two sentences. ‘All required disclosures and mandatory warnings in ads must be clear and conspicuous. Advertiser(s) must be accurately and clearly identified in the ad.’⁶⁴ The other sections in the advertising policy deal with prohibited and restricted content, such as gambling, political advertising, or financial products and services.

Pinterest is used to share pictures and videos. The terms of interest are their terms of use, community guidelines, B2B guidelines, and advertising policy. Disclosures are only dealt with in the community guidelines where they simply refer to the general guidelines on influencer marketing of the US Federal Trade Commission. Pinterest itself has no separate guidelines on disclosures.

The social media platforms explored deploy different methods regarding disclosures. What they have in common is that they place the regulatory burden on the influencers.

4.2 Findings

The empirical investigation reveals interesting patterns among the five platforms. Different levels of compliance are observed and these require further discussion. Please note that the font size and overall presentation may differ. Examples provided originate from the English version of the standard terms, but the German versions provide the exact same content.

Online marketing by brands themselves does not require labelling as advertisement and the same applies to influencers who create videos or editorials about their own products. The standard terms of YouTube and Facebook & Instagram comply with this legal obligation. Both platforms outline that a disclosure is only required when a third party is involved in exchange for remuneration. YouTube and Facebook & Instagram could have been more explicit about excessively positive reviews which must be disclosed as commercial communications. As

⁶⁴ Section 3, Snap Advertising Policies, effective as of 1 December 2018 (last accessed 11 January 2019).

mentioned earlier, Snapchat and Pinterest are generally silent on influencer marketing in their standard terms (n/a).

Table 2 Online marketing by brands, videos about own products, and editorial videos about own products (scenario 1, 2, and 3)

YouTube (YouTube Help: Paid product placements and endorsements)	Compliance	Paid product placements may be described as pieces of content that are created for a third party in exchange for compensation, and/or where that third party's brand, message or product is integrated directly into the content.
Facebook & Instagram (Advertiser Help)	Compliance	Promoting your own products Example: A creator posts content about their own makeup or bag line. Policy violation? No Need a tag? No Rationale There is no partner involved here, so it isn't considered branded content.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

In advertorial vlogs, the commercial intent must be disclosed by influencers under applicable legislation. YouTube and Facebook & Instagram complied with this obligation as well. The two platforms state in their standard terms that paid content must be labelled as advertisement to viewers.

Table 3 Advertorial vlogs (scenario 4)

YouTube (YouTube Help: Paid product placements and endorsements)	Compliance	Paid product placements may be described as pieces of content that are created for a third party in exchange for compensation, and/or where that third party's brand, message or product is integrated directly into the content.
Facebook & Instagram (Advertiser Help)	Compliance	Paid to post content you created Example: A creator takes a picture of a company's product and is paid by the company to post it. Policy violation? No Need a tag? Yes Rationale This is exactly what branded content is supposed to be: original content by the creator influenced by the brand.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

Commercial breaks within videos must be disclosed as sponsored content according to the previously examined rules. While Facebook & Instagram acknowledge that such a form of advertisement is legal, they do not allow influencers to deploy this form of marketing. A possible explanation for this is that the platforms themselves would like to advertise content within videos and this might otherwise create conflicts of interests. YouTube allows influencers to set ad breaks within long videos. While influencers cannot determine the content of the ad, they can be sure that YouTube declares it as advertisement to their audience. It is therefore considered to be in compliance with the legal requirements.

Table 4 Commercial breaks within videos (scenario 5)

YouTube (YouTube Help)	Compliant	Manage ad breaks in long videos [...] Use the ad breaks tool to create, preview, and edit automatically-generated or manually-set mid-roll ad breaks. [automatically displayed as advertisement]
Facebook & Instagram (Branded Content Policies)	Compliance	Facebook Pages and profiles and Instagram accounts must comply with the following: 1. Don't include pre, mid, or post-roll ads in videos or audio content.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

Product placement is one of the oldest forms of hidden marketing. It is required that the commercial intent be disclosed to viewers. YouTube and Facebook & Instagram comply with this in their standard terms and state that payment and control over the content are necessary to label it as product placement.

Table 5 Product placements (scenario 6)

YouTube (YouTube Help: Paid product placements and endorsements)	Compliance	Paid product placements may be described as pieces of content that are created for a third party in exchange for compensation, and/or where that third party's brand, message or product is integrated directly into the content.
Facebook & Instagram (Advertiser Help)	Compliance	Paid to post content you created Example: A creator takes a picture of a company's product and is paid by the company to post it. Policy violation? No Need a tag? Yes Rationale This is exactly what branded content is supposed to be: original content by the creator influenced by the brand.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

The next category is different: sponsorship with payment but no control by third parties. It needs to be disclosed as advertisement even though there is no control over the content by brands. YouTube makes clear that the content needs to be influenced by third parties through an established commercial relationship or that influencers get editorial or financial support. Facebook & Instagram is less clear about this, but it still satisfies the conditions of the seventh legal scenario.

Table 6 Sponsorship with no control (scenario 7)

YouTube (YouTube Help: Paid product placements and endorsements)	Compliance	Where your content does include Paid Promotion, some jurisdictions and brand partners require you to inform viewers about any commercial relationship that might have influenced or contributed to your content – be that editorially or financially. It's your responsibility to check and comply with laws and regulations around Paid Promotion content that apply to you.
Facebook & Instagram (Advertiser Help)	Compliance	Paid to post content you created Example: A creator takes a picture of a company's product and is paid by the company to post it. Policy violation? No Need a tag? Yes Rationale This is exactly what branded content is supposed to be: original content by the creator influenced by the brand.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

Only Facebook & Instagram comply with the legal obligation that giveaways need to be labelled as commercial communications. The commercial intent is not clear to viewers and influencers receive products in return for promoting them.

Table 7 Giveaways including free items or discounts (scenario 8)

YouTube	Silence	n/a
Facebook & Instagram (Advertiser Help)	Compliance	Given free products to post content you created Example: A creator takes a picture of a company’s product that was gifted to them for free. Policy violation? No Need a tag? Yes Rationale This is exactly what branded content is supposed to be: original content by the creator influenced by the brand. A free product constitutes an exchange of value, so a tag is required.
Snapchat	Silence	n/a
Pinterest	Silence	n/a

The final legal scenario concerns affiliate links, which must be labelled as sponsorship. Influencers receive a commission when viewers purchase products through the affiliate link. Unfortunately, none of the platforms addresses this issue. This is problematic because it is technically traceable, either manually or by automated means.

Table 8 Affiliate links (scenario 9)

YouTube	Silence	n/a
Facebook & Instagram	Silence	n/a
Snapchat	Silence	n/a
Pinterest	Silence	n/a

Table 9 Overview – Scenario 1-9

<i>Levels of compliance by type of influencer activity and platform</i>	YouTube	Facebook & Instagram	Snapchat	Pinterest
Online marketing by brands	Compliance	Compliance	Silence	Silence
Videos about own products	Compliance	Compliance	Silence	Silence
Editorial videos about own product	Compliance	Compliance	Silence	Silence
Advertorial vlogs	Compliance	Compliance	Silence	Silence
Commercial breaks within videos	Compliance	Compliance	Silence	Silence
Product placements	Compliance	Compliance	Silence	Silence
Sponsorship (no control)	Compliance	Compliance	Silence	Silence
Giveaways (free items or discounts)	Silence	Compliance	Silence	Silence
Affiliate links	Silence	Silence	Silence	Silence

Note: Please find the definition of each scenario in section 3.2 of this chapter.

4.3 Discussion and Implications

It is important to note once more that social media platforms perform public interest functions and are considered as vital public infrastructure, attracting social and economic activities. Indeed, they are considered by some to be the information railways of the twenty-first century.⁶⁵ It is consequently a relief that the standard terms showed no instance of non-

⁶⁵ cf Frank Pasquale, ‘From Territorial to Functional Sovereignty: The Case of Amazon’ (Law and Political Economy Blog, 6 December 2017) <<https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/>> accessed 27 April 2019. K. Sabeel Rahman, ‘Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities’ (2018) 2 Georgetown Law Technology Review 234.

compliance (by action) with applicable legal obligations. However, the results require some further discussion as they differed significantly between the five platforms.

YouTube and Facebook & Instagram have sophisticated standard terms that deal with most forms of disclosure. YouTube complies with seven out of nine obligations and Facebook & Instagram with eight out of nine. These findings are satisfactory. In particular, the approach of Facebook & Instagram is convincing. They outline whether the form of sponsorship is allowed and whether it is required to label it as advertisement. At the same time, the standard terms provide whether the practice is allowed on the platform. Not all practices that are legal are welcomed by platforms, as such practices might be in conflict with the platforms' interests (see for instance Table 4, Facebook & Instagram).

The findings in the Snapchat and Pinterest terms are disappointing; the non-existence of terms concerning disclosures suggests that the two platforms do not take the enforcement seriously. How should platforms enforce rules that are not part of their community guidelines? Should platforms generally police any activity that is considered illegal under applicable laws? Should they then refer to domestic legal obligations when they ban users? If that is the case, platforms not only perform public interest functions but could be even considered as public bodies. It is possible that this is the practice of platforms but it is equally possible that Snapchat and Pinterest take no interest in enforcing rules on hidden marketing.

The evidence supports the findings of the Princeton University study which has revealed that influencers largely do not comply with rules on disclosure.⁶⁶ Given the low rate of compliance amongst some platforms, it appears to be no surprise that influencers do not abide by the rules. The question arises whether more can be done to increase compliance amongst platforms and ultimately amongst influencers. Several policy recommendations are explored in the light of the findings, and should provide some further food for thought. What is clear is that there is no 'one size fits all approach': each platform has its unique attributes due to the characteristics of the service they provide.

The least intrusive form of regulation would be the introduction of a requirement to provide a link to the European and national regulatory bodies that deal with the regulation of influencer marketing. Influencers would be provided with official guidelines and platforms would simply have to include some hyperlinks in their standard terms. The five platforms examined all provided links to some regulatory bodies, but different countries have different rules. Consequently, platforms should provide links to the regulatory bodies of each jurisdiction.

One could equally argue that enforcement should be stepped up in the light of the low compliance rate amongst platforms and influencers.⁶⁷ Platforms *de facto* perform public interest functions but the question arises whether this is desirable. It is questionable whether platforms or governments would prefer this: the former would have to invest in infrastructure and staff and the latter would hand over jurisdiction to a private entity. The rules under the Unfair Commercial Practices Directive are currently enforced by the Member States (Article 11). National courts and regulatory bodies may not be able to cope with the cross-border aspect and the quantity of violations.⁶⁸ The relevant competence could be transferred to the

⁶⁶ Mathur, Narayanan, and Chetty (n 1).

⁶⁷ Ibid.

⁶⁸ See Dörte Poelzig, 'Private or Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices' in Willem van Boom et al. (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge 2016). Jonathan B Baker and Fiona Scott Morton, 'Antitrust Enforcement Against Platform MFNs' (2018) 127(7) *The Yale Law Journal* 2176.

European Commission like in competition law.⁶⁹ The European Commission has proven that they are capable of handling such complex procedures and that they do not step down against big internet platforms.⁷⁰ Furthermore, the New Deal for Consumers will strengthen the position of consumers. The update to current European legislation will enable consumers to claim their rights not only individually, but through collective redress.⁷¹

Some argue that enforcement could also take place through self-regulation. Platforms could set up an independent body that enforces their guidelines and applicable legal rules against influencers. This is easier said than done. Gillespie explored what forms of labour are involved in platform moderation.⁷² The key point to grasp is that there are many layers of moderation - he distinguishes between six layers in his own study. The biggest one is simply every platform user. They flag content that they find inappropriate. This flagged content is then reviewed by community managers, AI detection tools, crowd workers, and internal teams. Each subcategory has its unique tasks. Community managers are the lowest hierarchy and are typically administrators of group pages or business profiles. Reported content is flagged to them and they can decide whether it is against their or the platforms policy. AI detection tools can already detect various inappropriate content, but it is mostly the crowd workers that review and delete content. On top of the pyramid is the internal team that supervises the process and sets the guidelines. The question arises whether this is suitable to investigate non-disclosures of sponsorship. One would need investigative powers like a public prosecutor. Emails would need to be reviewed, witnesses interrogated, and so on. Platform moderation is fundamental to prevent the spread of hate crime or fake news, but it is not suitable to address more complex issues like influencer marketing

A far more intrusive step would be to introduce pre-drafted standard contract terms as suggested by the European Commission for e-commerce traders in 2001.⁷³ Platforms would be obliged to insert pre-drafted passages on influencer marketing into their standard terms, otherwise they could be held liable.⁷⁴ This would, of course, restrict the freedom of contract and limit the competition of terms between platforms. The benefit of competition is exemplified by Facebook's and Instagram's innovative terms.

Finally, the most intrusive step would be to place the liability not only on influencers and brands but also on platforms. At the moment, platforms can escape liability through Article 14 of the E-Commerce Directive (2000).⁷⁵ The provision only requires that platforms are not aware of any illegal activity or information (a) and that they remove such content once they become aware (b). Shifting the liability would mean that platforms would be incentivised to ensure compliance amongst their users. This would force them to rigorously enforce rules on disclosures in order to evade legal proceedings. Similar steps were taken with the recently

⁶⁹ See Erling Hjelmeng, 'Competition law remedies: Striving for coherence or finding new ways?' (2013) 50(4) *Common Market Law Review* 1007–1037.

⁷⁰ See Benjamin Edelman and Damien Geradin, 'Android and competition law: exploring and assessing Google's practices in mobile' (2016) 12(2) *European Competition Journal* 159. Pinar Akman, 'The theory of abuse in Google search: a positive and normative assessment under EU competition law' (2017) 2 *Journal of Law, Technology & Policy* 301.

⁷¹ See Commission (n 8).

⁷² Gillespie (n 3) 'The Human Labor of Modertaion'.

⁷³ Commission, 'Communication from the Commission to the Council and the European Parliament on european contract law' (Communication) COM (2001) 398 final, para 56.

⁷⁴ See Giuditta Cordero-Moss, 'Standard contract terms as an alternative to legislation' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016).

⁷⁵ Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

enacted Copyright Directive, in particular Article 13.⁷⁶ Whether platforms can live up to this expectation remains to be seen.

6. CONCLUSION

Several key observations are revealed by the empirical findings. First, it is observed that online platforms are not violating applicable legal rules. This means that all five platforms are in compliance with the identified rules in Germany and the United Kingdom. However, it does not mean that all platforms included all relevant legislation in their standard terms. Instead it means that they merely did not provide anything that was in breach.

Building upon this, the second observation suggests that some of the platforms are silent on a significant amount of the selected legal scenarios. For instance, none of the platforms addresses affiliate links. It is especially shocking that Pinterest and Snapchat do not address hidden marketing at all in their standard terms. How do they respond to influencers not disclosing their affiliation with brands? Do they invoke national law when suspending influencers from their platform? These are questions that need to be addressed on a broader level and stimulate a discussion on platform governance and responsibility. In addition, the question arises whether and how we should regulate this (public) infrastructure? Should platforms be held responsible when users do not comply with legal rules? Even platforms that are aware of most legal obligations did not include in their standard terms that affiliate links must be labelled as such. This uncertainty on what is allowed on platforms and what is not, is also exemplified by the fact that none of the selected platforms gives guidance on how to disclose hidden marketing to viewers.

The overall findings are unsatisfactory but unsurprising. They will contribute to the debate on what function platforms should actually have. What is positive is that all five platforms provide links to guidelines on influencer marketing by regulatory bodies, such as the US Federal Trade Commission. Platforms are, of course, under no obligation to include these rules in their terms or provide legal assistance to influencers. The standard terms of Facebook & Instagram are the most compliant and serve as a good, positive example. Their terms comply with most of the selected scenarios and the layout of the terms is also convincing. The platforms always outline whether this form of sponsorship is allowed on their website and whether it needs to be labelled as advertisement to be in compliance with applicable legal rules. Influencers can easily implement these guidelines. Moreover, the example of the terms of Facebook & Instagram shows that competition of terms can lead to a desired outcome.

It is of significant interest whether a causal relationship exists between the levels of compliance of the standard terms of social media platforms and the levels of compliance amongst influencers. More research is necessary into this emerging field of legal scholarship.

⁷⁶ Commission, 'Copyright in the Digital Single Market' (Proposal for a Directive) COM (2016) 593 final.