

# Navigating freezones in the influencerdom: a shadowlands guide

Alexandros Antoniou

## Abstract

This article delves into the rapidly evolving landscape of influencer marketing (IM) and its profound effects on the dynamics between social media users, advertisers, and brands. As the IM industry burgeons, influencers have transcended the dichotomy of self-publishers and traditional advertisers, shaping distinct career trajectories. The analysis critically examines the regulatory landscape, particularly the responsiveness of the Advertising Standards Authority (ASA) and the Competition and Markets Authority (CMA) to influencers' professionalisation. Despite the industry's growth, regulatory gaps persist, leaving consumers vulnerable to lightly-overseen influencers. The article argues for a transformative shift in regulatory perspective to encompass influencers throughout their career journey, challenging the prevailing notion that only high-reach influencers warrant scrutiny. It emphasises the need for a recalibrated regulatory threshold that accounts for emerging influencers, endorsing a more comprehensive definition and a holistic approach that recognises the multifaceted nature of IM practices. The article urges regulators to adapt to the nuanced and evolving nature of IM to ensure a more robust oversight and integrity in this emerging profession.

## 1. Introduction

Influencer marketing (IM) has cemented its place as a valuable asset in the modern marketer's toolkit, reflecting a fundamental change in the way brands connect with their target audiences in a cluttered digital arena. In 2023, the IM industry grew to be worth approximately \$21.1bn (up from \$16.4bn in the previous year)<sup>1</sup> and its valuation is expected to reach \$24.1bn by 2025.<sup>2</sup> No longer relegated to the realm of hobbyists, influencers have reshaped the landscape of career aspirations and opportunities.<sup>3</sup> They invest considerable time and effort in content creation, audience engagement, and strategic collaborations in diverse niches, ranging from beauty and fashion to travel and well-being. They wield sway over their online followings and often aspire to translate their persuasive prowess into a viable livelihood by building personal brands and monetising their content through advertising deals.<sup>4</sup> Their role as 'content creators',<sup>5</sup> 'opinion

---

<sup>1</sup> The State of Influencer Marketing 2023: Benchmark Report (Influencer Marketing Hub 2023) <<https://influencermarketinghub.com/influencer-marketing-benchmark-report/>> accessed 3 March 2023.

<sup>2</sup> Market and Markets, Influencer Marketing Platform Market <<https://www.marketsandmarkets.com/ResearchInsight/influencer-marketing-platform-market.asp?msclkid=12e97d6bb40511eca28a18f3ec919d31>> accessed 3 September 2023.

<sup>3</sup> Brooke Erin Duffy, *(Not) Getting Paid to Do What You Love: Gender and Aspirational Labor in the Social Media Economy* (Yale University Press 2022).

<sup>4</sup> Liselot Hudders, Steffi De Jans and Marijke De Veirman, 'The commercialisation of social media stars: a literature review and conceptual framework on the strategic use of social media influencers' (2021) 40(3) *International Journal of Advertising* 327; Tama Leaver, Tim Highfield and Crystal Abidin, *Instagram: Visual Social Media Cultures* (Polity 2020).

<sup>5</sup> Sophie Bishop, 'Influencer Management Tools: Algorithmic Cultures, Brand Safety and Bias' (2021) 7(1) *Social Media + Society* DOI: <https://doi.org/10.1177/20563051211003066>.

leaders’,<sup>6</sup> ‘trend setters’<sup>7</sup> and ‘cultural tastemakers’<sup>8</sup> appears now firmly entrenched in contemporary society.

The industry’s low barrier to entry persistently draws a stream of fresh participants, a substantial proportion of whom may exhibit limited awareness of the regulatory framework governing commercial communications. For instance, a recent investigation by the House of Commons cross-party Culture, Media and Sport Committee highlighted influencers’ alarmingly low rates of compliance with commercial intent disclosure requirements, breeding distrust in consumers.<sup>9</sup> This is a worrying trend, the implications of which transcend immediate trust concerns and contribute to an environment wherein influencers’ followers become susceptible to exploitation, rendering their decision-making prone to distortion. Despite the absence of tailored legislative provisions, influencer practices fall within the wider framework of consumer protection and advertising regulation. Consequently, the discerning application of extant measures by relevant authorities assumes a pivotal role in governing IM activities. Against the background of the burgeoning IM industry, this article asks whether regulators are seeing influencers’ professionalisation and whether the existing regulatory mechanisms are equipped to adeptly tackle the evolving challenges brought forth by this marketing phenomenon. These questions have not been duly considered in legal studies.

The analysis first explores how the contemporary conceptualisation of influencers transcends the conventional dichotomy of amateur self-publishers *vs* traditional advertisers (exemplified by established entities running commercial campaigns). It shows that influencers have gone beyond being mere publishers of self-expressive content (e.g., hobbyist vloggers) and have evolved into a distinct category of advertisers who follow a professional career trajectory with varying echelons, each marked by a blend of opportunities and strategic behaviours. The article then examines the extent to which the Advertising Standards Authority (ASA), the UK’s advertising regulator across all media, and the Competition and Markets Authority (CMA), the UK’s principal competition and consumer protection authority, stay attuned to the evolving dynamics of influencers’ professionalisation and vigilant in monitoring emerging trends in the IM landscape. Following a review of their principal regulatory tools, the article critiques their appropriateness and efficacy. It argues that the nuanced landscape surrounding influencers forging progressive career pathways is at odds with the prevailing perception held within the purview of marketing and advertising regulators that only high-reach, high-risk influencers warrant intensified scrutiny. There is, therefore, a regulatory disconnect that leaves consumers and followers vulnerable to questionable marketing practices by lightly-overseen influencers who operate in the early phases of their professional path. This, in turn, nurtures a fertile environment for unscrupulous actors to flourish. Without a transformative shift in regulatory perspective that acknowledges the full extent of influencers’ impact *throughout their entire career journey*, the current approach risks fuelling a lawless frontier in the IM realm with the potential to undermine the integrity and sustainability of this emerging profession.

---

<sup>6</sup> Marijke De Veirman, Veroline Cauberghe and Liselot Hudders, ‘Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude’ (2017) 36(5) *International Journal of Advertising* 798.

<sup>7</sup> Marian Makkar and Sheau-Fen Yap, ‘The anatomy of the inconspicuous luxury fashion experience’ (2018) 22(1) *Journal of Fashion Marketing and Management* 129.

<sup>8</sup> Jonathon Hutchinson, ‘Cultural Intermediaries: Audience Participation in Media Organisations’ (Palgrave Macmillan 2017)

<sup>9</sup> House of Commons Digital, Culture, Media and Sport Committee, *Influencer culture: Lights, camera, inaction?* (HC 2021-22, 258) para 6.

## 2. Influence without borders: when amateurs shine as pros

IM was not popularised until social media rose to prominence, but its function is not entirely new; nor is it necessarily tied to the Internet. Its origins can be traced to the ‘two-step flow’ model of information dissemination,<sup>10</sup> which proposes that interpersonal interaction has a more potent impact on shaping public opinion than mass media. This model involves traditional media outlets broadcasting messages, which are then collected, interpreted, and contextualised by ‘opinion leaders’ for less engaged segments of the public.<sup>11</sup> This hypothesis, which spotlights opinion leaders as intermediaries who capture and diffuse messages to their interpersonal networks, remains an important research tradition in the study of influence and decision-making. Initially explored in the 1940s during an election campaign, it later gained more credence through successive studies in marketing and consumer behaviour.<sup>12</sup> Since its inception, the opinion leadership framework has been extended to online environments, where individuals (or entities) are similarly ingrained as nodes of information diffusion in the digital architecture of social networking sites.<sup>13</sup>

Online opinion leaders oftentimes trigger discussions (e.g., responses in micro-blogging platforms) or frame conversations.<sup>14</sup> But, as internet personalities and grassroots organisations now share online space with more powerful media elites, the traditional top-down two-step flow model has evolved into more intricate patterns of information exchanges. Opinion leaders today contribute to sites of a multi-level participatory media culture<sup>15</sup> (see for example YouTube’s tagline ‘Broadcast Yourself’, inviting ordinary users to create the material they consume). Their content sometimes migrates to mainstream media, shaping the news agenda<sup>16</sup> and exerting bottom-up influence. This phenomenon aligns with Toffler’s ‘prosumer’,<sup>17</sup> a portmanteau which envisions consumers’ transformation from passive recipients of commodities and messages to active makers and interpreters of both. Contemporary prosumers are ‘consumers put to work’,<sup>18</sup> a trend accelerated by Web 2.0 technologies. They strenuously assert their creative agency by converting micro-blogging sites to audiovisual prosumption platforms.<sup>19</sup> Despite requiring ‘a certain amount of effort’ in production, such user-created content was perceived in the noughties as being predominantly ‘created outside of professional

---

<sup>10</sup> Paul Lazarsfeld, Bernard Berelson and Hazel Gaudet, *The People's Choice* (2nd ed, Columbia University Press 1948); Elihu Katz and Paul Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communication* (Free Press 1955).

<sup>11</sup> Elihu Katz, ‘The Two-Step Flow of Communication: An Up-To-Date Report on a Hypothesis’ (1957) 21(1) *Political Opinion Quarterly* 61, 64.

<sup>12</sup> Everett Rogers, *Diffusion of innovations* (4th ed, The Free Press 1995); Katz and Lazarsfeld (n 10).

<sup>13</sup> Rune Karlsen, ‘Followers are opinion leaders: the role of people in the flow of political communication on and beyond social networking sites’ (2015) 30(2) *European Journal of Communication* 301, 302.

<sup>14</sup> Itai Himelboim, Eric Gleave and Marc Smith, ‘Discussion catalysts in online political discussions: content importers and conversation starters’ (2009) 14(4) *Journal of Computer-Mediated Communication* 771.

<sup>15</sup> Mark Deuze, ‘Convergence culture in the creative industries’ (2007) 10(2) *International Journal of Cultural Studies* 243.

<sup>16</sup> Hans-Bernd Brosius and Gabriel Weimann, ‘Who sets the agenda: agenda-setting as a two-step flow’ (1996) 23(5) *Communication Research* 561. For an example from the celebrity culture, see Alexandros Antoniou, ‘Libel, social media, and celebrity journalism in the WAG-gate’ (2022) 27(4) *Communications Law* 177.

<sup>17</sup> Alvin Toffler, *The Third Wave: The Classic Study of Tomorrow* (Bantam 1984).

<sup>18</sup> Detlev Zwick, Samuel Bonsu and Aron Darmody, ‘Putting consumers to work: co-creation and new marketing governmentality’ (2008) 8(2) *Journal of Consumer Culture* 163.

<sup>19</sup> George Ritzer, Paul Dean and Nathan Jurgenson, ‘The coming age of the prosumer’ (2012) 56(4) *American Behavioral Scientist* 379, 385-6.

routines and practices',<sup>20</sup> namely independent of commercial contexts dominated by traditional media producers and free from regulation.

However, modern digital prosumers, unlike mere hobbyists tinkering with media technologies, benefit from opportunities to fortify their opinion leadership. They strategically leverage digital platforms for content creation, product evaluation and self-representation without the need for publicists. Notably, these tools also provide the breeding ground for electronic word-of-mouth (eWOM),<sup>21</sup> the most credible form of advertising,<sup>22</sup> empowering modern prosumers to reshape their relationship with traditional advertisers. Highly motivated opinion leaders now assume the role of market mavens whose perceived benevolence positively correlates with sales growth.<sup>23</sup> They wield influence in their peer group,<sup>24</sup> affecting a brand's success or failure, and offer business value as an expedient marketing channel for customer acquisition and retention,<sup>25</sup> even plugging gaps created by limited brand advertising.<sup>26</sup> This bi-directional power flow blurs traditional conceptualisations of professional and amateur prosumer activity, rendering such a notional opposition somewhat deceptive. A prosumer with an opinion leader status may evolve from an uncommitted amateur seeking self-expression into a professional producer with commercial aspirations, driven by a sense of empowerment to shape other people's perceptions through eWOM.<sup>27</sup>

With the rising popularity of online networking sites, the label of social media influencers (SMIs) began to be reserved mainly for those opinion leaders whose profiles were born out of (and maintained through) social - rather than legacy - media. SMIs resemble the enhanced modelling of prosumers with opinion leadership status.<sup>28</sup> But their capacity to turn their 'social and cultural capital'<sup>29</sup> into an economic one through shaping opinions in the pursuit of business objectives is a distinct asset that introduces them as a new generation of advertisers who challenge the dominance of the mainstream advertising industry. Leveraging their perceived credibility, authenticity and reach, SMIs wield significant sway over niche online communities

---

<sup>20</sup> OECD Committee for Information, Computer and Communications Policy, *Participative Web: User-Created Content* (OECD 2007) 4 <<https://www.oecd.org/digital/ieconomy/38393115.pdf>> accessed 21 February 2023.

<sup>21</sup> Ana Babić Rosario, Kristine de Valck and Francesca Sotgiu, 'Conceptualizing the electronic word-of-mouth process' (2020) 48(3) *Journal of the Academy of Marketing Science* 422; Safadar Hussain, Wasim Ahmed, Rana Jafar, Ambar Rabnawaz and Yang Jianzhou, 'eWOM source credibility, perceived risk and food product customer's information adoption' (2017) 66 *Computers in Human Behaviour* 96.

<sup>22</sup> Nielsen 2021 Trust in Advertising Study (November 2021) <<https://www.nielsen.com/insights/2021/beyond-martech-building-trust-with-consumers-and-engaging-where-sentiment-is-high/>> accessed 1 March 2023. The results are consistent with previous studies by the same industry body; see e.g., Global Trust in Advertising and Brand Messages (September 2013) <<https://www.eaca.eu/wp-content/uploads/2016/06/Global-Trust-in-Advertising.pdf>> accessed 1 March 2023.

<sup>23</sup> Viju Raghupathi and Joshua Fogel, 'The impact of opinion leadership on purchases through social networking websites' (2015) 10(3) *Journal of Theoretical and Applied Electronic Commerce Research* 18; Shuang Zoo, Helen McCormick, Marta Blazquez and Liz Barnes, 'eWOM: the rise of opinion leaders' in Rosy Boardman, Marta Blazquez, Claudia Henninger and Daniella Ryding (eds), *Social Commerce: Consumer Behaviour in Online Environments* (Palgrave Macmillan 2019) 189.

<sup>24</sup> Nicole Buzzetto-More, 'Social Media and Prosumerism' (2013) 10 *Issues in Informing Science and Information Technology* 67.

<sup>25</sup> Robert East, Jenni Romaniuk, Rahul Chawdhary and Mark Uncles, 'The impact of word of mouth on intention to purchase currently used and other brands' (2017) 59(3) *International Journal of Market Research* 321.

<sup>26</sup> Albert Muñiz and Hope Jensen Schau, 'Vigilante Marketing and Consumer-Created Communications' (2007) 36(3) *Journal of Advertising* 35.

<sup>27</sup> Daniël Muntinga, Marjolein Moorman and Edith Smit, 'Introducing COBRAs: exploring motivations for brand-related social media use' (2011) 30(1) *International Journal of Advertising* 13, 37.

<sup>28</sup> De Veirman, Cauberghe and Hudders (n 6).

<sup>29</sup> Mariah Wellman, Ryan Stoldt, Melissa Tully and Brian Ekdale, 'Ethics of Authenticity: Social Media Influencers and the Production of Sponsored Content' (2020) 35(2) *Journal of Media Ethics* 68, 68.

to promote products and services.<sup>30</sup> A noteworthy 44% of individuals born between the mid-1990s and the early 2010s (known as the Generation Z, which constitutes an estimated 30% of the global population)<sup>31</sup> base their purchasing decisions on recommendations made by SMIs.<sup>32</sup> When SMIs gain traction within a certain demographic, brands take notice and seek to align their marketing strategies with influencer collaborations to amplify their visibility and sales figures.<sup>33</sup>

SMIs have also boldly ventured into territories that were once seen as the exclusive preserve of the traditional advertising industry. This becomes evident, for instance, in their adept utilisation of sponsorship and product placement strategies on video-sharing platforms (VSP) like YouTube, TikTok, Snapchat and Twitch.<sup>34</sup> In this context, **sponsorship** means any contribution by undertakings who are not engaged in the provision or production of VSP services to the financing of VSP videos with a view to promoting their name, trade mark, image, activities, products etc.<sup>35</sup> This would cover, for instance, the scenario of an eyewear company offering an SMI an all-inclusive trip to the Whitehaven Beach to create promotional content for their summer campaign, whereby it is agreed that the SMI would publish a certain number of posts, and in return they would have access to a professional photographer during the trip. These commercial arrangements between influencers and brand sponsors are novel interpretations of earlier practices in the industry. *The New York Times* recount, for example, the unusual promotion for an alcoholic drink in the '90s which engaged incognito actors who posed as personable trendoids and visited nightspots during peak hours to talk up the product. They were, in fact, paid promoters who improvised scenes to generate favourable word-of-mouth. If a bartender had never heard of the drink, they would express their surprise and remove their apparent ignorance by explaining them how to make one. SMIs represent a contemporary evolution of these 'sponsored tableaux vivants'.<sup>36</sup>

SMIs can also be likened to 'walking product placements'.<sup>37</sup> **Product placement** is the inclusion of (or of a reference to) a product, service, or trade mark etc. within a video in return for payment or other valuable consideration.<sup>38</sup> In contrast to sponsorship references, which may be shown or announced briefly but do not form part of the narrative, product placement is built into the action. It could occur at different levels, ranging from a brief background prop to a product being an instrumental part of the content in question. Although product placement was originally seen as a supplemental way of getting a brand's message across (consider, for example, how Nike's sneakers in *Forrest Gump* or the ubiquity of tech brands in the *James Bond* universe create thematic connections and enhance viewer identification with the

---

<sup>30</sup> Duncan Brown and Nick Hayes, *Influencer Marketing: Who Really Influences Your Customers?* (Butterworth-Heinemann 2008); Nathaniel Evans et al, 'Disclosing Instagram influencer advertising: the effects of disclosure language on advertising recognition, attitudes, and behavioral intent' (2017) 17(2) *Journal of Interactive Advertising* 138.

<sup>31</sup> World Economic Forum, How Gen Z employment levels compare in OECD countries (WEF 26 March 2021) <<https://www.weforum.org/agenda/2021/03/gen-z-unemployment-chart-global-comparisons/>> 6 September 2023.

<sup>32</sup> Robert Williams, 'Gen Z relies on influencers for purchase decisions, Kantar says' (Marketing Zone, 2 March 2020) <[https://www.marketingdive.com/news/gen-z-relies-on-influencers-for-purchase-decisions-kantar-says/582890/#:%7E:text=Almost%20half%20\(44%25\)%20of.study%20shared%20with%20Mobile%20Marketer](https://www.marketingdive.com/news/gen-z-relies-on-influencers-for-purchase-decisions-kantar-says/582890/#:%7E:text=Almost%20half%20(44%25)%20of.study%20shared%20with%20Mobile%20Marketer)> accessed 5 September 2023.

<sup>33</sup> Fine Leung et al, 'Influencer Marketing Effectiveness' (2022) 86(6) *Journal of Marketing* 93.

<sup>34</sup> For the definition of VSP services, see Communications Act 2003, s 368S.

<sup>35</sup> *Ibid*, s 368Z13.

<sup>36</sup> Stuart Elliott, 'Advertising; When a Stranger Offers to Buy a Drink at the Bar, Is It Flattery, or a Walking Commercial for Cognac?' *The New York Times* (14 January 1994) D-15.

<sup>37</sup> Roya Wolverson, 'The human billboard', *Time Magazine* (15 April 2013) B1.

<sup>38</sup> Communications Act 2003, s 368Z13.

storyline), it has now become a more central aspect of marketing strategies<sup>39</sup> and is seamlessly woven into SMIs' curated content (e.g., posts about SMIs' daily plate chronicles with brands featured in tales from their culinary diaries<sup>40</sup> or posts captioned 'on a road trip adventure, and Thunder Cruiser is the engine behind this journey').

But SMIs have not only dismantled the barriers of exclusivity that once surrounded traditional advertisers; they have also unfurled a new era of engagement and interaction. Their content reinvents both sponsorship and product placement, elevating these marketing practices into immersive experiences that facilitate an even more subtle product integration. This is most notably exemplified through '**unboxing marketing**', a popular genre in which enthusiasts record and publish videos of themselves unpacking and reviewing (sometimes with obsessive detail) various products often gifted by brands in the hope that the influencer will share a positive message about them. Unboxing marketing is believed to be a more potent method for establishing a connection when contrasted with a typical review<sup>41</sup> and is commonly adopted by 'professionalising-amateur content creators'<sup>42</sup> in an attempt to aggregate consumption communities and incubate (and later monetise) their own brands. In this type of SMI unbox-orama, we witness the convergence of sponsorship and product placement: sponsorship, essentially a funding model where an external powerhouse injects financial support to promote its name in proximity with the resulting content, meets product placement, manifesting in the direct and vivid showcase of a branded product on screen. The end result is a seamless synergy between external funding and on-screen brand exposure, creating a powerful marketing fusion.

SMIs themselves perceive their practice as nothing less than a cutting-edge evolution of professional advertising,<sup>43</sup> with social media as their new organisational field. Even the terminology describing their professional identity has evolved, now embracing titles like 'digital content creators' or platforms-specific terms like 'TikTokker' and 'Instagrammer'. Social networking services, like Instagram, acknowledge SMIs as a profession to cater to by offering specialised accounts replete with an array of features tailored to optimise content production and business management. These enhanced tools facilitate SMIs' evolution into proficient intermediaries for various brands and businesses. Through this lens, social media platforms have evolved too from purely recreational spaces into bustling virtual workplaces for numerous content creators who are driven by the strategic objectives of cultivating public visibility and ultimately realising a substantial income stream. The recent announcement of an Irish university offering a degree programme centred around influencing marks another significant stride in the growing professionalisation of SMIs.<sup>44</sup> As the next section shows, SMIs' production prowess has redrawn the boundaries between work and leisure, and manifests itself throughout an evolutionary path of professional development.

---

<sup>39</sup> Mary Saladino, 'The Proliferation of Product Placement as a Means of Advertising Communication' (2008) 1(1) *Journal of International Business Ethics* 100.

<sup>40</sup> See, for example, ASA Ruling on Global Brands Ltd (20 September 2023) <<https://www.asa.org.uk/rulings/global-brands-ltd-g23-1199017-global-brands-ltd.html>> accessed 20 September 2023, concerning a ban on a TikTok ad which appeared on an influencer's account with the caption: 'What i [sic] eat in a day [...] THANK YOU CORKY'S'.

<sup>41</sup> Rhonwyn Vaudrey, 'A practice unpacked: Unboxing as a consumption practice' (2022) 145 *Journal of Business Research* 843.

<sup>42</sup> David Craig and Stuart Cunningham, 'Toy unboxing: living in a(n unregulated) material world' (2017) 163(1) *Media International Australia* 77.

<sup>43</sup> DCMS Committee, *Influencer culture* (n 9) para 11.

<sup>44</sup> Darragh Nolan, 'College to offer first degree for "influencers"' *Irish Independent* (Dublin, 26 September 2023) 16.

### 3. Influencers as career curators

Marketing research has traced SMIs' gradual transformation from casual prosumers, who may begin with ad-hoc visibility-enhancing activities, to 'human brands',<sup>45</sup> who cement their 'self-brand'<sup>46</sup> as a profit-generating source and compete against other influencers.<sup>47</sup> This process occurs across an evolutionary continuum, characterised by varying endorsement dynamics<sup>48</sup> and traversed by different players with distinct status and reach.<sup>49</sup>

At an initial **experimental** stage, SMIs concentrate on producing appealing content that might pave the way to a successful transition into the marketing system. They tend to behave as aspirational opinion leaders, often without a direct commercial motive (e.g., through unpaid work).<sup>50</sup> The focus is on accumulating cultural capital through repeated displays of opinion leadership (e.g., using taste as a device of judgment power)<sup>51</sup> and capitalising on brands' visibility (e.g., tagging brand accounts without necessarily being formally connected to them). At this stage, brands primarily act as 'providers of content and experiences',<sup>52</sup> namely they leverage SMIs' creativity to encourage the production of content that indirectly promotes their products or services without the need for a direct endorsement or trade agreement. This could occur, for instance, in exclusive product launch events where SMIs gain hands-on experience with a product and behind-the-scenes access to create authentic content while demonstrating its features; or, where SMIs position themselves as industry opinion leaders by hosting and moderating workshops or webinars related to their niche, whilst featuring a brand's offerings without a formal endorsement agreement in place. Simultaneously, brands unwittingly create a customer storehouse, synergistic with their independent promotions. This experimental phase is usually marked by the presence of micro-influencers (the 'rising stars') and nano-influencers, an emerging yet increasingly important cluster. Despite their smaller follower-base, these newcomers are deemed highly effective marketers due to their ability to foster intense relational bonds in a tight-knit online community and harness greater authenticity.<sup>53</sup>

At a more advanced level of this professional journey, an SMI's sphere of impact is 'energised and broadened'<sup>54</sup> by engaging more actively with a brand as a partner (e.g., through direct invitations to launches of new campaigns). This external recognition during this **partnering**

---

<sup>45</sup> Matthew Thomson, 'Human Brands: Investigating Antecedents to Consumers' Strong Attachments to Celebrities' (2006) 70(3) *Journal of Marketing* 104.

<sup>46</sup> Susie Khamis, Lawrence Ang and Raymond Welling, 'Self-branding, "micro-celebrity" and the rise of Social Media Influencers' (2017) 8(2) *Celebrity Studies* 191.

<sup>47</sup> Antonia Erz and Anna-Bertha Heeris Christensen, 'Transforming Consumers into Brands: Tracing Transformation Processes of the Practice of Blogging' (2018) 43(1) *Journal of Interactive Marketing* 69.

<sup>48</sup> Thaysa Costa Do Nascimento, Roberta Dias Campos and Maribel Suarez, 'Experimenting, partnering and bonding: a framework for the digital influencer-brand endorsement relationship' (2020) 36(11-12) *Journal of Marketing Management* 1009, 1015-1021.

<sup>49</sup> Parts of advertising industry appear to recognise different SMI groups based on data-driven measurements and average compensation per post; see e.g., Colin Campbell and Justine Rapp Farrell, 'More than meets the eye: The functional components underlying influencer marketing' (2020) 63(4) *Business Horizons* 469, 471-472. However, there is no widespread consensus on this classification and categories remain largely fluid.

<sup>50</sup> See, for example, written evidence submitted by The Creator Union to the DCMS inquiry on influencer culture (the Union represents digital creators who work and earn their money online)

<<https://committees.parliament.uk/writtenevidence/35417/pdf>> accessed 4 February 2023.

<sup>51</sup> Edward McQuarrie, Jessica Miller and Barbara Phillips, 'The Megaphone Effect: Taste and Audience in Fashion Blogging' (2013) 40(1) *Journal of Consumer Research* 136.

<sup>52</sup> Nascimento et al (n 48) 1017.

<sup>53</sup> Campbell and Farrell (n 49) 472; European Commission, *Behavioural Study on Advertising and Marketing Practices in Social Media* (Directorate General for Consumers 2018) 33 <[https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0\\_en](https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0_en)> accessed 9 July 2021.

<sup>54</sup> Nascimento et al (n 48) 1019.

phase arguably validates their opinion leadership. SMIs (sometimes called ‘meso-influencers’)<sup>55</sup> abandon at this point their individual dimension of content production to join the larger marketing realm and their motive for financial benefits from what they prosume online no longer appears subordinate.

Endorsement relations drive SMIs’ career advancement, gradually leading to even stronger bonds with brands through increased alignment with their missions. For SMIs reaching that final **bonding** stage, content creation more closely resembles a conventional creative industries career that requires a consistent investment of effort and provides a more sustainable reward system.<sup>56</sup> SMIs ultimately carve popular (to some socially desirable) careers (even outside online environments) and develop a brand identity that is cannily and almost exclusively cultivated for marketing purposes. Mega-influencers, i.e., top-tier SMIs with a sizeable reach but without necessarily a widespread recognition outside social media, will usually be at this end of the spectrum.

A common thread across all career progression stages is SMIs’ transformation into predominantly promotional powerhouses,<sup>57</sup> who seize attention and then deftly on-sell audiences. In this process, SMIs’ partnerships may be orchestrated with the aid of third-party actors,<sup>58</sup> reminiscent of talent management agencies in acting or modelling. These intermediaries, who currently operate outside of legal regulation, seek to exert dominance over SMIs’ activities by meticulously assessing their performance through profile analytics. It is noteworthy that, although the global number of such IM-focused services grew by 26% in 2021, reaching a staggering 18,900 firms exclusively dedicated to IM,<sup>59</sup> very little is known about the management and governance of endorsement relationships in this ecosystem.

But do the CMA and the ASA effectively track the evolving dynamics of influencers’ professionalisation? Following a brief overview of the broader regulatory framework governing IM (including upcoming reforms), the next section explores the extent to which the principal IM regulators in the UK stay vigilant in their oversight of emerging trends in this realm.

#### 4. Unmonitored zones in the influencerdom

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs, retained EU law),<sup>60</sup> which apply to business-to-consumer (B2C) relationships<sup>61</sup> and are administered by the CMA, prohibit ‘traders’ in all sectors from engaging in unfair commercial practices (which include commercial communications like marketing and advertising) with consumers, including

---

<sup>55</sup> Sophie Boerman, ‘The effects of the standardized Instagram disclosure for micro- and meso-influencers’ (2020) 103 *Computers in Human Behavior* 199; Marco Pedroni, ‘Meso-celebrities, fashion and the media: How digital influencers struggle for visibility’ (2016) 5(1) *Film, Fashion and Consumption* 103.

<sup>56</sup> Brooke Duffy and Megan Sawey, ‘Value, service and Precarity among Instagram Content Creators’ in David Craig and Stuart Cunningham (eds), *Creator Culture* (NY University Press 2021) 138.

<sup>57</sup> Khamis et al (n 46) 200-202.

<sup>58</sup> Ofcom, *VSP Content Creators and Community Standards*

<[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0024/216519/content-creators-community-standards.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0024/216519/content-creators-community-standards.pdf)> accessed 8 September 2023.

<sup>59</sup> See e.g., creator management and workflow automation platforms like Grin, Mavrck and LTK; The State of Influencer Marketing 2022: Benchmark Report (Influencer Marketing Hub 2022) <<https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>> accessed 3 March 2023.

<sup>60</sup> The CPRs implement the EU Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (the UCPD), as amended by Directive 2019/2161 on better enforcement and modernisation of Union consumer protection rules.

<sup>61</sup> Explanatory Memorandum to the CPRs, paras 2.1-2.3.



misleading marketing tactics and ‘blacklisted’ practices such as the absence of adequate disclosures of commercial intent.<sup>62</sup> A trader under the CPRs is a ‘person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader’.<sup>63</sup> So, SMIs qualify as traders to the extent that they endorse their own products or business, or endorse products under brand instructions and they are rewarded (or otherwise incentivised) to do so in their posts.<sup>64</sup> Endorsements of brands or products that are visibly linked to SMIs (e.g., by bearing their name or face) and promotional activities under brand agreements are, however, more likely to occur in the partnering and bonding stages of their professional trajectory. SMI activities at the experimental phase, which are less based on direct economic returns typically associated with traditional endorsement formats, could thus stealthily fly beneath the CMA’s radar (unless it can be established that an SMI is acting ‘on behalf of’ a trader). Moreover, when a self-employed SMI acts in their own name, the trader qualification may not be as straightforward since the CPRs require B2C commercial practices to be directly connected with the promotion, sale, or supply of a product to consumers.<sup>65</sup>

For completeness, platforms, brands, and social media agencies also constitute traders under the CPRs and have obligations to effectively tackle illegal incentivised endorsements.<sup>66</sup> It is anticipated that the Digital Markets, Competition and Consumers (DMCC) Bill,<sup>67</sup> which seeks to increase regulatory oversight of the digital sector, will recreate the CPRs’ effect with minor amendments. The Bill largely replicates the existing CPR list of banned practices and grants the authority to add to these.<sup>68</sup> Of note, influencers selling their own products may also be brought under consumer rights provisions, e.g., regarding pre-contractual transparency obligations in the case of distance contracts and rules on the right of withdrawal,<sup>69</sup> which are beyond the scope of this article.

The ‘established means’<sup>70</sup> for the investigation and resolution of CPR complaints in the non-broadcast space is the ASA,<sup>71</sup> which operates a system of collective regulation, bolstered through legal backstops.<sup>72</sup> The ASA enforces the non-broadcast CAP Code (which pertains to

---

<sup>62</sup> CPRs 2008, Regs 5-6 and Sch 1 (commercial practices which are in all circumstances considered unfair), para 11.

<sup>63</sup> Ibid, Reg 2(1).

<sup>64</sup> Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (C/2021/9320) section 4.2.6. Note that the 2021 Commission guidelines address IM as a separate issue for the first time.

<sup>65</sup> CPRs 2008, Reg 2(1).

<sup>66</sup> Ibid, Regs 3(3) and 6. See further CMA Written Evidence submitted to the Digital, Culture, Media and Sport Select Committee (7 May 2021) <<https://committees.parliament.uk/writtenevidence/35433/pdf/>> accessed 2 March 2023.

<sup>67</sup> DMCC Bill (HL Bill 12) 2023-24 (at the time of writing, the Bill undergoes parliamentary scrutiny).

<sup>68</sup> Ibid, Part 4. E.g., the CPRs definition of a ‘trader’ (cited earlier) is retained under Part 4, cl 223(3).

<sup>69</sup> Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the Consumer Rights Act 2015, implementing some provisions of the EU Directive 2011/83/EU on consumer rights.

<sup>70</sup> Office of Fair Trading, *Consumer Protection from Unfair Trading: Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive* (Department for Business Enterprise and Regulatory Reform 2008) para 11.9 (adopted by the CMA Board)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf)> accessed 1 February 2023.

<sup>71</sup> This is also the case in relation to impermissible comparative advertising and misleading B2B marketing contrary to the Business Protection from Misleading Marketing Regulations 2008 (BRPs).

<sup>72</sup> The regulator’s partner network includes the Office of Communication (Ofcom) and the Competition and Markets Authority (CMA) as well as the Gambling Commission, the Information Commissioner’s Office (ICO), the Medicines and Healthcare Products Regulatory Agency and the Financial Conduct Authority (FCA). For more the details of the ASA’s self-regulatory system within a co-regulatory framework, see ASA, *About Regulation* <<https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html>> accessed 2 February 2023.

non-broadcast ads, sales promotions, and direct marketing) as well as the BCAP Code (which applies to all ads and programme sponsorship on Ofcom-licensed TV and radio) through a complaints system and proactive ad monitoring across different media.<sup>73</sup> The Codes reflect and, in some instances, go beyond the base CPR obligations, e.g., they contain prohibitions against harmful and socially irresponsible ad content. They also complement the Financial Conduct Authority's (FCA) work by covering non-technical elements of financial promotions, namely matters of social responsibility and the truthfulness of claims that do not relate to specific characteristics of financial products, for which the FCA is the lead enforcer.<sup>74</sup> It is worth noting that, while the CMA addresses overarching issues about competition and market dynamics, the ASA predominantly concentrates on the content and ethics of advertising to safeguard consumers from misleading or unsuitable promotional material. Fundamentally, the CMA works to uphold fair market competition and business conduct to protect consumer interests, whereas the ASA places emphasis on fostering responsible advertising practices and maintaining the integrity of advertising messages.

The broader framework is supplemented by a set of advertising rules applying to video-sharing platforms (VSP) under the Communications Act 2003.<sup>75</sup> Although these do not directly impact SMIs, they affect VSP-distributed marketing communications that engage them. They exist alongside marketers' responsibilities to ensure compliance with self-regulatory mechanisms and impose predominantly platform-facing obligations. On top of requirements on VSP providers<sup>76</sup> to protect under-18s<sup>77</sup> and the general public,<sup>78</sup> the regime contains additional obligations to protect users against potential harms related to 'audio-visual commercial communications'.<sup>79</sup> The term captures traditional ads as well as sponsorship<sup>80</sup> and product placement,<sup>81</sup> which (as seen earlier) can be usefully extended to cover IM.<sup>82</sup> VSP providers' compliance with the 2003 Act requirements depends on whether AVCCs are 'marketed, sold or arranged'<sup>83</sup> by the provider (i.e., VSP-controlled, for example, by enabling advertisers to buy ads on their platform or providing targeting tools).

---

<sup>73</sup> The Codes are written by the Committee of Advertising Practice (CAP), which represents the advertising industry and is the sister organisation of the ASA, but they are administered independently by the Authority.

<sup>74</sup> See the FCA and ASA MoU, setting out the respective responsibilities of the two regulators: <<https://www.fca.org.uk/publication/mou/mou-fca-asa.pdf>> accessed 2 March 2023.

<sup>75</sup> Part 4B of the Communications Act 2003, which was introduced under the Audiovisual Media Services Regulations 2020 to implement the revised 2018 Audiovisual Media Services Directive (AVMSD) and came into effect on 1 November 2020.

<sup>76</sup> In summary, these include: (a) terms and conditions (incl. community guidelines, community standards, terms of service etc) preventing harmful material; (b) reporting, flagging, or rating of content; (c) access control measures such as age assurance and parental controls; (d) complaints processes; and (e) media literacy tools and information.

<sup>77</sup> Communications Act 2003, ss 368Z, 368Z1(1)(c) and Sch 15A.

<sup>78</sup> Ibid, ss 368E(1) and 368E(3)(za). See further Ofcom, *VSP Guidance: Guidance for Providers on Measures to Protect Users from Harmful Material* (6 October 2021) <[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/226302/vsp-harms-guidance.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/226302/vsp-harms-guidance.pdf)> accessed 3 September 2023.

<sup>79</sup> Communications Act 2003, ss 368Z, 368Z1(1)(c) and Sch 15A(4). For the definition of AVCC, see s 368Z13 of the 2003 Act.

<sup>80</sup> Ibid, s 368Z13.

<sup>81</sup> Ibid; see the earlier discussion on pp 5-6.

<sup>82</sup> Ofcom also accepts that the definition of audio-visual commercial communications applies to IM; see its *Guidance for VSP providers on measures to protect users from harmful material* (6 October 2021) 12 (fn 20) <<https://www.ofcom.org.uk/online-safety/information-for-industry/vsp-regulation/guidance-protecting-users-from-harmful-material>> accessed 8 September 2023.

<sup>83</sup> Communications Act 2003, ss 368Y(1) and 368Z.

In relation to VSP-controlled audio-visual commercial communication, platforms are responsible for ensuring compliance with provisions on prohibited and restricted products as well as the general advertising requirements,<sup>84</sup> implying a range of obligations towards SMIs, e.g., that their commercial communication shall be readily recognisable as such.<sup>85</sup> The ASA is the designated co-regulator for VPS-controlled advertising, with Ofcom acting as the statutory backstop. However, advertising can appear on VSPs without being marketed, sold, or arranged by them, as in the case of influencer marketing where the provider did not engage with an SMI in relation to the commercial communication or where a brand posted a commercial communication in its capacity as a user without any engagement with the VSP provider. In those cases of non-VSP-controlled advertising, platforms must take appropriate measures to ensure that audio-visual commercial communications meet the general advertising requirements, provisions on prohibited and restricted products, and requirements relating to the transparency of advertising.<sup>86</sup> Ofcom administers the framework for non-VPS-controlled advertising and assesses the appropriateness of measures taken by providers to protect users.<sup>87</sup>

Note that changes are forthcoming in this area. Pre-existing UK-established VSPs entered a transition period after the Online Safety Bill received Royal Assent on 26 October 2023. The Online Safety Act (OSA) 2023 imposes new legal duties on online intermediaries who host and index online content to protect UK users by assessing and responding to risks of harm, as well as taking steps to address them. It also confers new powers on Ofcom to act as the online safety regulator. During the said transition period, VSPs will be exempt from complying with most OSA duties but will continue being regulated by Ofcom under the previous VSP regime. The Secretary of State will specify in secondary legislation the date on which the VSP regulations will be repealed (at least six months' notice of the repeal date must be given).<sup>88</sup> When the transition period ends, platforms will come under the new online safety regime.<sup>89</sup> However, the latter does *not* introduce new provisions for VSP advertising. VSPs as a subset of online platforms will be considered within scope of the government's Online Advertising Programme, which aims to introduce a comprehensive advertising regulatory framework for all actors across the advertising supply chain (a consultation is planned on regulatory options).<sup>90</sup>

Having obtained a general picture of the wider regulatory framework applying to IM, the next section delves into some shadowy corners of influencer culture where oversight remains inadequate. It sheds light on the potential consequences of unchecked influence and the need for enhanced scrutiny in a swiftly transforming digital landscape. Two major areas of concern are identified: first, the regulators' grasp of who qualifies as an influencer/SMI; and second,

---

<sup>84</sup> Ibid, s 368Z(1).

<sup>85</sup> Ibid, s 368Z(4).

<sup>86</sup> Ibid, s 368Z1(1)(c).

<sup>87</sup> See further Ofcom, *VSP Guidance: Guidance for Providers on Control of Advertising* (7 December 2021) <[https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/229010/vsp-guidance-control-of-advertising.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/229010/vsp-guidance-control-of-advertising.pdf)> accessed 2 March 2023.

<sup>88</sup> Online Safety Act 2013, Sch 3, Part 3 and Sch 17.

<sup>89</sup> For more details, see further Ofcom, *Repeal of the VSP regime* (3 May 2023) <<https://www.ofcom.org.uk/online-safety/information-for-industry/vsp-regulation/repeal-of-the-vsp-regime>> accessed 17 September 2023.

<sup>90</sup> See further the Government response to the Online Advertising Programme consultation (DCMS, 25 July 2023) <<https://www.gov.uk/government/consultations/online-advertising-programme-consultation>> accessed 6 September 2023.

the shortcomings of the tools relied upon to bring influencers/SMIs within the regulators' purview.

#### ***4.1 The hazy zone of the influencer definition***

There is currently no targeted legal provision or industry-wide consensus on how precisely IM is defined and who rightfully assumes the mantle of an influencer/SMI. The ASA's definition of an influencer is quite broad, encompassing 'any human, animal or virtually produced persona that is active on any online social media platform',<sup>91</sup> regardless of their source of popularity or industry. A minimum numerical benchmark that measures SMIs' reach is not expressly required by the Authority, but an SMI needs to 'regularly' produce advertising content and have garnered 'the attention of a significant number of people.'<sup>92</sup> So, the ASA emphasises that an influencer must consistently create advertising content and have attracted the interest of a large but vaguely defined audience. It is unclear whether the CMA adopts a size parameter, but, according to the European Commission's Guidance on the interpretation and application of the unfair B2C commercial practices, the size of an SMI's following is deemed immaterial.<sup>93</sup> This misalignment between the two regulatory approaches may result in incongruent enforcement outcomes.

The ASA's criterion of 'a significant number of people' sets a *de minimis* threshold for regulatory intervention but arguably loses sight of the fact that the popularity of wide-reach (and usually high-ranking) SMIs does not automatically translate into positive influence on consumer behavioural outcomes.<sup>94</sup> To move products off the shelves, advertisers have lately veered away from flashy celebrity-style endorsements by mega-influencers at the bonding stage of their professional trajectory and turned to SMIs with a smaller yet more devoted following in web-based communities, where it is easier to maintain the level of intimacy that sets them apart.<sup>95</sup> This trend finds support in scholarship<sup>96</sup> and marketing practice which essentially recognise that the Kardashians (and the like) cannot sell everything.<sup>97</sup> As entrepreneur Seth Godin maintains, 'instead of trying to reach everyone, we should seek to reach the smallest viable audience and delight them so thoughtfully and fully that they tell others.'<sup>98</sup> Thus, placing undue emphasis on SMIs' audience size is misguided and out-of-step

---

<sup>91</sup> ASA, *Recognising Ads: Social Media and Influencer Marketing* (23 March 2022) <<https://www.asa.org.uk/advice-online/recognising-ads-social-media.html>> accessed 8 September 2023. Of note, in a previous version of the same guidance, the ASA made explicit the requirement for payment, defining an influencer as 'anyone who has been paid by a brand to advertise a product on their own social media, because of their social media influence' in ASA, *Recognising Ads: Social Media and Influencer Marketing* (29 December 2022) <<https://www.asa.org.uk/advice-online/recognising-ads-social-media.html>> accessed 3 March 2023.

<sup>92</sup> ASA Ruling on Sanofi UK IAW ThisMamaLife (3 July 2019) <<https://www.asa.org.uk/rulings/sanofi-uk-A19-557609.html>> accessed 2 February 2023; ASA Ruling on LIFT Aesthetics t/a lift.aesthetics (17 May 2023) <<https://www.asa.org.uk/rulings/lift-aesthetics-a22-1158433-lift-aesthetics.html>> accessed 17 May 2023.

<sup>93</sup> Commission Notice (n 64) section 4.2.6.

<sup>94</sup> Chung-Wha Ki and Youn-Kyung Kim, 'The mechanism by which social media influencers persuade consumers: The role of consumers' desire to mimic' (2019) 36(10) *Psychology & Marketing* 905.

<sup>95</sup> Daniele Scarpi, 'Does Size Matter? An Examination of Small and Large Web-Based Brand Communities' (2010) 24(1) *Journal of Interactive Marketing* 14.

<sup>96</sup> Chung-Wha Ki, Leslie Cuevas, Sze Man Chong, Heejin Lim, 'Influencer marketing: Social media influencers as human brands attaching to followers and yielding positive marketing results by fulfilling needs' (2020) 55 *Journal of Retailing and Consumer Services* 102133.

<sup>97</sup> See e.g., Richard Godwin, 'The rise of nano-influencers' *The Guardian* (London 14 November 2018) <<https://www.theguardian.com/commentisfree/2018/nov/14/rise-nano-influencer-brands-celebrities-youtube-instagram>> accessed 21 June 2021.

<sup>98</sup> Keynote speech in the 2019 Social Media Week 30 April – 2 May in New York City (the Social Media Week is a worldwide event that serves as a central meeting point for the entire social media marketing industry). Quoted in Joei Chan, 'The

with the industry's shift towards micro-influencer marketing which targets followers in close-knit networks.

A workable definition of an influencer is, however, an essential cornerstone for the formulation of impactful policies and sound governance in the IM realm. In its influencer culture inquiry, the House of Commons DCMS Committee offered a viable proposition but has been regrettably overlooked. The Committee's report defined an influencer as 'an individual content creator who builds trusting relationships with audiences and creates both commercial and non-commercial social media content across topics and genres.'<sup>99</sup> This conceptualisation is preferable as it takes a functional approach by focusing on how SMIs operate and avoids the imposition of essentialist criteria that confine them within rigid boundaries. It highlights both the revenue-generating and *non-commercial* facet of influencing. The latter brings in scope newcomers who operate at the experimental stage and benefit from the trust inhering in a durable network of connections that can lead to monetary compensation. Moreover, the cumulative attributes of 'commercial and non-commercial content' nested in this definition underline the flexible nature of SMIs' agency that cuts across *all* stages of their career lifecycle and sets it apart from traditional advertising. This is also a tacit (and welcome) acknowledgement that the boundary between 'professional' vs 'amateur opinion leadership' dimensions of the SMI activity is quite porous.

#### **4.2 The advertorial arena**

The CAP Code requires that marketing communications are 'obviously identifiable as such'.<sup>100</sup> Breach of this rule is also a blacklisted practice under the CPRs (and the Digital Markets, Competition and Consumers Bill) due to its inherently unfair nature. For these blacklisted activities, establishing wrongdoing alone suffices; proving its impact on consumer decisions is unnecessary. Engaging in such practices may result in civil or criminal enforcement action.<sup>101</sup> Both as traders and advertisers, SMIs are expected to clearly distinguish brand-controlled material from genuinely independent editorial content (i.e., any content that informs or entertains, provided its primary purpose is not to advertise).

SMIs must disclose material connections between brands and themselves in an obvious, conspicuous, prominent, upfront, timely and unambiguous manner in both third-party and self-

---

Smallest Viable Audience: How Micro-Influencers are Changing Marketing' Social Media Today (14 May 2019) <<https://www.socialmediatoday.com/news/the-smallest-viable-audience-how-micro-influencers-are-changing-marketing/554634/>> accessed 10 June 2021; but also see Seth Godin, *This is Marketing* (Penguin 2018) Ch 4 and The State of Influencer Marketing 2023: Benchmark Report (Influencer Marketing Hub 2023) <<https://influencermarketinghub.com/influencer-marketing-benchmark-report/>> accessed 3 March 2023, which reports marketers' strong preference for working with small-scale influencers ahead of expensive influencers and celebrities.

<sup>99</sup> DCMS Committee, *Influencer culture* (n 9) para 3.

<sup>100</sup> CAP Code, Rule 2.1. There are equivalent rules in the Code for broadcast media; see BCAP Code, Rule 2.1.

<sup>101</sup> CPRs 2008, Sch 1, para 11 and Regs 8-12; see also DMCC Bill (HL Bill 12) 2023-24, Sch 19, para 12 as well as cl 235, incl. cls 235(7) and 235(8)(a).

published content.<sup>102</sup> The ASA addresses transparency through its advertorial rules<sup>103</sup> and requires appropriate disclosures where a brand: (a) paid an SMI either in money or in kind; *and* (b) had some form of editorial control or veto over the content (e.g., through pre-suggested message scripts or pre-posting content clearance). However, the CMA's transparency test slightly differs, as it requires: (a) some form of payment, including various incentives and rewards (e.g., commissions, discounts, free-of-charge loans), gifted products, irrespective of whether these were 'in exchange for' a post; *and* (b) any form of commercial relationship between an SMI and a brand (including where an SMI has signed up to an affiliate scheme).<sup>104</sup> The preconditions are cumulative in both cases. Of note, the presence of editorial control by a brand is not necessary to trigger the CMA's intervention under the CPRs but could serve as a factor in determining their liability.<sup>105</sup> The second prong of ASA's advertorial test narrows the potential universe of SMIs that can be brought within its remit and may also appear out-dated. In an industry centred on authenticity, naturalness, and influencers' intrinsic motivations, where some brands consciously relinquish their editorial reins, the feature of control is not always relevant, especially because embracing genuine connections with followers takes precedence.<sup>106</sup>

Despite the apparent incoherence between the two approaches, the ASA has embraced a broad interpretation of the 'payment plus control' test. The demand for control, in particular, has been liberally construed and substantially diluted in several recent adjudications.<sup>107</sup> Even an expectation from a brand that some kind of related content will be created - as opposed to a mere hope that it might be where a gifted product is sent - could be seen by the ASA as 'control'. For instance, the regulator recently ruled against a 'clean-fluencer' (a home-cleaning SMI sharing lifestyle tips) who promoted her Tesco homeware range without proper labelling on her Instagram Stories, finding that both elements of the test were met, even though the posts had been created organically and not as part of her marketing obligations. Payment was received through royalties from the sale of the goods and control existed because the

---

<sup>102</sup> There is detailed guidance on how much disclosure must be provided and how this should occur across multiple different formats (e.g., desktop versions of a post as opposed to a post in-feed on Instagram using a mobile phone), what type of a relationship with a brand needs to be disclosed (a commercial, employment or family or all), what kind of labelling need to be used and how disclosures should occur if endorsements appear in a video or live stream format. See ASA, *Influencers' guide to making clear that ads are ads* (3rd edn, 23 March 2023) 7 <<https://www.asa.org.uk/resource/influencers-guide.html>> accessed 23 March 2023 and CMA, *Hidden ads: Being clear with your audience* (3 November 2022) <<https://www.gov.uk/government/publications/social-media-endorsements-guide-for-influencers/social-media-endorsements-being-transparent-with-your-followers>> accessed 3 February 2023. From the regulator's rulings, it appears that no case has been pursued yet against SMIs who have omitted a clear label (e.g., #AD) but used a platform's own branded content tool, e.g., Instagram's Paid Partnership tool.

<sup>103</sup> CAP Code, Rules 2.1, 2.3 and 2.4. An advertorial is 'an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement' (see III(k) in Scope of the Code). For a detailed analysis of the application of these rules in the ASA's decision-making, see Alexandros Antoniou, 'Advertising regulation and transparency in influencers' endorsements on social media' (2021) 26(4) *Communications Law - Journal of Computer, Media and Telecommunications Law* 190.

<sup>104</sup> This is a type of performance-based marketing whereby an SMI usually receives a commission for clicks or sales generated through personalised discount codes or links; see Antoniou (n 103) 201.

<sup>105</sup> Commission Notice (n 64) section 4.2.6.

<sup>106</sup> Karina Sokolova and Hajer Kefi, 'Instagram and YouTube bloggers promote it, why should I buy? How credibility and parasocial interaction influence purchase intentions' (2020) 53 *Journal of Retailing and Consumer Services* 101742.

<sup>107</sup> Antoniou (n 103) 197-200.

supermarket chain directly benefited from the marketing material, despite the lack of input into the posts or any other direct editorial control over them.<sup>108</sup> As a prevailing practice,

[...] if influencers are not completely free to do and say whatever they want, whenever they want, about a product for which they have received payment or payment in kind, the ASA is likely to consider the brand exercises a critical level of control over the marketing communication and the remit test has been met.<sup>109</sup>

This wide interpretation of control potentially allows the ASA to treat as within its remit any content that previously may have been within the CMA's remit only. However, the ASA's test is narrower and arguably less effective than the CMA's test, as it might not capture content where there was payment and a commercial arrangement in place, but a brand did not exert any control over an SMI's post (e.g., gifted products without a prior agreement that the SMI posts about them).

However, questions arise in relation to the requirement for payment (broadly conceived) that is mandated by both the ASA and CMA frameworks. The payment criterion does not address emergent ways of influencing, like '**hustling**'. Although marketing research has highlighted this phenomenon,<sup>110</sup> its regulatory implications have not yet been thoroughly explored. 'Hustlers' often signal their willingness to work for a brand ('Hey, look at me in your outfit. I can rock it for you [...] if you just call me'). Without being compensated, they strategically tag and curate content that shares an aesthetic affinity with a brand in a bid to benefit from its power of attraction, drive up engagement (views/likes, followers etc.) and either generate revenue from a future relationship or seek higher compensation in future brand deals. This is not uncommon among newcomers at the experimental stage of their SMI trajectory, especially micro- and nano- influencers who operate at a small scale yet have gained dominance within the SMI space,<sup>111</sup> because their loyal following makes them highly effective endorsers.<sup>112</sup> Practices like hustling may not directly intend to 'sell' through explicit calls to action (or affiliate links), but they seamlessly blend in with organic content, increase product awareness and improve brand perception. In essence, context overcomes content in such cases.

Under these circumstances, an SMI *could* be liable for contravening the CPRs requirements of 'professional diligence'<sup>113</sup> (i.e., by dishonestly implying or misleadingly pretending to have a material connection with a brand), but only if they qualify as trader, as outlined earlier. From a marketing and advertising perspective, however, hustlers' apparent 'free display' of creativity closely resembles advertising and strays into the area of undisclosed marketing, yet it is overlooked by regulators because payment is likely to be absent. The payment requirement

---

<sup>108</sup> ASA Ruling on Sophie Hinchliffe t/a Mrs Hinch (15 March 2023) <<https://www.asa.org.uk/rulings/sophie-hinchliffe-g22-1155720-sophie-hinchliffe.html>> accessed 15 March 2023. For a similar approach in a recent case, see ASA Ruling on Vodafone Ltd (8 February 2023) <<https://www.asa.org.uk/rulings/vodafone-ltd-a22-1160072-vodafone-ltd.html>> accessed 5 March 2023.

<sup>109</sup> House of Commons Digital, Culture, Media and Sport Committee, *Influencer culture: Lights, camera, inaction?* ASA System and CMA Responses to the Committee's Twelfth Report of Session 2021-22 (HC 2022-23, 610) 4.

<sup>110</sup> Daniel Carter, 'Hustle and Brand: The Sociotechnical Shaping of Influence' (2016) 2(3) *Social Media + Society* DOI: 10.1177/2056305116666630.

<sup>111</sup> According to some reports, their market share of 89% in 2020 grew to 91% a year on; Elizabeth Kerr, 'The number of sponsored posts is up 27% across FB, IG, Tiktok, and Youtube' *Bankless Times* (London, 31 January 2023) <<https://www.banklesstimes.com/news/2022/04/20/the-number-of-sponsored-posts-is-up-27percent-across-fb-ig-tiktok-and-youtube/>> accessed 1 March 2023.

<sup>112</sup> Hudders, De Jans and De Veirman (n 4) 334.

<sup>113</sup> CPRs 2008, ss 2(1) and 3(3); DMCC Bill (HL Bill 12) 2023-24, cl 227.

remains therefore a chink in their regulatory armour and leaves endorsement-like content generated by strong-tie D-listers untouched. There is a distinct difference between an SMI articulating their personal encounter with a product or service, while extending an invitation to a broader audience to consider its potential efficacy ('here is my experience with this product; give it a shot and hopefully it will work for you too') and an SMI engaging in a promotional spectacle, flaunting attire from a specific brand. The latter overtly emphasises brand association and lacks the user-centric, experiential depth typically inherent in non-promotional content. Capturing behaviour like hustling carries the potential to broaden the CMA's and ASA's remit by venturing into editorial territories (which currently sit outside their reach),<sup>114</sup> but it warrants immediate regulatory scrutiny due to its strong capacity to shape consumers' or followers' economic behaviour.

## 5. Revamping the enforcement zone

The CMA has issued guidance to SMIs, brands, third-party entities, and online platforms to promote compliance with consumer protection laws, with the bulk of its publications centring on hidden advertising.<sup>115</sup> CMA investigations in unlabelled endorsements have led to undertakings by a few high-profile SMIs and major platforms to implement technology designed to identify posts containing hidden ads.<sup>116</sup> However, there is no robust mechanism for enforcing compliance with undertakings and their impact is yet to be measured. The Digital Markets, Competition and Consumers (DMCC) Bill aims (among others) to address weaknesses in the CMA's underpowered enforcement toolkit<sup>117</sup> by introducing a new two-fold enforcement regime that grants the CMA direct decision-making powers against consumer protection breaches through administrative proceedings, in addition to the existing court-based route.<sup>118</sup> The Bill will upgrade the CMA's enforcement capability through information-gathering and investigatory powers as well as financial penalties for frustrating enforcement procedures and non-compliance both against infringing businesses and individuals, including

---

<sup>114</sup> CAP Code, Scope of the Code, II(k).

<sup>115</sup> CMA, *Hidden ads: Being clear with your audience* (3 November 2022) <<https://www.gov.uk/government/publications/social-media-endorsements-guide-for-influencers>> accessed 8 September 2023; CMA, *Business responsibility and social media endorsements* (3 November 2022) <<https://www.gov.uk/government/publications/businesses-and-social-media-endorsements>> accessed 8 September 2023; and CMA, *Hidden ads: Principles for social media platforms* (3 November 2022) <<https://www.gov.uk/government/publications/compliance-principles-for-social-media-platforms>> accessed 8 September 2023.

<sup>116</sup> CMA Press Release, 'Instagram to tackle hidden advertising after CMA action' (CMA, 16 October 2020) <<https://www.gov.uk/government/news/instagram-to-tackle-hidden-advertising-after-cma-action>> accessed 19 September 2023; CMA Press Release, 'Celebrities and social media stars investigated for not labelling posts' (CMA, 16 August 2018) <<https://www.gov.uk/government/news/celebrities-and-social-media-stars-investigated-for-not-labelling-posts>> accessed 19 September 2023; and CMA, *Undertakings to the CMA (pursuant to s 219 of the Enterprise Act 2002) relating to the CPRs 2008* (1 October 2020) <[https://assets.publishing.service.gov.uk/media/5f882329e90e07415e7f36cb/Facebook\\_Undertakings\\_-\\_pdf](https://assets.publishing.service.gov.uk/media/5f882329e90e07415e7f36cb/Facebook_Undertakings_-_pdf)> accessed 15 September 2023.

<sup>117</sup> CMA submission to the Digital Markets, Competition and Consumers Bill Committee (27 June 2023) <<https://www.gov.uk/government/publications/cma-submission-to-the-digital-markets-competition-and-consumers-bill-committee/cma-submission-to-the-digital-markets-competition-and-consumers-bill-committee>> accessed 12 September 2023; see also DCMS Committee, *Influencer culture* (n 9) paras 64 and 85. For more on the Authority's current approach to compliance and enforcement, see CMA, *Consumer protection enforcement guidance* (CMA58, updated 4 November 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf)> accessed 8 March 2023.

<sup>118</sup> DMCC Bill (HL Bill 12) 2023-24 (Part 3); see also the discussion earlier on pp. 8 and 12. The Bill's Part 3 introduces a court-based system to streamline and improve the court enforcement procedure currently outlined in Part 8 of the Enterprise Act 2002.



SMIs, found in breach of the legislation.<sup>119</sup> Although these reforms will enable the CMA to conduct faster and more flexible consumer law investigations, the identification of who may be a trader is not as clear cut for all SMIs. The B2C relationship required under the Bill can be challenging to establish in relation to newcomers in the IM industry, particularly those at the experimenting stages of their professional trajectory, whose indirect promotional activities (see section 3 earlier) might not be recognised as commercial practices and not be attributed to them as traders, thereby falling outside the scope of the Bill’s enhanced enforcement powers.

The ASA employs AI tools to automate a previously manual and labour-intensive tracking process of disclosure breaches,<sup>120</sup> but the sheer scale of content and ephemeral nature of SMI advertising formats (e.g., Instagram Stories which disappear by design after 24 hours from the posting time) pose monitoring and evidence capture challenges. These are further compounded by the lack of hard-edged statutory sanctions. The ASA’s enforcement effectiveness is further weakened by the fact that the regulator’s legal backstop for non-broadcast adverts (including SMIs’ endorsements), Trading Standards,<sup>121</sup> can only intervene if CAP Code breaches correspond to CPR breaches.<sup>122</sup> But, the CAP and CPR provisions do not exactly match, meaning that SMIs posting harmful content that goes beyond consumer economic detriment (e.g., cosmetic interventions) may not face credible enforcement action. To date, the ASA has not escalated non-compliance instances by involving a legal backstop for repeated SMI breaches.

To stimulate compliance, the ASA relies (though oftentimes at a post-investigation stage) on extra-legal control mechanisms, e.g., reputational penalties which operate by undermining SMIs’ long-term self-interest in their curated self-brand and eroding the high levels of trust at the core of the fictive relationships they lead.<sup>123</sup> Reputational sanctions are thought to incentivise compliance because their consequences (e.g., adverse media coverage, boycotts, demonetisation etc.) can exceed the effect of a fine that a court (or regulator) could impose. The ASA has leveraged the reputational slant with targeted on-platform alerts about persistent rule-breakers and an electronic ‘wall of shame’ of non-compliant SMIs who routinely fail to adequately disclose ads.<sup>124</sup> There is, however, little evidence of these measures’ effectiveness in increasing compliance within the wider SMI community.

Notably, the regulator’s AI tools appear to largely monitor high-reach, high-risk mega-influencers.<sup>125</sup> This is also evidenced by the fact that SMIs who sit on the ASA’s ‘naughty list’

---

<sup>119</sup> Department of Business, Energy and Industrial Strategy, *Reforming competition and consumer policy* (20 July 2021) 16-17 <<https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy>> accessed 17 September 2023.

<sup>120</sup> ASA, *How data science is changing ad regulation* (17 November 2022) <<https://www.asa.org.uk/news/how-data-science-is-changing-ad-regulation.html>> accessed 9 September 2023.

<sup>121</sup> ASA and National Trading Standards, *Making Ads Responsible: How We Enforce the Advertising Rules* (22 March 2016) <<https://www.asa.org.uk/static/uploaded/5b773c7e-0e04-41bd-b09b30a440d44fd4.pdf>> accessed 7 September 2023.

<sup>122</sup> Office of Fair Trading, *Consumer Protection from Unfair Trading: Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive* (Department for Business Enterprise and Regulatory Reform 2008) para 11.1 (adopted by the CMA Board) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf)> accessed 1 February 2023.

<sup>123</sup> Judith van Erp, ‘Reputational Sanctions in Private and Public Regulation’ (2008) 1(5) *Erasmus Law Review* 145, 157.

<sup>124</sup> ASA, Non-compliant social media influencers <<https://www.asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html>> accessed 7 November 2023.

<sup>125</sup> ASA and CAP Annual Report 2021 (19 May 2022) 15 <<https://www.asa.org.uk/resource/annual-report-2021.html>> accessed 1 March 2023. The influencer AI tool looks at a combination of imagery and text to identify the likelihood of whether a post is an ad. It then checks if the post has been correctly labelled.

have (at the time of writing) large follower-bases ranging from 520,000 to 3.6m. This high threshold of regulatory intervention needs adjustment – particularly in light of the recent shift to micro-influencer marketing - to also target SMIs who operate at less advanced stages of their professional cycle but are nevertheless skilled at building more authentic relationships that can lend credibility to hidden ads. Monitoring a more diverse array of influencers in social media sweeps is essential towards a more thorough and comprehensive oversight framework. In addition, expanding the scope of its awareness-raising efforts is critical for the ASA. This can be accomplished, for example, through strategic collaborations with platforms to implement concise standardised assessments aimed at enhancing understanding of legal responsibilities upon registering for an SMI account, akin to health and safety or data protection tests routinely mandated for employees. These measures are particularly important because smaller-scale SMIs often harbour the erroneous belief that rules are not relevant to them (e.g., when promoting smaller local brands) or feel uncertain about accountability.<sup>126</sup> Such attitudes, left unchecked, can seriously disincentivise adherence and potentially normalise a culture of non-compliance.

## 6. Conclusion

This article examined the transformative impact of the ongoing shake-up in power dynamics between social media users, advertisers, and brands, showing that the hierarchies between producers and consumers of social media content have flattened and the boundaries of the traditional advertising system are no longer intact. The analysis emphasised how SMIs have masterfully harnessed the productive potential of online prosumption and gained significant purchase in the marketing realm. Gone are the days when they could be purely seen as powerless or benign amateur self-publishers. SMIs now follow a professional trajectory and offer a major revenue-generating resource for brands. Their perceived amateur status is increasingly becoming an untenable assumption on which to base our understanding of how their commercial communications should be regulated. Against the background of the ever-evolving IM sphere, this article highlighted blind-spots in the regulatory gaze, particularly in respect of who qualifies as an influencer and the criteria under the advertorial test. The analysis showed that current regulatory approaches in relation to both are under-inclusive, amplifying the hurdles in the pursuit of effective enforcement.

More specifically, the current regulatory threshold requires a recalibration to zero in on harnessing the rising power of emerging SMIs who operate at the nascent phases of their professional journey, often without building brand partnerships and securing valuable endorsements. In the absence of payment, they elude the regulators' watchful eye even though they exhibit a remarkable knack for cultivating genuine connections that bestow hidden promotional content with an unmatched aura of trustworthiness. It is, therefore, imperative that regulators exert rigorous vigilance over a wider spectrum of professionalising influencers during social media sweeps, particularly because smaller-scale SMIs often perceive themselves as being exempt from regulatory control. This lingering sense of uncertainty about accountability can erode their motivation to adhere to established commercial communication norms. The article emphasised the benefits of adopting the DCMS Committee's robust definition of an influencer, which encompasses both the revenue-driven and non-commercial dimensions of influencing, as a more solid foundation upon which effective oversight in the IM sphere can rest.

---

<sup>126</sup> Ofcom, *VSP Content Creators and Community Standards* (n 58) 17.

Finally, regulators in the IM domain must broaden their perspective beyond the established criteria of payment and editorial control. Attempting to pigeonhole influencers' practices solely within these limited parameters oversimplifies the intricate and multifaceted nature of their commercial communication practices in today's digital marketing frontier. Such rigid categorisation fails to acknowledge the impact of emerging influencers who do not monetise their content at the early stages of their career lifecycle yet wield substantial influence, leaving a significant gap in oversight. Moreover, in an industry where authenticity, organic appeal, and influencers' innate drive reign supreme, select brands are willing to deliberately release their editorial grip, rendering the concept of editorial control largely inconsequential. Influencers, as a new breed of professional advertisers, now impact audiences in profound ways beyond transactional considerations and content supervision. To effectively oversee this dynamic ecosystem, regulators must adopt a more holistic and adaptable approach that recognises the complex and evolving nature of IM.

### **Acknowledgements**

I would like to express my gratitude to the anonymous reviewers for their feedback and constructive comments, which significantly contributed to enhancing the quality and clarity of this article. Their thoughtful insights and suggestions have helped refining the content, and their time and effort are genuinely appreciated.