

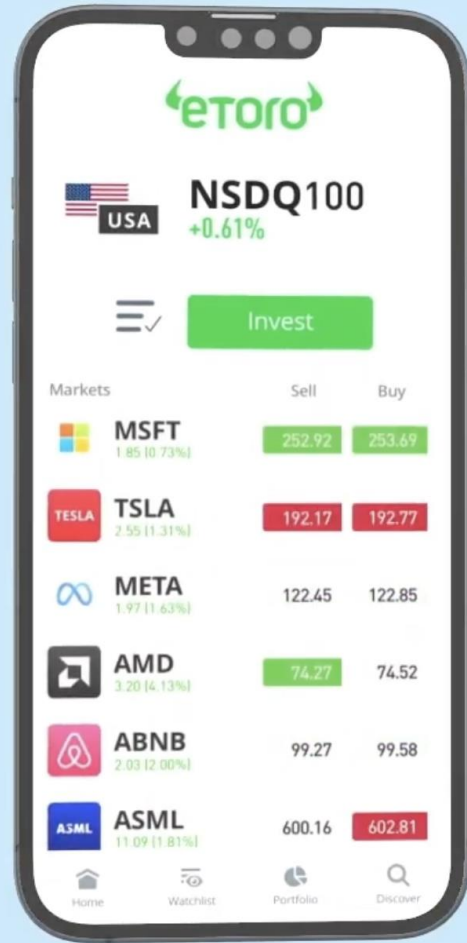
# Platform Governance through Private Regulation: The Case of Financial Influencers

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# Overview

- I. Setting the Scene (+)
- II. Defining the Practices and Business Models of Finfluencers
- III. Mapping the Legal Framework
- IV. Platform Governance through Private Regulation
- V. Policy Considerations
- VI. Conclusions

## II. Defining the Practices and Business Models of Finfluencers

Table 1 Practices and Business Models of Finfluencers

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

# III. Mapping the Legal Framework

- **Hidden / influencer marketing**

- Unfair Commercial Practices Directive 2005/29/EC
  - Arts. 5, 6, 7, 8, 9 and Annex Section 11 and 22
  - EU and national case law; regulators

- **Advertising financial products**

- Market Abuse Regulation 596/2014
- Commission Delegated Regulation 2016/958
- MiFID II Directive 2014/65

- **Legal responsibility of platforms**

- Articles 14 and 15 of the E-Commerce Directive 2000/31
- Digital Service Act (DSA) in 2023/2024

# Hidden / influencer marketing (1): the UCPD 2005/29

- Maximum harmonisation Directive
- Scope: broad definition of unfair commercial practices (Article 2(d)):
  - ‘means 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’
- Case-by-case assessment (general test) and Annex (‘black-list’)

# Hidden / influencer marketing (2): the UCPD and Influencers

- Starting point is that all commercial practices are lawful
- Does the practice fall into the **'black-list'** of the UCPD?
  - Section 11 of Annex I: '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 (advertorial).'
  - Section 22 of Annex I: '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.'
  - **NEW** Section 23c of Annex I (2019 amendment of UCPD): 'Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.'
- Is the practice **misleading** (Arts. 6 and 7) or **aggressive** (Arts. 8 and 9)?
- Is the practice infringing upon **professional diligence** (Art. 5(2))?

# Hidden / influencer marketing (3): Developments

- **2005:** Unfair Commercial Practices Directive 2005/29
- **2014:** Advertising Standards Authority (ASA) Adjudication on Mondelez UK Ltd (Oreo Case)
- **2015:** CMA initiated study on online review and endorsements
- **2017:** OLG Celle and LG Hagen
- **2018:** LG Berlin
- **2018:** Princeton study scrutinizes hidden marketing relationships on social media
- **2021:** BGH Cases of 9 September
- **2022:** European Parliament study on influencer marketing



# Advertising financial products (1)

- Market Abuse Regulation 596/2014 (Arts 20, 21)
  - Broad scope: ‘produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy’
  - Must present it objectively and disclose any interests or conflicts of interest
  - Defence: journalism, freedom of expression
    - Unless: ‘an advantage or profits from the disclosure or the dissemination of the information in questions’ or ‘the disclosure or the dissemination is made with the intention of misleading the market’
    - ESMA guidance: ‘claiming something is not an investment recommendation and/or someone is not an expert’ is not a valid defence

# Advertising financial products (2)

- Commission Delegated Regulation 2016/958
  - General duty to present information objectively
  - Information and formal requirements
    - Disclose name, job title, date and time when recommendation is made; company and supervising authority where required
    - Finfluencers could fall within expert category, additional requirements e.g. methodology
    - Product specific rules: CFDs

# Advertising financial products (3)

- MiFID II Directive 2014/65
  - Investment brokerage
  - Investment advice
  - Investment recommendation

# Platform Regulation: Intermediary liability

- Article 14 of the E-Commerce Directive
- CJEU Case C-18/18 *Glawischnig-Piesczek v Facebook* (2019)
- Digital Service Act (DSA): 'Good Samaritan' provision

# IV. Platform Governance through Private Regulation

- 5 Platforms
  - Facebook and Instagram, YouTube, TikTok, and Twitter
  - In the UK, Luxembourg, and Germany
  - November 2022
- Examined principles and divergence from applicable rules

# Facebook and Instagram

- General provision that bans anything ‘unlawful, misleading, discriminatory or fraudulent’
- Hidden marketing: detailed description of when, but not how, to disclose sponsored content (but tool to disclose); no country-specific guidelines
- Financial products: ‘gold-plated’ MiFID II by prohibiting ads that promote ‘financial products and services that are frequently associated with misleading or deceptive promotional practices’, including initial coin offerings, binary options, and CFDs
- Same rules for all three selected jurisdictions

# YouTube

- General provision creators and brands must be aware and abide by local laws
- Hidden marketing: will inform users about sponsored content at the beginning of the video, but warns that it might not be sufficient depending on local laws
- Financial products: only general provision and country-specific rules provided fall outside scope of inquiry
- Same rules for all three selected jurisdictions

# TikTok

- General provision
- Hidden marketing: requires consent for ‘any commercial or unauthorized purpose, including communicating or facilitating any commercial advertisement or solicitation or spamming’
- Financial products: bans pyramid schemes or any other prohibited solicitation and ‘Ponzi, multi-level marketing, or pyramid schemes; Content that promotes investment schemes with promise of high returns, fixed betting, or any other types of scams.’
- Same rules for all three selected jurisdictions



# Twitter

- General provision
- Hidden marketing: country specific guidance
- Financial products: 'Global Ban Policy' for investment advice, opportunities, and offers to increase wealth
  - Germany and the UK, 'subject to local laws' and prior authorisation
  - Must also 'provide necessary disclosures, balanced information of risks and benefits, and all information that must be provided to the investor; Be clearly identified as financial services; Indicate the nature and specific type of financial service' Same rules for all three selected jurisdictions
- Same rules for UK and Germany; no approval for financial products in Luxembourg

# Overview Platform Rules

	<b>Facebook and Instagram</b>	<b>YouTube</b>	<b>TikTok</b>	<b>Twitter</b>
General provision	Yes	Yes	Yes	Yes
Hidden marketing rules and guidance	Yes	Yes	Just that users require permission	Yes and country-specific guidance
Rules on advertising financial products	Yes ('gold-palted')	Yes	Bans a number of practices	Banned but exceptions (e.g. for Germany and UK but not Luxembourg)

# V. Policy Considerations

- Towards a positive duty to trade fairly?
- Increase transparency
  - New disclosure requirements
  - Ban commission-based system for advertising financial products
- Active supervision of Finfluencers by regulators
- Ban 'gold-plating' by platforms
- Regulators should review the impact of Finfluencers on financial stability

# VI. Conclusions

- Platforms regulate Finfluencers and even 'gold-plate' applicable rules
- Further research necessary to review the impact of Finfluencers on consumers and capital markets
- Let's already regulate Finfluencers to increase trust in financial sector and social media

# Villmools merci!

## Additional readings

- Pflücke, 'Compliance with European Consumer Law' (Oxford University Press, forthcoming 2024)
- Pflücke, 'Protecting Consumers and Capital Markets in the Age of Social Media: the Case of Finfluencers' (OBLB 2023)
- Pflücke, 'Rethinking the Regulation of Financial Influencers' (VerfB 2023)
- Pflücke, 'Regulating Finfluencers' (EuCML 2022)
- Pflücke, 'Making Influencers Honest: The Role of Social Media Platforms in Regulating Disclosures' in C Goanta and S Ranchordas (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020)